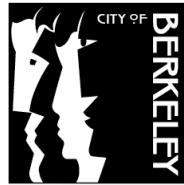


AGENDA



BERKELEY CITY COUNCIL MEETING

Tuesday, November 9, 2021

6:00 PM

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI
DISTRICT 2 – TERRY TAPLIN
DISTRICT 3 – BEN BARTLETT
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN
DISTRICT 6 – SUSAN WENGRAF
DISTRICT 7 – RIGEL ROBINSON
DISTRICT 8 – LORI DROSTE

PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE

Pursuant to Government Code Section 54953(e) and the state declared emergency, this meeting will be conducted exclusively through teleconference and Zoom videoconference. The COVID-19 state of emergency continues to directly impact the ability of the members to meet safely in person and presents imminent risks to the health of the attendees. Therefore, no physical meeting location will be available.

Live audio is available on KPFB Radio 89.3. Live captioned broadcasts of Council Meetings are available on Cable B-TV (Channel 33) and via internet accessible video stream at <http://www.cityofberkeley.info/CalendarEventWebcastMain.aspx>.

To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL <https://us02web.zoom.us/j/83174462723>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen.

*To join by phone: Dial 1-669-900-9128 or 1-877-853-5257 (Toll Free) and enter Meeting ID: 831 7446 2723. If you wish to comment during the public comment portion of the agenda, Press *9 and wait to be recognized by the Chair.*

Please be mindful that the teleconference will be recorded as any Council meeting is recorded, and all other rules of procedure and decorum will apply for Council meetings conducted by teleconference or videoconference.

To submit a written communication for the City Council's consideration and inclusion in the public record, email council@cityofberkeley.info.

This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900. The City Council may take action related to any subject listed on the Agenda. Meetings will adjourn at 11:00 p.m. - any items outstanding at that time will be carried over to a date/time to be specified.

Preliminary Matters

Roll Call:

Ceremonial Matters: *In addition to those items listed on the agenda, the Mayor may add additional ceremonial matters.*

1. Presentation: Study to Achieve Equity in City Contracting - "Berkeley Inclusion in Opportunity Index"

City Manager Comments: *The City Manager may make announcements or provide information to the City Council in the form of an oral report. The Council will not take action on such items but may request the City Manager place a report on a future agenda for discussion.*

Public Comment on Non-Agenda Matters: *Persons will be selected to address matters not on the Council agenda. If five or fewer persons wish to speak, each person selected will be allotted two minutes each. If more than five persons wish to speak, up to ten persons will be selected to address matters not on the Council agenda and each person selected will be allotted one minute each. The remainder of the speakers wishing to address the Council on non-agenda items will be heard at the end of the agenda.*

Consent Calendar

The Council will first determine whether to move items on the agenda for "Action" or "Information" to the "Consent Calendar", or move "Consent Calendar" items to "Action." Three members of the City Council must agree to pull an item from the Consent Calendar for it to move to Action. Items that remain on the "Consent Calendar" are voted on in one motion as a group. "Information" items are not discussed or acted upon at the Council meeting unless they are moved to "Action" or "Consent".

No additional items can be moved onto the Consent Calendar once public comment has commenced. At any time during, or immediately after, public comment on Information and Consent items, any Councilmember may move any Information or Consent item to "Action." Following this, the Council will vote on the items remaining on the Consent Calendar in one motion.

For items moved to the Action Calendar from the Consent Calendar or Information Calendar, persons who spoke on the item during the Consent Calendar public comment period may speak again at the time the matter is taken up during the Action Calendar.

Public Comment on Consent Calendar and Information Items Only: *The Council will take public comment on any items that are either on the amended Consent Calendar or the Information Calendar. Speakers will be entitled to two minutes each to speak in opposition to or support of Consent Calendar and Information Items. A speaker may only speak once during the period for public comment on Consent Calendar and Information items.*

Additional information regarding public comment by City of Berkeley employees and interns: Employees and interns of the City of Berkeley, although not required, are encouraged to identify themselves as such, the department in which they work and state whether they are speaking as an individual or in their official capacity when addressing the Council in open session or workshops.

Consent Calendar

1. Resolution Reviewing and Ratifying the Proclamation of Local Emergency Due to the Spread of a Severe Acute Respiratory Illness Caused by a Novel (New) Coronavirus (COVID-19)

From: City Manager

Recommendation: Adopt a Resolution reviewing the need for continuing the local emergency due to the spread of a severe acute respiratory illness caused by a novel (new) coronavirus (COVID-19) and ratifying the Proclamation of Local Emergency issued by the Director of Emergency Services on March 3, 2020, initially ratified by the City Council on March 10, 2020, and subsequently reviewed and ratified by the Council on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021.

Financial Implications: To be determined

Contact: Dee Williams-Ridley, City Manager, (510) 981-7000, Farimah Brown, City Attorney, (510) 981-6950

2. Formal Bid Solicitations and Request for Proposals Scheduled for Possible Issuance After Council Approval on November 9, 2021

From: City Manager

Recommendation: Approve the request for proposals or invitation for bids (attached to staff report) that will be, or are planned to be, issued upon final approval by the requesting department or division. All contracts over the City Manager's threshold will be returned to Council for final approval.

Financial Implications: \$100,000

Contact: Henry Oyekanmi, Finance, (510) 981-7300

3. Opt-In to CAA Health and Dependent Care Account Extension for 2020 and 2021 Plan Years and Return 2020 Employee Funds to American Fidelity for Extended Employee Reimbursement Period

From: City Manager

Recommendation: Adopt a Resolution granting authority to extend the 2020 and 2021 timeframes under the Consolidated Appropriations Act (CAA) for employees to be able to access their American Fidelity flexible spending and dependent care account funds for additional time due to the effects of the COVID-19 pandemic on employees' ability to seek medical/child care services eligible for reimbursement under the City's existing Plan. Return approximately \$19,740.84 of 2020 funds forfeited from City employee flexible spending and dependent care accounts back to American Fidelity in order to allow them to process 2020-2021 employee reimbursement claims until December 31, 2021.

Financial Implications: See report

Contact: Donald E. Ellison, Human Resources, (510) 981-6800

Consent Calendar

- 4. Grant Application: Prop 68 – Per Capita and RIRE Grant Programs**
From: City Manager
Recommendation: Adopt two Resolutions authorizing the City Manager or designee to submit applications to two Proposition 68 parks grant programs, accept grant funds, and execute related grant agreements and any amendments that may be necessary:
1. The Proposition 68 Per Capita Grant Program; and
2. The Proposition 68 RIRE Grant Program.
Financial Implications: See report
Contact: Scott Ferris, Parks, Recreation and Waterfront, (510) 981-6700
- 5. Revenue Grant: California Office of Traffic Safety (OTS) for the 2022 Selective Traffic Enforcement Program (STEP) Grant**
From: City Manager
Recommendation: Adopt a Resolution authorizing the Chief of Police to accept the "Selective Traffic Enforcement Program (STEP)" grant and enter into the resultant grant agreement and any amendments, with the California Office of Traffic Safety. This OTS grant is for \$180,000 for the period of October 1, 2021 through September 30, 2022, which is Federal Fiscal Year 2022.
Financial Implications: See report
Contact: Jennifer Louis, Police, (510) 981-5900
- 6. Board of Library Trustees Reappointment: Amy Roth**
From: Board of Library Trustees
Recommendation: Adopt a Resolution Approving the Reappointment of Amy Roth to the Board of Library Trustees ("BOLT") for a second term of four years commencing January 4, 2022.
Financial Implications: None
Contact: Tess Mayer, Commission Secretary, (510) 981-6100

Council Consent Items

- 7. Berkeley Holiday Fund: Relinquishment of Council Office Budget Funds to General Fund and Grant of Such Funds**
From: Mayor Arreguin
Recommendation: Adopt a Resolution approving the expenditure of an amount not to exceed \$500 per Councilmember including \$500 from Mayor Arreguin to the Berkeley Holiday Fund's annual campaign with funds relinquished to the City's general fund for this purpose from the discretionary Council Office Budgets of Mayor Arreguin and any other Councilmembers who would like to contribute.
Financial Implications: See report
Contact: Jesse Arreguin, Mayor, (510) 981-7100

Council Consent Items

8. **United Against Hate Week 2021**
From: Mayor Arreguin (Author), Councilmember Hahn (Co-Sponsor) and Councilmember Wengraf (Co-Sponsor)
Recommendation: 1) Adopt a Resolution declaring November 14th – 20th, 2021 as United Against Hate Week.
2) Adopt a Resolution approving the D-13 expenditure in an amount not to exceed \$250 per Councilmember, to Not in Our Town for United Against Hate Week.
Financial Implications: See report
Contact: Jesse Arreguin, Mayor, (510) 981-7100
9. **Affordable Housing Overlay** (*Reviewed by the Land Use, Housing & Economic Development Policy Committee*)
From: Councilmember Taplin (Author), Councilmember Bartlett (Co-Sponsor), Councilmember Robinson (Co-Sponsor)
Recommendation: Council refers to the City Manager and the Planning Commission to consider an Affordable Housing Overlay for 100% affordable housing and seek to integrate it into the ongoing Housing Element process in anticipation of the 2023-2031 RHNA cycle. Staff should consider revisions to the zoning code and General Plan, permitting increased height and density for 100% affordable housing developments, including specific consideration of labor and design/form standards, to achieve the underlying goals:
1. Exceeding standards set forth in California Government Code Section 65915 (AB-1763) with additional local height and density incentives, including waivers and modifications similar to those vested in state density bonus law, with ministerial approval for qualifying 100% affordable projects deed-restricted for Low, Very Low, Extremely Low, and Moderate Income households (exclusive of manager's unit) pursuant to AB-1763, and maintaining demolition restrictions consistent with state law, specifying:
 - a. In R3, R4, MU-R, and all C-prefixed zoning districts, a local density bonus (granted in addition to, but not compounding with, any State density bonus[es]) with standards reflective of whatever State density bonus a project would be entitled to under the provisions of AB 1763 (2019), waiving limits on floor area ratio, and permitting up to 80% lot coverage; and study additional incentives in these zones;
 - b. In R-1, R-1A, R-2, and R-2A zones, a local bonus for qualifying projects inclusive of existing density bonuses, waiving limits on floor area ratio, and permitting up to 80% lot coverage; and study project feasibility in these zones;
 - c. Create General Plan amendments that allow for 100% affordable qualifying projects to increase density while avoiding inconsistencies with General Plan densities;
 - d. Skilled and trained workforce standards as defined by SB-7 (Atkins, 2021) for qualifying projects with at least 50,000 square feet of total floor area;
 2. Exempting parcels with Designated City, State, and Federal Historic Landmarks;
 3. Exempting parcels in Very High Fire Hazard Severity Zones (VHFHSZ) as determined by the California Department of Forestry and Fire Protection (CalFire), and in City of Berkeley Fire Zones 2 and 3;

Council Consent Items

4. Develop objective design standards or form-based standards for qualifying projects to receive ministerial approval, including guidelines for architectural details with respect to neighborhood context, massing, and building facades; materials, color, and finishes; open space, public art, and landscaping; circulation and outdoor lighting; 20' average building setback above the fourth floor (or 45') from any property line that is adjacent to a low or low-to-medium residential district; utilities; interiors; financial feasibility, and environmental sustainability, to be implemented with the following provisions:

a. Solicit community input, including through public outreach to be conducted in the Housing Element update process, for design standards that would ensure consistency with the City of Berkeley's architectural quality;

b. Establish an advisory Design Review process through the Design Review Committee (DRC). An applicant may elect to return for advisory comment up to two more times. For projects with fewer than 150 units, the City shall review and approve, based on consistency with objective standards, an affordable housing application within 90 days of submission. After 60 days, the City shall provide the applicant with an exhaustive list of objective standards not met by the project, and how the standards could or should be met. For projects with 150 units or more, these time frames shall be 90 and 180 days, respectively. The time under these provisions will toll between the City's issuance of a letter describing inconsistency with objective standards and the time necessary for the applicant to respond to those items.

Policy Committee Recommendation: On October 7, 2021 the Land Use, Housing & Economic Development policy committee took the following action: M/S/C (Robinson/Hahn) Positive recommendation to approve the item as submitted in supplemental material from the Author; revising the first paragraph of the recommendation to read "Council refers to the City Manager and the Planning Commission to consider an Affordable Housing Overlay for 100% affordable housing and seek to integrate it into the ongoing Housing Element process in anticipation of the 2023-2031 RHNA cycle. Staff should consider revisions to the zoning code and General Plan, permitting increased height and density for 100% affordable housing developments, including specific consideration of labor and design/form standards, to achieve the underlying goals:"; and adding the words "or form-based standards" to bullet 4 of the recommendation.

Financial Implications: See report

Contact: Terry Taplin, Councilmember, District 2, (510) 981-7120

Council Consent Items

- 10. Budget Referral: Berkeley Ceasefire**
From: Councilmember Taplin (Author), Councilmember Bartlett (Co-Sponsor), Mayor Arreguin (Co-Sponsor) and Councilmember Wengraf (Co-Sponsor)
Recommendation: 1. Refer to the Fiscal Year 2023 budget process \$200,000 for consulting costs to develop a Gun Violence Intervention (GVI) program, commonly known as “Operation Ceasefire.”
2. Refer to the City Manager the development of a Gun Violence Intervention program with technical support from experienced consultants solicited by a Request For Proposals (RFP), community service providers including faith groups and violence intervention programs, hospital intervention programs, life coaching programs, Berkeley Housing Authority, Berkeley YouthWorks, Berkeley Police Department, Alameda County Workforce Development Board, Alameda County District Attorney’s Office, Alameda County Probation, California’s Office of the Attorney General, US Attorney’s Office, US Marshals Service, US Department of Justice, and other jurisdictions and agencies in the region as needed; and consider an alternate Urban Gun Violence Disruption Strategy such as the Peacemaker Fellowships program as implemented in the cities of Richmond, Stockton, and Sacramento.
Financial Implications: \$200,000
Contact: Terry Taplin, Councilmember, District 2, (510) 981-7120
- 11. Budget Referral: Strawberry Creek Lodge Food Program**
From: Councilmember Taplin (Author)
Recommendation: Refer to the Annual Appropriations Ordinance (AAO) #1 budget process \$100,000 for the Strawberry Creek Lodge Food Program.
Financial Implications: \$100,000
Contact: Terry Taplin, Councilmember, District 2, (510) 981-7120
- 12. Budget Referral: West Berkeley Residential Preferential Parking (RPP)**
From: Councilmember Taplin (Author)
Recommendation: That the City Council refers to the FY2023 budget process the funding of increased staffing, new enforcement vehicles, and sign installations necessary for the expansion of the Residential Preferential Parking (RPP) Program out of its current boundaries into West Berkeley, in zones to be identified and authorized by the Traffic Division of the Public Works Department, as well as for the enhancement of enforcement in existing RPP zones.
Financial Implications: See report
Contact: Terry Taplin, Councilmember, District 2, (510) 981-7120

Council Consent Items

- 13. Resolution Recognizing Housing as Human Right; Referring to City Manager Several Measures to Begin Developing Social Housing in the City of Berkeley** *(Reviewed by the Land Use, Housing & Economic Development Policy Committee)*
From: Councilmember Taplin (Author), Mayor Arreguin (Co-Sponsor), Councilmember Harrison (Co-Sponsor), Councilmember Hahn (Co-Sponsor)
Recommendation: Adopt a Resolution recognizing housing as a human right; refer to the City Manager’s office several measures to begin developing social housing in the City of Berkeley. Measures shall include, but not be limited to:
1. Study and report to council on development potential, including density bonuses, for mixed-income housing development starting with the city-owned parcels at 1011 University Ave, and seek information through an RFI or other process on the potential for cross-subsidized limited-equity leasehold and rental models or other social housing development models;
 2. Study and return to council a report and, if feasible, a proposal for a Reparative Justice Revolving Loan Fund with affirmative racial justice and anti-displacement goals in coordination with the city’s Small Sites Program, including, but not limited to:
 - a. Providing low-interest loans for tenants, nonprofits, limited-equity co-operatives, and community land trusts to acquire real property; support Low Income Housing Tax Credit (LIHTC) funding; develop and/or maintain mixed-income and permanently affordable housing;
 - b. Funding a Local Operating Subsidies Program to provide permanently affordable housing for Very Low and Extremely Low Income households;
 - c. Leveraging local funds with state and regional partnerships through the Bay Area Housing Finance Agency (BAHFA) with the Association of Bay Area Governments (ABAG), Berkeley Housing Authority, Berkeley Unified School District (BUSD) and BART;
 - d. Consider best practices from other agencies and other partnership opportunities;
 3. Refer to the budget process up to \$300,000 for one or more consultants to study potential social housing models for the City of Berkeley;
 4. Establish a publicly available, user-friendly data dashboard potentially using third-party data visualization tools for monitoring Housing Justice Indicators in the city including, but not limited to:
 - a. State certification of city’s Housing Element and progress toward RHNA goals for each income tier in annual Housing Pipeline Reports;
 - b. Housing Element compliance with Affirmatively Furthering Fair Housing (AFFH) rule pursuant to California Government Code Section 65583 and Chapter 15, Section 8899.50 of Division 1 of Title 2, presented with, at a minimum:
Citywide and regional affordability as defined by median rents and home prices as share of one-third of the City of Berkeley and Alameda County’s median household income in most recent American Community Survey data;
Local funding and open BMR housing application slots available to meet housing needs of Moderate, Low-, Very Low-, and Extremely Low-Income households;
Anti-displacement metrics using UC Berkeley Displacement Project data and tracking successful applications to affordable housing units in the city using Local Preference policy;

Council Consent Items

Geographic considerations including historic redlining and segregation; Sensitive Communities and High Displacement Risk Areas identified in the 2019 CASA Compact by the Metropolitan Transportation Commission (MTC); and access to economic opportunity as measured by State of California Tax Credit Allocation Committee (TCAC) Opportunity Area Maps; Any other considerations relevant to AFFH compliance and reparative housing justice.

Policy Committee Recommendation: On June 17, 2021 the Land Use, Housing & Economic Development policy committee took the following action: M/S/C (Hahn/Robinson) Qualified positive recommendation that Council approve the item with amendments formally discussed at the meeting and as follows: 1. Including a budget referral of up to \$300,000 and clarifying that the allocation may include one or more consultants; 2. Amending the staff report to remove the portion under "Rationale for Recommendation" beginning with "In Hawaii, Sen. Chang has opted for a more direct route..." and encompassing footnotes 48, 49, and 50; and 3. Amending the Resolution to include record of the "attendant freedoms and entitlements as enumerated by the United Nations"; removing the portion of the Resolution incorporating a referral to the City Manager; and making typographical changes to the Resolution as agreed to by the Author.

Financial Implications: See report

Contact: Terry Taplin, Councilmember, District 2, (510) 981-7120

14. Budget Referral: Homeless Outreach Coordinator for South Shattuck Avenue and Adeline Street at 62nd Street

From: Councilmember Bartlett (Author)

Recommendation: Referral to the November Budget Annual Appropriations Ordinance to fund \$200,000 for a Homeless Outreach Coordinator for South Shattuck Avenue at Dwight Way to Adeline Street at 62nd Street.

Financial Implications: \$200,000

Contact: Ben Bartlett, Councilmember, District 3, (510) 981-7130

Council Consent Items

- 15. Letter of Opposition to the Environmental Protection Agency and Oxitec Ltd.'s Proposal to Release Genetically Engineered Mosquitoes in California Counties**
From: Councilmember Bartlett (Author), Councilmember Hahn (Co-Sponsor), Councilmember Harrison (Co-Sponsor)

Recommendation: That the Mayor and Members of the Berkeley City Council oppose the United States Environmental Protection Agency ("US EPA") and Oxitec Ltd.'s proposal to conduct the world's largest release of genetically engineered ("GE") Aedes Aegypti mosquitoes. The mosquitos are proposed to be released across 12 California counties, which may include: Shasta, Yolo, Sacramento, Alameda, Stanislaus, Fresno, Tulare, Los Angeles, Orange, San Bernardino, and Riverside. The company intends to release several billion of the mosquitoes on 85,000 acres over a 2-year period. The Council should ask the US EPA Administrator Michael Regan, California Environmental Protection Agency ("CalEPA") Secretary Jared Blumenfeld, and Governor Gavin Newsom to deny the experimental use permit ("EUP") application to release genetically engineered mosquitoes across the state. The Council should send letters to State Senator Nancy Skinner, Rep. Barbara Lee, Rep. Mark DeSaulnier, Sen. Dianne Feinstein, Sen. Alex Padilla, Assemblymember Buffy Wicks, and County Supervisor Keith Carson.

Financial Implications: See report

Contact: Ben Bartlett, Councilmember, District 3, (510) 981-7130

- 16. Budget Referral: Solano-Peralta Park restoration and improvements**
From: Councilmember Hahn (Author)

Recommendation: Refer \$50,000 to the November 2021 AAO process for restoration and improvements for the Solano-Peralta Park, located at 1559 Solano Avenue, also bordered by Peralta and Capistrano Avenues

Financial Implications: \$50,000

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

Council Consent Items

17. **Bright Streets to Schools** *(Reviewed by the Facilities, Infrastructure, Transportation, Environment & Sustainability Policy Committee)*
From: Councilmember Hahn (Author), Councilmember Wengraf (Co-Sponsor)
Recommendation: 1. Complete the work, if necessary, to paint all crosswalks, midlines, bike lanes, and other street markings, clarify and/or improve traffic signage, and paint curbs in areas around Berkeley public schools
2. Conduct an inventory to determine the cost of painting and/or improving crosswalks, midlines, bike lanes, and other street markings, traffic signage, and curbs in areas around City of Berkeley public buildings, including libraries, senior centers, recreation centers, and other facilities with public access and substantial public use, and in high-volume pedestrian areas and commercial districts; and
3. Identify additional funding sources for completing such work.
4. Present general design standards for crosswalks and other street markings, signs, reflectors, bollards and other safety and street markings to ensure consistency and safety the FITES Committee for input and review, and eventual adoption of official patterns and elements to be specified for all new and refreshed streets in Berkeley.
Policy Committee Recommendation: On October 7, 2021 the Facilities, Infrastructure, Transportation, Environment & Sustainability policy committee took the following action: M/S/C (Robinson/Harrison) to send the item, as revised in the supplemental material submitted by Councilmember Hahn, and further revised by the committee to the City Council with a positive recommendation. The committee revised the fourth recommendation to read: Present general design standards for crosswalks and other street markings, signs, reflectors, bollards and other safety and street markings to ensure consistency and safety the FITES Committee for input and review, and eventual adoption of official patterns and elements to be specified for all new and refreshed streets in Berkeley.
Financial Implications: See report
Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150
18. **PG&E's Safety Initiative: 10,000 Miles of Undergrounding Power Lines**
From: Councilmember Wengraf (Author), Councilmember Taplin (Co-Sponsor) and Councilmember Hahn (Co-Sponsor)
Recommendation: Adopt a Resolution and send a letter to the PG&E CEO and Board of Directors recommending that Berkeley's evacuation routes and the two established but yet to be completed Underground Utility Districts in Berkeley's Very High Fire Hazard Severity Zone be considered in the 10,000-mile promise to underground utilities.
Financial Implications: None
Contact: Susan Wengraf, Councilmember, District 6, (510) 981-7160

Action Calendar

The public may comment on each item listed on the agenda for action as the item is taken up. For items moved to the Action Calendar from the Consent Calendar or Information Calendar, persons who spoke on the item during the Consent Calendar public comment period may speak again at the time the matter is taken up during the Action Calendar.

The Presiding Officer will request that persons wishing to speak use the "raise hand" function to determine the number of persons interested in speaking at that time. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. The Presiding Officer may, with the consent of persons representing both sides of an issue, allocate a block of time to each side to present their issue.

Action items may be reordered at the discretion of the Chair with the consent of Council.

Action Calendar – Public Hearing

19. **Public Hearing: Administrative Citations and Property Lien at 2800 Garber Street**

From: City Manager

Recommendation: Conduct a public hearing and upon conclusion, adopt a Resolution rejecting the property owners' objection to the cost of the administrative fines issued to them for their failure to comply with the City's anti-blight ordinance and building permit requirement, and allowing the special assessment lien on 2800 Garber St. to be recorded as written and approved by the City Manager.

Financial Implications: See report

Contact: Paul Buddenhagen, City Manager's Office, (510) 981-7000

Action Calendar – Old Business

20. **Objective Standards Recommendations for Density, Design and Shadows** *(Continued from October 26, 2021) (Item Contains Supplemental Material)*

From: Joint Subcommittee for the Implementation of State Housing Laws

Recommendation: Refer to the Planning Commission and Design Review Committee to review the recommendations from the Joint Subcommittee for the Implementation of State Housing Laws (JSISHL) for objective standards for density, design and shadows and draft Zoning Ordinance amendments for City Council consideration.

Financial Implications: See report

Contact: Alene Pearson, Commission Secretary, (510) 981-7400

Action Calendar – Old Business

21. **Proposal to Allocate Revenues Generated by the Transient Occupancy Tax in the Waterfront Area to the Marina Fund to Avoid Insolvency, Rebuild its Fund Balance and to Stabilize its Finances** *(Continued from October 26, 2021)*

From: Parks and Waterfront Commission

Recommendation: That Council adopt a Resolution adopting a policy that all Transient Occupancy Taxes (TOT hotel tax) generated at the Berkeley Waterfront be allocated to the City's Marina Enterprise Fund. All other property, sales, utility users, and parking taxes; as well as business license and franchise fees, would continue to be allocated to the City's General Fund.

Policy Committee Recommendation: Send the item to Council with a negative recommendation and additionally request a referral to the Budget & Finance Policy Committee to discuss and develop alternative revenue streams for the Marina Fund including a dedicated reserve.

Financial Implications: See report

Contact: Roger Miller, Commission Secretary, (510) 981-6700

Action Calendar – Old Business

22. **Amending the Berkeley Election Reform Act (BERA) Relating to Officeholder Accounts** *(Reviewed by the Agenda & Rules Committee) (Continued from October 26, 2021)*

From: Agenda & Rules Committee: Mayor Arreguin, Councilmember Hahn, Councilmember Wengraf

Recommendation: Take one of the following actions:

1. Refer a proposal to the Fair Campaign Practices Commission (FCPC) amending the Berkeley Election Reform Act (BERA), BMC Chapter 2.12, and Lobbyist Registration Act, BMC Chapter 2.09, to enact “a reasonable set of limitations and rules” to regulate the maintenance of officeholder accounts, as developed and referred for consideration by the Agenda and Rules Committee; or
2. Refer a proposal to the FCPC amending BERA, BMC Chapter 2.12, to prohibit Officeholder Accounts, as originally proposed by the Fair Campaign Practices Commission.

Policy Committee Recommendation: Send the item to Council with two proposed alternatives: 1) Councilmember Hahn’s proposal to regulate officeholder accounts, and 2) the Fair Campaign Practices Commission proposal to prohibit officeholder accounts; and to include the Commission’s analysis of regulating officeholder accounts in the item that goes to the full Council.

Financial Implications: See report

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

23. **Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley** *(Continued from October 26, 2021) (Item Contains Supplemental Material)*

From: Councilmember Harrison (Author) and Councilmember Bartlett (Co-sponsor)

Recommendation: Refer to the November 2021 budget process approximately \$500,000 in General Fund Revenue toward fully subsidizing AC Transit fares originating from Berkeley on Sundays for at least one calendar year and contingent on restoration of the suspended Line 80 serving some of Berkeley’s lowest income neighborhoods.

Financial Implications: General Fund - \$500,000

Contact: Kate Harrison, Councilmember, District 4, (510) 981-7140

Public Comment – Items Not Listed on the Agenda

Adjournment

NOTICE CONCERNING YOUR LEGAL RIGHTS: *If you object to a decision by the City Council to approve or deny a use permit or variance for a project the following requirements and restrictions apply: 1) No lawsuit challenging a City decision to deny (Code Civ. Proc. §1094.6(b)) or approve (Gov. Code 65009(c)(5)) a use permit or variance may be filed more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a use permit or variance, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

Live captioned broadcasts of Council Meetings are available on Cable B-TV (Channel 33), via internet accessible video stream at <http://www.cityofberkeley.info/CalendarEventWebcastMain.aspx> and KPFB Radio 89.3.

Archived indexed video streams are available at <http://www.cityofberkeley.info/citycouncil>. Channel 33 rebroadcasts the following Wednesday at 9:00 a.m. and Sunday at 9:00 a.m.

Communications to the City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service to the City Clerk Department at 2180 Milvia Street. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk Department for further information.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be posted on the City's website at <http://www.cityofberkeley.info>.

Agendas and agenda reports may be accessed via the Internet at <http://www.cityofberkeley.info/citycouncil>

COMMUNICATION ACCESS INFORMATION:

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.



Captioning services are provided at the meeting, on B-TV, and on the Internet.

I hereby certify that the agenda for this meeting of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on October 28, 2021.

Mark Numainville, City Clerk

Communications – November 9, 2021

Council rules limit action on Communications to referral to the City Manager and/or Boards and Commissions for investigation and/or recommendations. All communications submitted to Council are public record.

Homeless Crimes Against Business'

1. Tai Yu, owner of Great China Restaurant
2. Hugh, owner of Music Lovers Audio
3. Laura Menard
4. Eric Friedman

Public Toilet Placement at the People’s Park Mural

- 5. Pablo Menendez
- 6. Liz Wiener
- 7. Aminta Steinbach
- 8. Christine Schwartz
- 9. Yeshi Neumann
- 10. Miles Perez
- 11. Kathleen Caine
- 12. Jean Hohl

Automated License Plate Readers (ALRP)

- 13. Margot Smith
- 14. Diana Bohn
- 15. Elliot Halpern

Public Security Cameras

- 16. Cecelia Mautner

Berkeley Bird Festival

- 17. Glenn Phillips, on behalf of the Golden Gate Audubon Society

Native Plant Film

- 18. Kelly Hammargren

North Berkeley Senior Center – Investigate and Audit

- 19. Walter Wood

1915 Berryman

- 20. David Kellogg
- 21. Nicholas Armour, Planning and Development
- 22. Mary Telling
- 23. Eric Johnson
- 24. Dorothy Walker

Eden I&R October 2021 E-Newsletter

- 25. Eden I&R

Wireless Radiation

- 26. Phoebe Anne Sorgen (2)

Support the Plastic Bag Ordinance

- 27. 32 similarly-worded form letters

Zoning

- 28. Kaye Jacuzzi

Water Main Break on University

29. Jack Hlavac, Managing Director of DoubleTree by Hilton Berkeley Marina (2)

League of Women Voters of Berkeley, Albany and Emeryville – Police Oversight

30. Katherine Lee, Interim Director of Police Accountability

Letter of Intent to File a Restraining Order

31. Yesica Prado and Melissa Cheatwood

Street Paving

32. Dan Wohlfeiler

URL's Only

33. Vivian Warkentin (2)

Supplemental Communications and Reports

Items received by the deadlines for submission will be compiled and distributed as follows. If no items are received by the deadline, no supplemental packet will be compiled for said deadline.

- **Supplemental Communications and Reports 1**
Available by 5:00 p.m. five days prior to the meeting.
- **Supplemental Communications and Reports 2**
Available by 5:00 p.m. the day before the meeting.
- **Supplemental Communications and Reports 3**
Available by 5:00 p.m. two days following the meeting.



Office of the City Attorney

CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Farimah Faiz Brown, City Attorney

Subject: Resolution Reviewing and Ratifying the Proclamation of Local Emergency Due to the Spread of a Severe Acute Respiratory Illness Caused by a Novel (New) Coronavirus (COVID-19)

RECOMMENDATION

Adopt a Resolution reviewing the need for continuing the local emergency due to the spread of a severe acute respiratory illness caused by a novel (new) coronavirus (COVID-19) and ratifying the Proclamation of Local Emergency issued by the Director of Emergency Services on March 3, 2020, initially ratified by the City Council on March 10, 2020, and subsequently reviewed and ratified by the Council on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021.

FISCAL IMPACT OF RECOMMENDATION

To be determined.

CURRENT SITUATION AND ITS EFFECTS

Pursuant to California Government Code section 8630 and Berkeley Municipal Code Chapter 2.88, on March 3, 2020, the City Manager, in her capacity as Director of Emergency Services, proclaimed a local emergency due to conditions of extreme peril to the safety of persons and property within the City as a consequence of the global spread of a severe acute respiratory illness caused by a novel (new) coronavirus (COVID-19), including a confirmed case in the City of Berkeley. As a result of multiple confirmed and presumed cases in Alameda County, the County has declared a local health emergency. The Proclamation of Local Emergency empowers the Director of Emergency Services to make and issue rules and regulations on matters reasonably related to the protection of life and property as affected by such local emergency. Pursuant to Government Code section 8630(b) and Berkeley Municipal Code section

2.88.040.A.1, on March 10, 2020, the City Council ratified the Proclamation of Local Emergency with the passage of Resolution No. 69-312.

Pursuant to Government Code section 8630(c), the City Council must review the need for continuing the local emergency at least once every sixty (60) days. The Council last reviewed and ratified the Proclamation of Local Emergency on September 14, 2021. The Council therefore must review the continuing need for the local emergency by November 13, 2021.

This item requests that the Council review the continued need for the local emergency and again ratify the Proclamation of Local Emergency issued on March 3, 2020, initially ratified by the Council on March 10, 2020, and subsequently reviewed and ratified by the Council on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021. If reviewed and ratified on November 6, 2021, the Council will need to again review and ratify the proclamation by January 5, 2022 in order to continue the local emergency.

If at any time the Council determines that the need for continuing the local emergency has ended, state law directs the Council to terminate the local emergency at the earliest possible date that conditions warrant. (Cal. Gov. Code section 8630(d).)

BACKGROUND

On March 1, 2020, Alameda County Public Health Department and Solano County Public Health Department reported two presumptive cases of COVID-19, pending confirmatory testing by the Centers for Disease Control (CDC), prompting Alameda County to declare a local health emergency.

On March 3, 2020, the City's Director of Emergency Services proclaimed a local emergency due to the spread of COVID-19, including a confirmed case in the City of Berkeley and multiple confirmed and presumed cases in Alameda County.

On March 10, 2020, the City Council ratified the Proclamation of Local Emergency. Since that date, there have been over 4,955 confirmed cases of COVID-19 and at least 55 deaths in the City of Berkeley.

Since April 2021, the highly transmissible SARS-CoV-2 B.1.617.2 ("Delta") variant has been detected in the City of Berkeley and is contributing to substantial levels of community transmission.

The City Council has subsequently reviewed and ratified the Proclamation of Local Emergency on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Not applicable.

RATIONALE FOR RECOMMENDATION

The Resolution would enable the Director of Emergency Services to continue to efficiently allocate resources due to the ongoing and imminent threat to public safety.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Dee Williams-Ridley, City Manager, City Manager's Office (510) 981-7000

Farimah Brown, City Attorney, City Attorney's Office (510) 981-6998

Attachments:

1: Resolution

RESOLUTION NO. –N.S.

RESOLUTION REVIEWING AND RATIFYING THE
PROCLAMATION OF LOCAL EMERGENCY

WHEREAS, the Emergency Services Act, Government Code sections 8558(c) and 8630 authorize the proclamation of a local emergency when conditions of disaster or extreme peril to the safety of persons and property within the territorial limits of a city exist; and

WHEREAS, pursuant to Government Code section 8630, such an emergency may be proclaimed by the governing body or by an official designated by ordinance adopted by the governing body; and

WHEREAS, Berkeley Municipal Code section 2.88.040 provides that the City Manager, serving as the Director of Emergency Services, may request that the City Council proclaim the existence of a local emergency; and

WHEREAS, under provision of local law, if the City Council cannot be convened and, in the judgment of the Director of Emergency Services, the circumstances warrant it, a proclamation of local emergency may be issued which must be ratified or nullified by the City Council within seven days of issuance; and

WHEREAS, in accordance with authority granted under the above provisions of state and local law, the Director of Emergency Services beginning on March 3, 2020 did proclaim the existence of a local emergency caused by epidemic in the form of the global spread of a severe acute respiratory illness caused by a novel (new) coronavirus (“COVID-19”), including confirmed cases in California and the San Francisco Bay Area, and presumed cases in Alameda County prompting the County to declare a local health emergency; and

WHEREAS, on March 10, 2020, the City Council ratified the Proclamation of Local Emergency with the passage of Resolution No. 69-312; and

WHEREAS, Government Code section 8630(c) requires that the City Council review the need for continuing the local emergency at least once every sixty (60) days; and

WHEREAS, the City Council subsequently reviewed the need for continuing the local emergency and again ratified the Proclamation of Local Emergency on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021; and

WHEREAS, the City Council does find that the aforesaid conditions of extreme peril continue to exist, and now include over 4,955 confirmed cases of COVID-19 and at least 55 deaths in the City of Berkeley, thereby warranting and necessitating the continuation of the local emergency; and

WHEREAS, the City Council will need to again review the need for continuing the local emergency and ratify the Proclamation of Local Emergency by January 5, 2022;

WHEREAS, the City Council recognizes that the SARS-CoV-2 B.1.617.2 (“Delta”) variant of COVID-19 that is currently circulating nationally and within the City is contributing to a substantial increase in transmissibility and more severe disease; and

WHEREAS, on July 16, 2021, in light of the apparent increased transmissibility of the Delta variant, the City of Berkeley recommended that all individuals including fully vaccinated persons wear masks in public indoor settings; and

WHEREAS, on July 26, 2021, the California State Health Officer issued an order requiring vaccination or routine testing of all employees working in high-risk health care and congregate settings, in light of the fact that current requirements of staff in health care settings, such as universal mask requirements for all staff are not proving sufficient to prevent transmission of the more transmissible Delta variant; and

WHEREAS, on July 27, 2021, the CDC updated its guidance for fully vaccinated persons to reflect new evidence regarding the Delta variant, noting that “[i]nfections in fully vaccinated people (breakthrough infections) happen in only a small proportion of people who are fully vaccinated, even with the Delta variant”; and

WHEREAS, on August 2, 2021, the Health Officer for the City of Berkeley issued an order requiring all individuals to wear masks in all indoor public settings; and

WHEREAS, on August 5, 2021, the California State Health Officer issued an order requiring that workers in healthcare settings be fully vaccinated by September 30, 2021; and

WHEREAS, on August 11, 2021, the City announced its intention to implement a vaccination policy for City employees to protect the health and safety of the City of Berkeley’s employees and community members from the imminent and substantial threat to public health and safety posed by the Delta variant; and

WHEREAS, on September 14, 2021, given the increased and unforeseen risk posed by the Delta variant, as compared to earlier variants of the COVID-19 virus previously present in the City of Berkeley, the City Council found that a Citywide vaccination policy protects public health and reduces the risk of substantial harm to City staff and community members that could result from workplace outbreaks caused by the Delta variant; and

WHEREAS, on September 14, 2021, given the urgency posed by the highly transmissible nature of the Delta variant, the City Council recognized the variant’s existence as creating an emergency of grave character and as warranting immediate adoption of a Citywide vaccination policy.

NOW, THEREFORE BE IT RESOLVED by the Council of the City of Berkeley that it is hereby proclaimed and ordered that the Proclamation of Local Emergency, issued by the Director of Emergency Services on March 3, 2020, initially ratified by the City Council on March 10, 2020, and subsequently reviewed and ratified by the City Council on April 21, 2020, June 16, 2020, July 28, 2020, September 22, 2020, November 17, 2020, December 15, 2020, February 9, 2021, March 30, 2021, May 25, 2021, July 20, 2021, and September 14, 2021, has been reviewed and is hereby again ratified and confirmed; and

BE IT FURTHER RESOLVED that during the existence of this local emergency the powers, functions, and duties of the emergency organization of this City shall be those prescribed by state law, and the Charter, ordinances, resolutions and approved plans of the City of Berkeley.



Office of the City Manager

CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Henry Oyekanmi, Director, Finance

Subject: Formal Bid Solicitations and Request for Proposals Scheduled for Possible Issuance After Council Approval on November 9, 2021

RECOMMENDATION

Approve the request for proposals or invitation for bids (attached to staff report) that will be, or are planned to be, issued upon final approval by the requesting department or division. All contracts over the City Manager's threshold will be returned to Council for final approval.

Total estimated cost of items included in this report is \$100,000.

<u>PROJECT</u>	<u>Fund</u>	<u>Source</u>	<u>Amount</u>
Solid Waste Metal Containers	601	Zero Waste	\$100,000
Total:			\$100,000

CURRENT SITUATION AND ITS EFFECTS

On May, 6, 2008, Council adopted Ordinance No. 7,035-N.S. effective June 6, 2008, which increased the City Manager's purchasing authority for services to \$50,000. As a result, this required report submitted by the City Manager to Council is now for those purchases in excess of \$100,000 for goods; and \$200,000 for playgrounds and construction; and \$50,000 for services. If Council does not object to these items being sent out for bid or proposal within one week of them appearing on the agenda, and upon final notice to proceed from the requesting department, the IFB (Invitation for Bid) or RFP (Request for Proposal) may be released to the public and notices sent to the potential bidder/respondent list.

Formal Bid Solicitations and Request for Proposals
Scheduled for Possible Issuance After Council
Approval on November 9, 2021

CONSENT CALENDAR
November 9, 2021

BACKGROUND

On May 6, 2008, Council adopted Ordinance No. 7,035-N.S., amending the City Manager's purchasing authority for services.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The Finance Department reviews all formal bid and proposal solicitations to ensure that they include provisions for compliance with the City's environmental policies. For each contract that is subject to City Council authorization, staff will address environmental sustainability considerations in the associated staff report to City Council.

RATIONALE FOR RECOMMENDATION

Need for the services.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Darryl Sweet, General Services Manager, Finance, (510) 981-7329

Attachments:

1: Formal Bid Solicitations and Request for Proposals Scheduled For Possible Issuance After Council Approval on November 9, 2021

- a) Solid Waste Metal Containers

Note: Original of this attachment with live signature of authorizing personnel is on file in General Services.

SPECIFICATI ON NO.	DESCRIPTION OF GOODS / SERVICES BEING PURCHASED	APPROX. RELEASE DATE	APPROX. BID OPENING DATE	INTENDED USE	ESTIMATED COST	BUDGET CODE TO BE CHARGED	DEPT. / DIVISION	CONTACT NAME & PHONE
22-11479-C	Solid Waste Metal Containers	11/10/2021	11/21/2021	Solid Waste Metal Containers (front and rear loading)	\$100,000	601-54-627-733-3019-000-473- 651110-	Public Works/Zero Waste	Rogelio Marqina 981-6355
Dept TOTAL					\$100,000			
DEPT. TOTAL					\$100,000			



Office of the City Manager

CONSENT CALENDAR

November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Donald E. Ellison, Interim Director of Human Resources

Subject: Opt-In to CAA Health and Dependent Care Account Extension for 2020 and 2021 Plan Years and Return 2020 Employee Funds to American Fidelity for Extended Employee Reimbursement Period

RECOMMENDATION

Adopt a Resolution granting authority to extend the 2020 and 2021 timeframes under the Consolidated Appropriations Act (CAA) for employees to be able to access their American Fidelity flexible spending and dependent care account funds for additional time due to the effects of the COVID-19 pandemic on employees' ability to seek medical/child care services eligible for reimbursement under the City's existing Plan. Return approximately \$19,740.84 of 2020 funds forfeited from City employee flexible spending and dependent care accounts back to American Fidelity in order to allow them to process 2020-2021 employee reimbursement claims until December 31, 2021.

FISCAL IMPACTS OF RECOMMENDATION

The financial impact of this recommendation is approximately \$19,740.84 of funds that need to be returned to American Fidelity in order to allow the vendor to continue to accept reimbursement for eligible claims from employees between January 1, 2020 and December 31, 2021. The cost of this extension will be paid from the General Fund and sufficient funds are available to fund this extension as this was the amount of employee funds forfeited back to the City by American Fidelity in accordance with our Plan document and IRS laws and rules.

CURRENT SITUATION AND ITS EFFECTS

On March 16, 2020, the City of Berkeley's Public Health Officer issued an Order directing individuals to shelter in place and for all businesses to cease non-essential operations due to the COVID-19 pandemic. In response, City offices directed staff to work from home if possible. In addition, places of business throughout the state including medical and dental offices and child care facilities severely restricted operations or closed for business in order to help mitigate the spread of the virus.

Unfortunately, these developments impacted City of Berkeley employees enrolled in the City's flex spending and dependent care Plan. Due to the COVID-19 related business closures, employees were no longer able to schedule routine medical or dental

appointments or access childcare, costs which would normally qualify as claims for reimbursement through American Fidelity as eligible flex spending and dependent care expenses under the City's Plan. This resulted in employees being unable to use all of their 2020 pre-tax funds deducted from their paychecks and held by American Fidelity, the City vendor responsible for processing employee reimbursement claims.

On December 27, 2020, the CAA allowed employers to voluntarily opt-in to extending the period of time employees can request reimbursement for 2020 and 2021 eligible expenses. The CAA addressed many of the problems that employees who contributed to health flex spending accounts or dependent care assistance accounts were facing, since the pandemic limited opportunities to spend the funds they contributed for their own health care or to pay expenses to care for dependents. Under the CAA, health and dependent care accounts may be amended to give participants a grace period of up to 12 months following the end of Plan years ending in 2020 or 2021.

In accordance with IRS rules and the City's Plan, employees were entitled to a 74-day grace period to submit claims for reimbursement after December 31, 2020. After this short grace period, American Fidelity was legally obligated to return any remaining employee funds as a forfeiture back to the City. In early 2021, well past the 74-day grace period, the COVID-19 pandemic was still in effect and continued to hinder the ability of employees to access their pre-tax funds through American Fidelity.

On or about April 20, 2021, American Fidelity reconciled their records and forwarded the forfeited pre-tax funds back to the City. Nine (9) employees enrolled in the American Fidelity dependent care Plan lost approximately \$16,427.26, and 19 employees forfeited approximately \$3,313.58 from their flexible spending accounts for a total of \$19,740.84 of employee funds forfeited back to the City from Plan year 2020. During summer 2021 labor negotiations, the City committed to make affected employees whole.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACT

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

After review by City staff and a benefits expert, it was determined that the best option for making employees whole was to extend the timeframes under the CAA for all affected employees to seek reimbursement from the vendor for their forfeited 2020 health and dependent care funds.

ALTERNATIVE ACTIONS CONSIDERED

Refunding the funds back to employees would be a violation of IRS rules and laws.

CONTACT PERSON

Donald E. Ellison, Interim Human Resources Director, (510) 981-6807

Attachments

1: Resolution:

Exhibit A: Opt-In to CAA Health and Dependent Care Account Extension for 2020 and 2021 Plan Years and Return 2020 Employee Funds to American Fidelity for Extended Employee Reimbursement Period

RESOLUTION NO. ##,###-N.S.

OPT-IN TO CAA HEALTH AND DEPENDENT CARE ACCOUNT EXTENSION FOR 2020 AND 2021 PLAN YEARS AND RETURN 2020 EMPLOYEE FUNDS TO AMERICAN FIDELITY FOR EXTENDED EMPLOYEE REIMBURSEMENT PERIOD

WHEREAS, on March 16, 2020, the City of Berkeley's Public Health Officer issued an Order directing individuals to shelter in place and for all businesses to cease non-essential operations due to the COVID-19 pandemic; and

WHEREAS, employees who contributed to American Fidelity health flex spending accounts or dependent care assistance accounts in 2020 and 2021 under the City's Plan had limited opportunities to spend the funds they contributed for their own health care or to pay expenses to care for dependents during to the pandemic; and

WHEREAS, on December 27, 2020, the Consolidated Appropriations Act (CAA) allowed employers to voluntarily opt-in to extending the period of time employees can request reimbursement for 2020 and 2021 eligible expenses; and

WHEREAS, in April 2021, American Fidelity forwarded a total of approximately \$19,740.84 employee funds forfeited back to the City from nine (9) health and 19 dependent care accounts for Plan year 2020.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the City Manager is hereby authorized to extend the City's Plan timeframes for employee reimbursement for years 2020 and 2021 under the CAA, and return \$19,740.84 to American Fidelity to allow employees to seek reimbursement for eligible 2020 health and dependent care expenses under the City's Plan.



Office of the City Manager

CONSENT CALENDER
November 9, 2021

To: Honorable Mayor and Members of the City Council
 From: Dee Williams-Ridley, City Manager
 Submitted by: Scott Ferris, Director, Parks Recreation & Waterfront
 Subject: Grant Application: Prop 68 – Per Capita and RIRE Grant Programs

RECOMMENDATION

Adopt two Resolutions authorizing the City Manager or designee to submit applications to two Proposition 68 parks grant programs, accept grant funds, and execute related grant agreements and any amendments that may be necessary:

1. **The Proposition 68 Per Capita Grant Program** and
2. **The Proposition 68 RIRE Grant Program.**

FISCAL IMPACTS OF RECOMMENDATION

The Proposition 68 Per Capital Grant Program of 2018 has allocated \$177,952 to the City of Berkeley based on population. The grant funds will be deposited in revenue budget code 306-52-545-000-1020-000-000-431210-. The City will provide a 20% match on the project amount when using these funds. Match funds will come from Parks Tax (Fund 138) and Measure T1 (Fund 511) funds which are available in the FY21 and FY22 Grove Park (PRWT119004) budget.

The Prop 68 Recreational Infrastructure Revenue Enhancement (RIRE) Grant Program has allocated \$250,000 to the City of Berkeley and has no match requirement. The grant funds will be deposited in revenue budget code 306-52-545-000-1021-000-000-431210-.

CURRENT SITUATION AND ITS EFFECTS

In 2018, California voters approved Proposition 68 (the California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access for All Act of 2018) to provide funds for local park rehabilitation, creation, and improvement grants to local governments. The City of Berkeley will receive \$177,952 from the Prop 68 Per Capital Grant Program and will use these funds for the Grove Park Renovation Project. The City of Berkeley will also receive \$250,000 from the Recreational Infrastructure Revenue Enhancement (RIRE) Grant Program and will use these funds for the Grove Park Renovation Project as well. In order to access the grant funds, the state requires Council adoption of the attached resolutions.

BACKGROUND

In 2020, the City conducted a community process to develop the scope for the renovation project at Grove Park. Staff will complete the design phase and go out to bid for construction in the Spring of 2022.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE CHANGE

All parks improvement construction projects are required to comply with the City of Berkeley Climate Action Plan, specifically in terms of reducing construction waste, as well as environmentally preferred purchasing guidelines to reduce waste and increase the use of renewable resources.

RATIONALE FOR RECOMMENDATION

These grant funds have been awarded to the City of Berkeley on a per capita basis and will allow the City to complete the Grove Park Renovation Project.

CONTACT PERSON

Scott Ferris, Director, PRW, (510) 981-6700
Roger Miller, Senior Management Analyst, (510) 981-6704

Attachments:

- 1: Resolution – Prop 68 Per Capita Grant Program
- 2: Resolution – Prop 68 RIRE Grant Program

Resolution Number ##,###

RESOLUTION OF THE COUNCIL OF THE CITY OF BERKELEY APPROVING
APPLICATION(S) FOR PER CAPITA GRANT FUNDS

WHEREAS, the State Department of Parks and Recreation has been delegated the responsibility by the Legislature of the State of California for the administration of the Per Capita Grant Program, setting up necessary procedures governing application(s); and

WHEREAS, said procedures established by the State Department of Parks and Recreation require the grantee's Governing Body to certify by resolution the approval of project application(s) before submission of said applications to the State; and

WHEREAS, the grantee will enter into a contract(s) with the State of California to complete project(s).

NOW, THEREFORE, BE IT RESOLVED that the City of Berkeley hereby:

1. Approves the filing of project application(s) for Per Capita program grant project(s); and
2. Certifies that said grantee has or will have available, prior to commencement of project work utilizing Per Capita funding, sufficient funds to complete the project(s); and
3. Certifies that the grantee has or will have sufficient funds to operate and maintain the project(s), and
4. Certifies that all projects proposed will be consistent with the park and recreation element of the City of Berkeley general or recreation plan (PRC §80063(a)), and
5. Certifies that these funds will be used to supplement, not supplant, local revenues in existence as of June 5, 2018 (PRC §80062(d)), and
6. Certifies that it will comply with the provisions of §1771.5 of the State Labor Code, and
7. (PRC §80001(b)(8)(A-G)) To the extent practicable, as identified in the "Presidential Memorandum--Promoting Diversity and Inclusion in Our National Parks, National Forests, and Other Public Lands and Waters," dated January 12, 2017, the City of Berkeley will consider a range of actions that include, but are not limited to, the following:
 - (A) Conducting active outreach to diverse populations, particularly minority, low-income, and disabled populations and tribal communities, to increase awareness within those communities and the public generally about specific programs and opportunities.
 - (B) Mentoring new environmental, outdoor recreation, and conservation leaders to increase diverse representation across these areas.
 - (C) Creating new partnerships with state, local, tribal, private, and nonprofit organizations to expand access for diverse populations.
 - (D) Identifying and implementing improvements to existing programs to increase visitation and access by diverse populations, particularly minority, low-income, and disabled populations and tribal communities.

(E) Expanding the use of multilingual and culturally appropriate materials in public communications and educational strategies, including through social media strategies, as appropriate, that target diverse populations.

(F) Developing or expanding coordinated efforts to promote youth engagement and empowerment, including fostering new partnerships with diversity-serving and youth-serving organizations, urban areas, and programs.

(G) Identifying possible staff liaisons to diverse populations.

8. Agrees that to the extent practicable, the project(s) will provide workforce education and training, contractor and job opportunities for disadvantaged communities (PRC §80001(b)(5)).
9. Certifies that the grantee shall not reduce the amount of funding otherwise available to be spent on parks or other projects eligible for funds under this division in its jurisdiction. A one-time allocation of other funding that has been expended for parks or other projects, but which is not available on an ongoing basis, shall not be considered when calculating a recipient's annual expenditures. (PRC §80062(d)).
10. Certifies that the grantee has reviewed, understands, and agrees to the General Provisions contained in the contract shown in the Procedural Guide; and
11. Delegates the authority to the City Manager, or designee to conduct all negotiations, sign and submit all documents, including, but not limited to applications, agreements, amendments, and payment requests, which may be necessary for the completion of the grant scope(s); and
12. Agrees to comply with all applicable federal, state and local laws, ordinances, rules, regulations and guidelines.

BE IT FURTHER RESOLVED THAT, Council authorize the implementation of the project and appropriation of funding for related expenses, including matching funds, subject to securing the grant.

BE IT FURTHER RESOLVED THAT, a record signature copy of said agreements and any amendments to be on file in the Office of the City Clerk.

Resolution Number ##,###

RESOLUTION OF THE COUNCIL OF THE CITY OF BERKELEY APPROVING
APPLICATION(S) FOR RECREATIONAL INFRASTRUCTURE REVENUE
ENHANCEMENT (RIRE) PROGRAM GRANT FUNDS

WHEREAS, the State Department of Parks and Recreation has been delegated the responsibility by the Legislature of the State of California for the administration of the Recreational Infrastructure Revenue Enhancement Grant Program, setting up necessary procedures governing application(s); and

WHEREAS, said procedures established by the State Department of Parks and Recreation require the grantee's (Governing Body) to certify by resolution the approval of project application(s) before submission of said applications to the State; and

WHEREAS, the grantee will enter into contracts with the State of California to complete project(s).

NOW, THEREFORE, BE IT RESOLVED that the grantee's Berkeley City Council hereby:

1.Approves the filing of project application(s) for Recreational Infrastructure Revenue Enhancement Grant Program grant project(s); and

2.Certifies that said grantee has or will have available, prior to commencement of project work utilizing Recreational Infrastructure Revenue Enhancement funding, sufficient funds to complete the project(s); and

3.Certifies that the grantee has or will have sufficient funds to operate and maintain the project(s); and

4.Certifies that it will comply with the provisions of §1771.5 of the State Labor Code; and

5.(PRC §80001(b)(8)(A-G)) To the extent practicable, as identified in the "Presidential Memorandum--Promoting Diversity and Inclusion in Our National Parks, National Forests, and Other Public Lands and Waters," dated January 12,2017, the (city/county/district) will consider a range of actions that include, but are not limited to, the following:

(A)Conducting active outreach to diverse populations, particularly minority, low-income, and disabled populations and tribal communities, to increase awareness within those communities and the public generally about specific programs and opportunities.

(B)Mentoring new environmental, outdoor recreation, and conservation leaders to increase diverse representation across these areas.

(C)Creating new partnerships with state, local, tribal, private, and nonprofit organizations to expand access for diverse populations.

(D) Identifying and implementing improvements to existing programs to increase visitation and access by diverse populations, particularly minority, low-income, and disabled populations and tribal communities.

(E) Expanding the use of multilingual and culturally appropriate materials in public communications and educational strategies, including through social media strategies, as appropriate, that target diverse populations.

(F) Developing or expanding coordinated efforts to promote youth engagement and empowerment, including fostering new partnerships with diversity-serving and youth-serving organizations, urban areas, and programs.

(G) Identifying possible staff liaisons to diverse populations.

6. Agrees that to the extent practicable, the project(s) will provide workforce education and training, contractor and job opportunities for disadvantaged communities (PRC §80001(b)(5)); and

7. Certifies that the grantee has reviewed, understands, and agrees to the General Provisions contained in the contract shown in the Procedural Guide; and

8. Delegates the authority to the City Manager, or designee to conduct all negotiations, sign and submit all documents, including, but not limited to applications, agreements, amendments, and payment requests, which may be necessary for the completion of the grant scope(s); and

9. Agrees to comply with all applicable federal, state and local laws, ordinances, rules, regulations and guidelines.

BE IT FURTHER RESOLVED THAT, Council authorize the implementation of the project and appropriation of funding for related expenses, subject to securing the grant.

BE IT FURTHER RESOLVED THAT, a record signature copy of said agreements and any amendments to be on file in the Office of the City Clerk.



Office of the City Manager

CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council
 From: Dee Williams-Ridley, City Manager
 Submitted by: Jennifer A. Louis, Interim Chief of Police
 Subject: Revenue Grant: California Office of Traffic Safety (OTS) for the 2022
 Selective Traffic Enforcement Program (STEP) Grant

RECOMMENDATION

Adopt a Resolution authorizing the Chief of Police to accept the "Selective Traffic Enforcement Program (STEP)" grant and enter into the resultant grant agreement and any amendments, with the California Office of Traffic Safety. This OTS grant is for \$180,000 for the period of October 1, 2021 through September 30, 2022, which is Federal Fiscal Year 2022.

FISCAL IMPACTS OF RECOMMENDATION

The total of this project will not exceed \$180,000. Grant revenues will be deposited into budget code 309-71-703-812-0000-000-000-431-110 to offset expenditures. Appropriation of the expenditures is being included in the First Amendment to the Appropriations Ordinance. This grant will fund overtime, benefits, equipment, training costs, and reduce additional General Fund expenditures.

CURRENT SITUATION AND ITS EFFECTS

Securing OTS grant funding is a Strategic Plan Priority Project, advancing our goal to create a resilient, safe, connected, and prepared city.

Currently the Traffic Bureau at the Berkeley Police Department is staffed by one motor officer, one traffic data analyst, one sergeant, and one lieutenant. Motor officers' responsibilities include injury-collision investigations and traffic enforcement. However, resources often deplete rapidly due to ancillary duties and personnel shortages in the operations/patrol division. OTS funding builds upon our current traffic safety efforts by allowing patrol and motor officers opportunities to address traffic safety issues. The BPD utilizes a multipronged approach which includes both education and enforcement.

The most significant aspect is improving pedestrian and bicycle safety, distracted and impaired driving, in addition to and outside of their regularly scheduled duties. Additionally, the funds provide opportunities for leadership development and learning in traffic safety and DUI/impaired driving enforcement, and enhance the department's overall mission of public safety.

BACKGROUND

Office of Traffic Safety (OTS) rankings place the City of Berkeley number one for the past seven years in pedestrian and bicycle related injury collisions when compared to fifty-nine other cities with comparable populations. Each year hundreds of people are injured in traffic collisions that occur in the City of Berkeley. Berkeley maintains a high ranking in total fatal and injury collisions, hit and run injury collisions, speed related collisions, nighttime collisions, and motorcycle involved collisions. With assistance from the 2022 Office of Traffic Safety Grant, the department will continue our efforts to reduce the number of community members injured in collisions whether they choose to walk, drive, bike or ride a motorcycle in our city.

In 2018, the City of Berkeley was number one (1/59) for injury collisions involving pedestrians; number one (1/59) for collisions involving bicyclists; number one (1/59) for injury collisions involving bicyclists; and number one (1/59) for collisions involving pedestrians, and fifth (5/59) for injuries and fatal collisions involving motorcyclists. Based on these statistics and OTS rankings, the City of Berkeley is one of the most dangerous cities in the State of California to be a pedestrian or bicyclist.

Between February 2010 and December 2020, there have been twenty-six fatal auto collisions in the City of Berkeley. Thirteen of those resulted in a pedestrian being killed, and five resulted in a bicyclist being killed. To date in 2021, the Berkeley Police Department has investigated five fatal collisions.

The OTS Grant and the City Council's Vision Zero Program have shared ideologies. BPD's participation directly supports two of three of Vision Zero's tenets. BPD's efforts directly support Public Awareness Education and Traffic Enforcement. Public Awareness through our social media, departmental messaging, and direct contact with the public (in the field and at community meetings) and data-driven enforcement of primary collision factor offenses in areas where they have the highest probability of occurring.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

The City of Berkeley continues to have one of the highest bicycle and pedestrian usage rates in the County of Alameda and, as a result, there are a large number of bicyclists and pedestrians sharing the roadway with motorists. This grant will support the City of Berkeley's efforts to promote more sustainable forms of transportation, reducing greenhouse gas emissions-with the goal of reducing traffic injuries and fatalities related to all modes of transportation.

RATIONALE FOR RECOMMENDATION

The Police Department requests this OTS grant funding be approved to enhance our current mission of providing a safer environment for pedestrians, bicyclists, motorcyclists, and motorists on all City of Berkeley roadways and highways.

ALTERNATIVE ACTIONS CONSIDERED

The California Office of Traffic Safety currently provides the only known grant funding specific to traffic enforcement and related education. Not accepting this OTS grant would require additional overtime expenditures from General Fund resources or could result in a decrease in the overall safety of the citizens of Berkeley.

CONTACT PERSON

Lieutenant Jen Tate, Police Traffic Bureau, (510) 981-5983

Attachments:

1: Resolution

Exhibit A: OTS Grant Agreement

RESOLUTION NO. ##,###-N.S.

REVENUE GRANT: SELECTIVE TRAFFIC ENFORCEMENT PROGRAM (STEP)
GRANT FROM THE OFFICE OF TRAFFIC SAFETY TO FUND STRATEGIES TO
REDUCE THE NUMBER OF INJURIES AND DEATHS RELATED TO TRAFFIC
COLLISIONS IN THE CITY OF BERKELEY

WHEREAS, the Police Department is committed to providing a safe and secure environment through law enforcement within the City of Berkeley; and

WHEREAS, the Office of Traffic Safety (OTS) has made grant funding available to the Police Department to assist them in their mission of increasing traffic safety; and

WHEREAS, this grant will provide funding to support efforts to reduce injury and fatal collisions involving pedestrians, bicyclists, motorcyclists, and motorists on all City of Berkeley roadways and highways; and

WHEREAS, grant revenues will be deposited into budget code 309-71-703-812-0000-000-000-431110, in the DUI Enforcement Education Program Fund.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Chief of Police is authorized to accept the Selective Traffic Enforcement Program (STEP) Grant and enter into the resultant grant agreement and any amendments, with the Office of Traffic Safety (OTS) to fund increased levels of impaired or distracted driving enforcement, nighttime seatbelt enforcement, motorcycle safety enforcement, and educational programs regarding bicycle and pedestrian collisions in the amount of \$180,000 for the period of October 1, 2021 to September 30, 2022.

Exhibit

A: OTS Grant Agreement

<p>E. ACCOUNTING OFFICER OF OFFICE OF TRAFFIC SAFETY</p> <p>NAME: Carolyn Vu</p> <p>ADDRESS: 2208 Kausen Drive, Suite 300 Elk Grove, CA 95758</p>	<p>9. DUNS INFORMATION</p> <p>SAMS #: KC7DYL9EF25</p> <p>REGISTERED</p> <p>ADDRESS: 2180 Milvia Street 3rd Floor</p> <p>CITY: Berkeley</p> <p>ZIP+4: 94704-1122</p>
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10. PROJECTED EXPENDITURES						
FUND	CFDA	ITEM/APPROPRIATION	F.Y.	CHAPTER	STATUTE	PROJECTED EXPENDITURES
				AGREEMENT TOTAL		\$180,000.00
				AMOUNT ENCUMBERED BY THIS DOCUMENT		\$180,000.00
<p><i>I CERTIFY upon my own personal knowledge that the budgeted funds for the current budget year are available for the period and purpose of the expenditure stated above.</i></p>				PRIOR AMOUNT ENCUMBERED FOR THIS AGREEMENT		\$ 0.00
				TOTAL AMOUNT ENCUMBERED TO DATE		\$180,000.00
OTS ACCOUNTING OFFICER'S SIGNATURE			DATE SIGNED			

1. PROBLEM STATEMENT

In California alone, there are 49 cities with larger populations than Berkeley. In Alameda County, Berkeley is ranked number four in population behind Oakland, Fremont, and Hayward. Yet, the City of Berkeley is famous around the globe.

As of 2018, Berkeley's population was over 121,000. The population density was over 11,000 per square mile. Nearly 48 percent of Berkeley residents use a motor vehicle to commute to work, just under 8 percent used a bicycle and 16 percent walked. Berkeley makes up only 8 percent of Alameda County's population but more than 37 percent of the county's population of people who walk and ride bikes to work.

In addition to residents, the city's population spikes during the day as people commute to Berkeley for travel, special events, work, and education. UC Berkeley had nearly 43,000 student population in 2019. Located less than ½ mile away from UC Berkeley, is Berkeley City College, with a student population of over 6,000. Berkeley High School, located just 1 block away has a student population of over 3,000. All of these schools are near central Berkeley in the downtown business district.

Additionally, in 2018 Berkeley City Council voted to allow three scooter companies, each with 200-400 scooters to operate within the city. Berkeley joined a number of other cities in California and across the nation trying to maintain safety and implement regulations. According to a study published by the Center for Disease Control and Prevention and Public Health Departments of Austin, Tex., published in April 2019, found that for every 100,000 scooter rides, 20 people were injured. Half of the injuries were to the head and 15 percent showed evidence of traumatic brain injury. The City of Berkeley continually strives to promote safety for all forms of transportation as the large number of bicyclists and pedestrians share the crowded roadway with motorists.

Office of Traffic Safety (OTS) rankings place the City of Berkeley number one for the past seven years in pedestrian and bicycle related injury crashes when compared to fifty-nine other cities with comparable populations. Each year hundreds of people are injured in traffic crashes that occur in the City of Berkeley. Berkeley maintains a high ranking in total fatal and injury crashes, hit and run injury crashes, motorcycle involved crashes, nighttime crashes, and speed related crashes. With assistance from the 2022 Office of Traffic Safety Grant we will continue our efforts to reduce the number of citizens injured in crashes whether they choose to walk, drive, bike or ride a motorcycle in our city.

In 2018, the City of Berkeley was ranked number one (1/59) for crashes involving bicyclists; number one (1/59) for injury crashes involving pedestrians; number one (1/59) for crashes involving pedestrians sixty-five years of age and older; number five (5/59) for injury crashes involving motorcyclists; and number seven (7/59) for injury crashes involving bicyclists under fifteen year or age. Based on these statistics and OTS rankings, the City of Berkeley is one of the most dangerous cities in the State of California to walk or ride a bicycle. The fault for the bicycle injury crashes rested equally between the bicyclist and the motor vehicle operator.

Between March 2010 and December 2020, there have been twenty-six fatal auto crashes in the City of Berkeley. Thirteen of those resulted in a pedestrian being killed, and five resulted in a bicyclist being killed. In 2020 alone Berkeley Police Investigated two fatal crashes.

On Monday, January 20th 2020, at approximately 10:33 a.m., a 58 year old female pedestrian was laying on the sidewalk on University Ave near 6th St. A domestic violence suspect was driving a Nissan Maxima, and in an attempt to evade police, drove onto the sidewalk hitting the victim and fleeing. The female pedestrian died due to the injuries and trauma caused by the crash. The suspect in the fatal hit and run crash was eventually captured and charged with murder, vehicular manslaughter with gross negligence counts, evading an officer causing death, leaving the scene of an accident causing death, and corporal injury to a relationship partner.

On Tuesday, February 11th 2020 at approximately 9:20 a.m., a 20 year old male was the sole occupant of an Infinity that was driving southbound on San Pablo Ave approaching the intersection with Ashby Ave. This intersection is controlled by signal lights which were working properly and not a factor in the crash. For unknown reasons the driver accelerated to approx. 40 MPH before colliding with a traffic signal pole. The driver later succumbed to his injuries and died at Highland Hospital. He had a quantity of marijuana metabolite in his blood, but the investigation could not determine if this was a factor in the crash.

In 2020, 384 persons were injured in auto crashes in the City of Berkeley. 68 of those were pedestrians, 63 were bicyclists. In crashes involving a pedestrian, the motor vehicle operator was found at fault over eighty-seven percent of the time. In crashes involving a bicyclist, the bicyclist was found at fault approximately fifty percent of the time. These factors are important in formulating Berkeley PD's enforcement strategy in these two critical areas.

In 2020, Berkeley Police made 100 misdemeanor DUI arrests (79 alcohol, 13 drugs only, 6 combo), 7 felony DUI arrests, and 2 minor with BAC over .05.

Over the past six years (1/2015-1/2021), 168 injuries occurred in crashes where alcohol or drugs were a factor. Continued, proactive enforcement through DUI saturation patrols and DUI checkpoints funded through the OTS grant will be an effective aid for taking dangerously impaired drivers off the road, and also educating the community as to the dangers of drug and alcohol impaired driving. Due to Covid-19 and staffing levels in years past, Berkeley PD was unable to conduct many DUI Checkpoints, but were able to keep the roadways safer by using the DUI Saturation funds.

Unsafe speed (22350 VC) was the most prevalent primary crash factor in 2020. 85 people were injured as a result of unsafe speed. According to OTS rankings for 2018 the City of Berkeley ranked in the top ten (10/59) for speed related injury crashes. The majority of roadways in Berkeley have 25 MPH speed limits. Drivers travelling in the City of Berkeley at unsafe speeds continues to be an enforcement priority for the Berkeley Police Department. OTS funds will greatly assist the department and allow us to expand our enforcement efforts.

According to OTS rankings for 2018 the City of Berkeley ranks fourteen (14/59) in Total Fatal and Injury crashes.

According to NHTSA, "Of the 37,133 people killed in motor vehicle crashes in 2017 47% were not wearing seatbelts." Berkeley Police understands the importance of buckling up. In 2020 BPD Officers issued about 120 citations for seatbelt violations. Many of these were issued by traffic enforcement officers when using OTS Funds to staff extra enforcement during "Click it or ticket".

A factor that is vastly under reported in injury crashes in the City of Berkeley is distracted driving due to cellular phone use. According NHTSA 3,166 people were killed by distracted driving in 2017. While it is often difficult to determine if this is the primary crash factor in many crashes, BPD Officers issued about 500 citations for driving while using a cellphone device in a non-hands free manner in 2020.

Based on the NHTSA findings, drivers who text while behind the wheel have a twenty-three percent chance of causing a crash. OTS funds will greatly assist our 2022 efforts to prevent distracted driving in the City of Berkeley.

Two of the core methodologies that the Berkeley PD Traffic Unit employs, are the use of internal crash and SWITRS data to identify the top PCF's and the most dangerous roadways in the city for vehicles, pedestrians, and bicyclists, and to direct the majority of available resources to those areas. Secondly, altering traffic violator behavior through vigorous traffic enforcement—by issuing citations, rather than warnings.

Funds from the Office of Traffic Safety 2022 grant will assist members of the Berkeley Police Department in its mission to reduce the overall number of injury crashes, bicycle and pedestrian related crashes, alcohol related crashes, speed related crashes, motorcycle related crashes, and crashes involving distracted driving.

Currently, the traffic bureau at the Berkeley Police Department is staffed by four motor officers, one traffic data analyst, one sergeant and one lieutenant. Motor officer's responsibilities include injury-crash investigations and traffic enforcement; however, resources often deplete rapidly due to ancillary duties and personnel shortages in the operations/patrol division. OTS funding builds upon our current traffic safety efforts by allowing patrol and motor officers opportunities to address traffic safety—most significantly pedestrian and bicycle safety, distracted and impaired driving— in addition to and outside of their regularly scheduled duties. Additionally, the funds provide opportunities for leadership development and learning in traffic safety and DUI/impaired driving enforcement and enhance the department's overall mission of public safety.

2. PERFORMANCE MEASURES

A. Goals:

1. Reduce the number of persons killed in traffic crashes.
2. Reduce the number of persons injured in traffic crashes.
3. Reduce the number of pedestrians killed in traffic crashes.
4. Reduce the number of pedestrians injured in traffic crashes.
5. Reduce the number of bicyclists killed in traffic crashes.
6. Reduce the number of bicyclists injured in traffic crashes.
7. Reduce the number of persons killed in alcohol-involved crashes.
8. Reduce the number of persons injured in alcohol-involved crashes.
9. Reduce the number of persons killed in drug-involved crashes.
10. Reduce the number of persons injured in drug-involved crashes.
11. Reduce the number of persons killed in alcohol/drug combo-involved crashes.
12. Reduce the number of persons injured in alcohol/drug combo-involved crashes.
13. Reduce the number of motorcyclists killed in traffic crashes.
14. Reduce the number of motorcyclists injured in traffic crashes.
15. Reduce hit & run fatal crashes.
16. Reduce hit & run injury crashes.
17. Reduce nighttime (2100 - 0259 hours) fatal crashes.
18. Reduce nighttime (2100 - 0259 hours) injury crashes.

B. Objectives:

	Target Number
1. Issue a press release announcing the kick-off of the grant by November 15. The kick-off press releases and media advisories, alerts, and materials must be emailed to the OTS Public Information Officer at pio@ots.ca.gov , and copied to your OTS Coordinator, for approval 14 days prior to the issuance date of the release.	1
2. Participate and report data (as required) in the following campaigns, National Walk to School Day, National Teen Driver Safety Week, NHTSA Winter Mobilization, National Distracted Driving Awareness Month, National Motorcycle Safety Month, National Bicycle Safety Month, National Click it or Ticket Mobilization, NHTSA Summer Mobilization, National Child Passenger Safety Week, and California's Pedestrian Safety Month.	10
3. Develop (by December 31) and/or maintain a "HOT Sheet" program to notify patrol and traffic officers to be on the lookout for identified repeat DUI offenders with a suspended or revoked license as a result of DUI convictions. Updated HOT sheets should be distributed to patrol and traffic officers monthly.	12
4. Send law enforcement personnel to the NHTSA Standardized Field Sobriety Testing (SFST) (minimum 16 hours) POST-certified training.	2
5. Send law enforcement personnel to the NHTSA Advanced Roadside Impaired Driving Enforcement (ARIDE) 16 hour POST-certified training.	2
6. Send law enforcement personnel to the Drug Recognition Expert (DRE) training.	2
7. Send law enforcement personnel to the DRE Recertification training.	1
8. Send law enforcement personnel to SFST Instructor training.	1
9. Send law enforcement personnel to DRE Instructor training.	1

<p>10. Conduct DUI/DL Checkpoints. A minimum of 1 checkpoint should be conducted during the NHTSA Winter Mobilization and 1 during the Summer Mobilization. To enhance the overall deterrent effect and promote high visibility, it is recommended the grantee issue an advance press release and conduct social media activity for each checkpoint. For combination DUI/DL checkpoints, departments should issue press releases that mention DL's will be checked at the DUI/DL checkpoint. Signs for DUI/DL checkpoints should read "DUI/Driver's License Checkpoint Ahead." OTS does not fund or support independent DL checkpoints. Only on an exception basis and with OTS pre-approval will OTS fund checkpoints that begin prior to 1800 hours. When possible, DUI/DL Checkpoint screeners should be DRE- or ARIDE-trained.</p>	<p>3</p>
<p>11. Conduct DUI Saturation Patrol operation(s).</p>	<p>21</p>
<p>12. Conduct Traffic Enforcement operation(s), including but not limited to, primary crash factor violations.</p>	<p>30</p>
<p>13. Conduct highly publicized Distracted Driving enforcement operation(s) targeting drivers using hand held cell phones and texting.</p>	<p>28</p>
<p>14. Conduct highly publicized Motorcycle Safety enforcement operation(s) in areas or during events with a high number of motorcycle incidents or crashes resulting from unsafe speed, DUI, following too closely, unsafe lane changes, improper turning, and other primary crash factor violations by motorcyclists and other drivers.</p>	<p>29</p>
<p>15. Conduct highly publicized pedestrian and/or bicycle enforcement operation(s) in areas or during events with a high number of pedestrian and/or bicycle crashes resulting from violations made by pedestrians, bicyclists, and drivers.</p>	<p>32</p>
<p>16. Conduct Traffic Safety educational presentation(s) with an effort to reach community members. Note: Presentation(s) may include topics such as distracted driving, DUI, speed, bicycle and pedestrian safety, seat belts and child passenger safety.</p>	<p>4</p>
<p>3. METHOD OF PROCEDURE</p>	
<p>A. Phase 1 – Program Preparation (1st Quarter of Grant Year)</p>	
<ul style="list-style-type: none"> • The department will develop operational plans to implement the “best practice” strategies outlined in the objectives section. • All training needed to implement the program should be conducted this quarter. • All grant related purchases needed to implement the program should be made this quarter. • In order to develop/maintain the “Hot Sheets,” research will be conducted to identify the “worst of the worst” repeat DUI offenders with a suspended or revoked license as a result of DUI convictions. The Hot Sheets may include the driver’s name, last known address, DOB, description, current license status, and the number of times suspended or revoked for DUI. Hot Sheets should be updated and distributed to traffic and patrol officers at least monthly. • Implementation of the STEP grant activities will be accomplished by deploying personnel at high crash locations. 	
<p><u>Media Requirements</u></p>	
<ul style="list-style-type: none"> • Issue a press release approved by the OTS PIO announcing the kick-off of the grant by November 15, but no sooner than October 1. The kick-off release must be approved by the OTS PIO and only distributed after the grant is fully signed and executed. If you are unable to meet the November 15 deadline to issue a kick-off press release, communicate reasons to your OTS coordinator and OTS PIO. 	
<p>B. Phase 2 – Program Operations (Throughout Grant Year)</p>	
<ul style="list-style-type: none"> • The department will work to create media opportunities throughout the grant period to call attention to the innovative program strategies and outcomes. 	
<p><u>Media Requirements</u></p>	
<ul style="list-style-type: none"> • The following requirements are for all grant-related activities • Send all media advisories, alerts, videos, graphics, artwork, posters, radio/PSA/video scripts, storyboards, digital and/or print educational materials for grant-related activities to the OTS PIO at pio@ots.ca.gov for approval and copy your OTS coordinator. Optimum lead time would be 7 days before the scheduled release but at least 3 business days prior to the scheduled release date for review and approval is appreciated. 	

- The OTS PIO is responsible for the approval of the design and content of materials. The agency understands OTS PIO approval is not authorizing approval of budget expenditure or cost. Any cost approvals must come from the Coordinator.
- Pre-approval is not required when using any OTS-supplied template for media advisories, press releases, social media graphics, videos or posts, or any other OTS-supplied educational material. However, copy the OTS PIO at pio@ots.ca.gov and your OTS coordinator when any material is distributed to the media and public, such as a press release, educational material, or link to social media post. The OTS-supplied kick-off press release templates and any kickoff press releases are an exception to this policy and require prior approval before distribution to the media and public.
- If an OTS-supplied template, educational material, social media graphic, post or video is substantially changed, the changes shall be sent to the OTS PIO at pio@ots.ca.gov for approval and copy to your OTS Coordinator. Optimum lead time would be 7 days prior to the scheduled release date, but at least 3 business days prior to the scheduled release date for review and approval is appreciated.
- Press releases, social media posts and alerts on platforms such as NextDoor and Nixle reporting immediate and time-sensitive grant activities (e.g. enforcement operations, day of event highlights or announcements, event invites) are exempt from the OTS PIO approval process. The OTS PIO and your Coordinator should still be notified when the grant-related activity is happening (e.g. car seat checks, bicycle rodeos, community presentations, DUI checkpoints, etc.).
- Enforcement activities such as warrant and probation sweeps, court stings, etc. that are embargoed or could impact operations by publicizing in advance are exempt from the PIO approval process. However, announcements and results of activities should still be copied to the OTS PIO at pio@ots.ca.gov and your Coordinator with embargoed date and time or with "INTERNAL ONLY: DO NOT RELEASE" message in subject line of email.
- Any earned or paid media campaigns for TV, radio, digital or social media that are part of a specific grant objective, using OTS grant funds, or designed and developed using contractual services by a sub-grantee, requires prior approval. Please send to the OTS PIO at pio@ots.ca.gov for approval and copy your grant coordinator at least 3 business days prior to the scheduled release date.
- Social media posts highlighting state or national traffic safety campaigns (Distracted Driving Month, Motorcycle Safety Awareness Month, etc.), enforcement operations (DUI checkpoints, etc.), or any other grant-related activity such as Bicycle rodeos, presentations, or events, are highly encouraged but do not require prior approval.
- Submit a draft or rough-cut of all digital, printed, recorded or video material (brochures, posters, scripts, artwork, trailer graphics, digital graphics, social posts connected to an earned or paid media campaign grant objective) to the OTS PIO at pio@ots.ca.gov and copy your OTS Coordinator for approval prior to the production or duplication.
- Use the following standard language in all press, media, and printed materials, space permitting: Funding for this program was provided by a grant from the California Office of Traffic Safety, through the National Highway Traffic Safety Administration.
- Space permitting, include the OTS logo on all grant-funded print materials, graphics and paid or earned social media campaign grant objective; consult your OTS Coordinator for specifics, format-appropriate logos, or if space does not permit the use of the OTS logo.
- Email the OTS PIO at pio@ots.ca.gov and copy your OTS Coordinator at least 21 days in advance, or when first confirmed, a short description of any significant grant-related traffic safety event or program, particularly events that are highly publicized beforehand with anticipated media coverage so OTS has sufficient notice to arrange for attendance and/or participation in the event. If unable to attend, email the OTS PIO and coordinator brief highlights and/or results, including any media coverage (broadcast, digital, print) of event within 7 days following significant grant-related event or program. Media and program highlights are to be reflected in QPRs.
- Any press releases, work plans, scripts, storyboards, artwork, graphics, videos or any educational or informational materials that received PIO approval in a prior grant year needs to be resubmitted for approval in the current grant year.
- Contact the OTS PIO or your OTS Coordinator for consultation when changes from any of the above requirements might be warranted.

C. Phase 3 – Data Collection & Reporting (Throughout Grant Year)

1. Prepare and submit invoice claims (due January 30, April 30, July 30, and October 30)
2. Prepare and submit Quarterly Performance Reports (QPR) (due January 30, April 30, July 30, and October 30)
 - Collect and report quarterly, appropriate data that supports the progress of goals and objectives.
 - Provide a brief list of activity conducted, procurement of grant-funded items, and significant media activities. Include status of grant-funded personnel, status of contracts, challenges, or special accomplishments.
 - Provide a brief summary of quarterly accomplishments and explanations for objectives not completed or plans for upcoming activities.
 - Collect, analyze and report statistical data relating to the grant goals and objectives.

4. METHOD OF EVALUATION

Using the data compiled during the grant, the Grant Director will complete the “Final Evaluation” section in the fourth/final Quarterly Performance Report (QPR). The Final Evaluation should provide a brief summary of the grant’s accomplishments, challenges and significant activities. This narrative should also include whether goals and objectives were met, exceeded, or an explanation of why objectives were not completed.

5. ADMINISTRATIVE SUPPORT

This program has full administrative support, and every effort will be made to continue the grant activities after grant conclusion.

FUND NUMBER	CATALOG NUMBER (CFDA)	FUND DESCRIPTION	TOTAL AMOUNT
402PT-22	20.600	State and Community Highway Safety	\$100,000.00
164AL-22	20.608	Minimum Penalties for Repeat Offenders for Driving While Intoxicated	\$80,000.00

COST CATEGORY	FUND NUMBER	UNIT COST OR RATE	UNITS	TOTAL COST TO GRANT
A. PERSONNEL COSTS				
Positions and Salaries				
<u>Straight Time</u>				\$0.00
<u>Overtime</u>				
DUI/DL Checkpoints	164AL-22	\$13,536.00	3	\$40,608.00
DUI Saturation Patrol	164AL-22	\$1,410.00	21	\$29,610.00
Benefits - OT	164AL-22	\$70,218.00	1	\$6,959.00
Traffic Enforcement Operations	402PT-22	\$705.00	30	\$21,150.00
Distracted Driving Operations	402PT-22	\$705.00	28	\$19,740.00
Motorcycle Enforcement Operations	402PT-22	\$705.00	29	\$20,445.00
Pedestrian/Bicycle Operations	402PT-22	\$705.00	32	\$22,560.00
Traffic Safety Education	402PT-22	\$846.00	4	\$3,384.00
Benefit Rate	402PT-22	\$87,279.00	1	\$8,649.00
Category Sub-Total				\$173,105.00
B. TRAVEL EXPENSES				
In State Travel	402PT-22	\$4,071.65	1	\$4,072.00
				\$0.00
Category Sub-Total				\$4,072.00
C. CONTRACTUAL SERVICES				
				\$0.00
Category Sub-Total				\$0.00
D. EQUIPMENT				
				\$0.00
Category Sub-Total				\$0.00
E. OTHER DIRECT COSTS				
DUI Checkpoint Supplies	164AL-22	\$2,823.40	1	\$2,823.00
Category Sub-Total				\$2,823.00
F. INDIRECT COSTS				
				\$0.00
Category Sub-Total				\$0.00
GRANT TOTAL				\$180,000.00

BUDGET NARRATIVE
<p>PERSONNEL COSTS DUI/DL Checkpoints - Overtime for grant funded law enforcement operations conducted by appropriate department personnel.</p>
<p>DUI Saturation Patrol - DUI Saturation Patrol consists of two police officers working a minimum 5 hour shift.</p>
<p>Benefits - OT - 9.91% - Workers Compensation 8.46%, Medicare 1.45%</p>
<p>Traffic Enforcement Operations - Traffic Enforcement Operations typically consists of a solo officer working a minimum 5 hour shift.</p>
<p>Distracted Driving Operations - Distracted driving typically consists of a solo officer working a minimum five hour shift.</p>
<p>Motorcycle Enforcement Operations - Motorcycle Enforcement typically consists of a solo officer working a minimum five hour shift.</p>
<p>Pedestrian/Bicycle Operations - Pedestrian/Bicycle Operations may consist of solo officer shifts or officers working in teams. These shifts are a minimum of five hours.</p>
<p>Traffic Safety Education - Efforts focused on traffic safety through education rather than enforcement.</p>
<p>Benefit Rate - 9.91% - Workers Compensation 8.46%, Medicare 1.45%</p>
<p>TRAVEL EXPENSES In State Travel - Costs are included for appropriate staff to attend conferences and training events supporting the grant goals and objectives and/or traffic safety. Local mileage for grant activities and meetings is included. Anticipated travel may include SFST, ARIDE, DRE training. All conferences, seminars or training not specifically identified in the Budget Narrative must be approved by OTS. All travel claimed must be at the agency approved rate. Per Diem may not be claimed for meals provided at conferences when registration fees are paid with OTS grant funds.</p>
<p>CONTRACTUAL SERVICES -</p>
<p>EQUIPMENT -</p>
<p>OTHER DIRECT COSTS DUI Checkpoint Supplies - On-scene supplies needed to conduct sobriety checkpoints. Costs may include 28" traffic cones, MUTCD compliant traffic signs, MUTCD compliant high visibility vests (maximum of 10), traffic counters (maximum of 2), generator, gas for generators, lighting, reflective banners, electronic flares, PAS device supplies, heater, propane for heaters, fan, anti-fatigue mats, and canopies. Additional items may be purchased if approved by OTS. The cost of food and beverages will not be reimbursed.</p>
<p>INDIRECT COSTS -</p>
<p>STATEMENTS/DISCLAIMERS Program Income default statement: There will be no program income generated from this grant. Enforcement Grant Quota Disclaimer:</p>

Nothing in this "agreement" shall be interpreted as a requirement, formal or informal, that a particular law enforcement officer issue a specified or predetermined number of citations in pursuance of the goals and objectives here under.

CHP Grant Program Disclaimer:

The OTS grant funded activities must be separate from the CHP Cannabis Tax Fund Grant Program activities and maintained under separate accounting/tracking/other codes (example: the same DUI checkpoint may not be funded by both the CHP and the OTS).

CERTIFICATIONS AND ASSURANCES FOR HIGHWAY SAFETY GRANTS
(23 U.S.C. Chapter 4; Sec. 1906, Pub. L. 109-59, As Amended By Sec. 4011, Pub. L. 114-94)

The officials named on the grant agreement, certify by way of signature on the grant agreement signature page, that the Grantee Agency complies with all applicable Federal statutes, regulations, and directives and State rules, guidelines, policies and laws in effect with respect to the periods for which it receives grant funding. Applicable provisions include, but are not limited to, the following:

GENERAL REQUIREMENTS

- 23 U.S.C. Chapter 4 – Highway Safety Act of 1966, as amended
- Sec. 1906, Pub. L. 109-59, as amended by Sec. 4011, Pub. L. 114-94
- 23 CFR part 1300 – Uniform Procedures for State Highway Safety Grant Programs
- 2 CFR part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
- 2 CFR part 1201 – Department of Transportation, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

NONDISCRIMINATION

(applies to subrecipients as well as States)

The State highway safety agency will comply with all Federal statutes and implementing regulations relating to nondiscrimination (“Federal Nondiscrimination Authorities”). These include but are not limited to:

- **Title VI of the Civil Rights Act of 1964** (42 U.S.C. 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin) and 49 CFR part 21;
- **The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970**, (42 U.S.C. 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- **Federal-Aid Highway Act of 1973**, (23 U.S.C. 324 *et seq.*), and **Title IX of the Education Amendments of 1972**, as amended (20 U.S.C. 1681-1683 and 1685-1686) (prohibit discrimination on the basis of sex);
- **Section 504 of the Rehabilitation Act of 1973**, (29 U.S.C. 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability) and 49 CFR part 27;
- **The Age Discrimination Act of 1975**, as amended, (42 U.S.C. 6101 *et seq.*), (prohibits discrimination on the basis of age);
- **The Civil Rights Restoration Act of 1987**, (Pub. L. 100-209), (broadens scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal aid recipients, subrecipients and contractors, whether such programs or activities are Federally-funded or not);
- **Titles II and III of the Americans with Disabilities Act** (42 U.S.C. 12131-12189) (prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing) and 49 CFR parts 37 and 38;
- **Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations** (prevents discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations); and
- **Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency** (guards against Title VI national origin discrimination/discrimination because of limited English proficiency (LEP) by ensuring that funding recipients take reasonable steps to ensure that LEP persons have meaningful access to programs (70 FR 74087-74100).

The Subgrantee-

- Will take all measures necessary to ensure that no person in the United States shall, on the grounds of race, color, national origin, disability, sex, age, limited English proficiency, or membership in any other class protected by Federal Nondiscrimination Authorities, be excluded from participation in, be denied the benefits of,

or be otherwise subjected to discrimination under any of its programs or activities, so long as any portion of the program is Federally-assisted;

- Will administer the program in a manner that reasonably ensures that any of its subrecipients, contractors, subcontractors, and consultants receiving Federal financial assistance under this program will comply with all requirements of the Non-Discrimination Authorities identified in this Assurance;
- Agrees to comply (and require its subrecipients, contractors, subcontractors, and consultants to comply) with all applicable provisions of law or regulation governing US DOT's or NHTSA's access to records, accounts, documents, information, facilities, and staff, and to cooperate and comply with any program or compliance reviews, and/or complaint investigations conducted by US DOT or NHTSA under any Federal Nondiscrimination Authority;
- Acknowledges that the United States has a right to seek judicial enforcement with regard to any matter arising under these Non-Discrimination Authorities and this Assurance;
- Agrees to insert in all contracts and funding agreements with other State or private entities the following clause:

“During the performance of this contract/funding agreement, the contractor/funding recipient agrees—

- a. To comply with all Federal nondiscrimination laws and regulations, as may be amended from time to time;
- b. Not to participate directly or indirectly in the discrimination prohibited by any Federal non-discrimination law or regulation, as set forth in appendix B of 49 CFR part 21 and herein;
- c. To permit access to its books, records, accounts, other sources of information, and its facilities as required by the State highway safety office, US DOT or NHTSA;
- d. That, in event a contractor/funding recipient fails to comply with any nondiscrimination provisions in this contract/funding agreement, the State highway safety agency will have the right to impose such contract/agreement sanctions as it or NHTSA determine are appropriate, including but not limited to withholding payments to the contractor/funding recipient under the contract/agreement until the contractor/funding recipient complies; and/or cancelling, terminating, or suspending a contract or funding agreement, in whole or in part; and
- e. To insert this clause, including paragraphs (a) through (e), in every subcontract and sub agreement and in every solicitation for a subcontract or sub-agreement, that receives Federal funds under this program.

POLITICAL ACTIVITY (HATCH ACT)
(applies to subrecipients as well as States)

The State will comply with provisions of the Hatch Act (5 U.S.C. 1501-1508), which limits the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

CERTIFICATION REGARDING FEDERAL LOBBYING
(applies to subrecipients as well as States)

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of

any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement;

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;

3. The undersigned shall require that the language of this certification be included in the award documents for all sub-award at all tiers (including subcontracts, subgrants, and contracts under grant, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

RESTRICTION ON STATE LOBBYING

(applies to subrecipients as well as States)

None of the funds under this program will be used for any activity specifically designed to urge or influence a State or local legislator to favor or oppose the adoption of any specific legislative proposal pending before any State or local legislative body. Such activities include both direct and indirect (e.g., "grassroots") lobbying activities, with one exception. This does not preclude a State official whose salary is supported with NHTSA funds from engaging in direct communications with State or local legislative officials, in accordance with customary State practice, even if such communications urge legislative officials to favor or oppose the adoption of a specific pending legislative proposal.

CERTIFICATION REGARDING DEBARMENT AND SUSPENSION

(applies to subrecipients as well as States)

Instructions for Primary Tier Participant Certification (States)

1. By signing and submitting this proposal, the prospective primary tier participant is providing the certification set out below and agrees to comply with the requirements of 2 CFR parts 180 and 1200.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective primary tier participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary tier participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default or may pursue suspension or debarment.

4. The prospective primary tier participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary tier participant learns its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction*, *civil judgment*, *debarment*, *suspension*, *ineligible*, *participant*, *person*, *principal*, and *voluntarily excluded*, as used in this clause, are defined in 2 CFR parts 180 and 1200. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person

who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary tier participant further agrees by submitting this proposal that it will include the clause titled "Instructions for Lower Tier Participant Certification" including the "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions and will require lower tier participants to comply with 2 CFR parts 180 and 1200.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any prospective lower tier participants, each participant may, but is not required to, check the System for Award Management Exclusions website (<https://www.sam.gov/>).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal government, the department or agency may terminate the transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Tier Covered Transactions

(1) The prospective primary tier participant certifies to the best of its knowledge and belief, that it and its principals:

- (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency;
- (b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
- (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or Local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and
- (d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

(2) Where the prospective primary tier participant is unable to certify to any of the Statements in this certification, such prospective participant shall attach an explanation to this proposal.

Instructions for Lower Tier Participant Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below and agrees to comply with the requirements of 2 CFR parts 180 and 1200.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered in to. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal government, the

department or agency with which this transaction originated may pursue available remedies, including suspension or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms *covered transaction, civil judgment, debarment, suspension, ineligible, participant, person, principal, and voluntarily excluded*, as used in this clause, are defined in 2 CFR parts 180 and 1200. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Instructions for Lower Tier Participant Certification" including the "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions and will require lower tier participants to comply with 2 CFR parts 180 and 1200.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant is responsible for ensuring that its principals are not suspended, debarred, or otherwise ineligible to participate in covered transactions. To verify the eligibility of its principals, as well as the eligibility of any prospective lower tier participants, each participant may, but is not required to, check the System for Award Management Exclusions website (<https://www.sam.gov/>).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal government, the department or agency with which this transaction originated may pursue available remedies, including suspension or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions:

1. The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participating in covered transactions by any Federal department or agency.

2. Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

BUY AMERICA ACT

(applies to subrecipients as well as States)

The State and each subrecipient will comply with the Buy America requirement (23 U.S.C. 313) when purchasing items using Federal funds. Buy America requires a State, or subrecipient, to purchase with Federal funds only steel, iron and manufactured products produced in the United States, unless the Secretary of Transportation determines that such domestically produced items would be inconsistent with the public interest, that such materials are not reasonably available and of a satisfactory quality, or that inclusion of domestic materials will increase the cost of the overall project contract by more than 25 percent. In order to use Federal

funds to purchase foreign produced items, the State must submit a waiver request that provides an adequate basis and justification for approval by the Secretary of Transportation.

PROHIBITION ON USING GRANT FUNDS TO CHECK FOR HELMET USAGE

(applies to subrecipients as well as States)

The State and each subrecipient will not use 23 U.S.C. Chapter 4 grant funds for programs to check helmet usage or to create checkpoints that specifically target motorcyclists.

POLICY ON SEAT BELT USE

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the Grantee is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information and resources on traffic safety programs and policies for employers, please contact the Network of Employers for Traffic Safety (NETS), a public-private partnership dedicated to improving the traffic safety practices of employers and employees. You can download information on seat belt programs, costs of motor vehicle crashes to employers, and other traffic safety initiatives at www.trafficsafety.org. The NHTSA website (www.nhtsa.gov) also provides information on statistics, campaigns, and program evaluations and references.

POLICY ON BANNING TEXT MESSAGING WHILE DRIVING

In accordance with Executive Order 13513, Federal Leadership On Reducing Text Messaging While Driving, and DOT Order 3902.10, Text Messaging While Driving, States are encouraged to adopt and enforce workplace safety policies to decrease crashes caused by distracted driving, including policies to ban text messaging while driving company-owned or rented vehicles, Government-owned, leased or rented vehicles, or privately-owned vehicles when on official Government business or when performing any work on or behalf of the Government. States are also encouraged to conduct workplace safety initiatives in a manner commensurate with the size of the business, such as establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving, and education, awareness, and other outreach to employees about the safety risks associated with texting while driving.



CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and
Members of the City Council

From: Board of Library Trustees

Submitted by: Tess Mayer, Director of Library Services, Acting as Secretary, Board of Library
Trustees

SUBJECT: Board of Library Trustees Reappointment: Amy Roth

RECOMMENDATION

Adopt a Resolution Approving the Reappointment of Amy Roth to the Board of Library Trustees (“BOLT”) for a second term of four years commencing January 4, 2022.

FISCAL IMPACTS OF RECOMMENDATION

None.

BACKGROUND

The Board of Library Trustees consists of five members appointed by the City Council upon recommendation of the Board of Library Trustees. Board members are appointed for terms of four years, serve without compensation, and must be Berkeley residents. Trustee Roth is currently serving as a result of her appointment to the board by City Council resolution 68,266-N.S. on December 19, 2017 to complete her first term of office which ends on January 3, 2022. The practice of the board has been to support trustees expressing an interest in serving a second term of office by putting forward a recommendation to the City Council in advance of the terms expiration to ensure continuity and a full complement of board members in order to conduct business. At its October 6, 2021 regular meeting, the board adopted Resolution #21-118 to appoint Amy Roth to a second term: M/S/C (Hahn/Roth); Ayes – Trustees Davenport, Greene, Hahn, Roth and Selawsky. Noes: None; Abstentions: None; Absent: None.

CURRENT SITUATION AND ITS EFFECTS

Trustee Roth’s first term will end on January 3, 2022 and she is eligible for a second term that would end on January 3, 2026. Trustee Roth is currently a member in good standing.

CONTACT PERSON

Tess Mayer, Director, Library Services, (510) 981-6195

Attachments:

1. Resolution

RESOLUTION NO. ##,###-N.S.

**RE-APPOINTMENT OF AMY ROTH AS A MEMBER OF
THE LIBRARY BOARD OF TRUSTEES**

WHEREAS, membership of the Board of Library Trustees is composed of five appointments by the City Council, including one appointment of a current council member; and

WHEREAS, Amy Roth was appointed to a first term as a 'Trustee' on December 19, 2017, which ends on January 3, 2022; and

WHEREAS, at its October 6, 2021 meeting, the Board of Library Trustees recommended that Amy Roth be reappointed to a second term on the Library Board by Resolution # 21-118.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that Amy Roth be reappointed to the Board of Library trustees for a second term beginning January 4, 2022 and ending January 3, 2026.



Office of the Mayor

CONSENT CALENDAR
November 9, 2021

To: Honorable Members of the City Council
 From: Mayor Jesse Arreguín
 Subject: Berkeley Holiday Fund: Relinquishment of Council Office Budget Funds to General Fund and Grant of Such Funds

RECOMMENDATION

Adopt a Resolution approving the expenditure of an amount not to exceed \$500 per Councilmember including \$500 from Mayor Arreguín to the Berkeley Holiday Fund's annual campaign with funds relinquished to the City's general fund for this purpose from the discretionary Council Office Budgets of Mayor Arreguín and any other Councilmembers who would like to contribute.

BACKGROUND

The Berkeley Holiday Fund has helped make the holiday season happier for hundreds of Berkeley's neediest residents for 108 years. An all-volunteer organization, the Berkeley Holiday Fund has been partnering with 29 Berkeley service agencies, such as the Center for Elder Independence, the YMCA, Berkeley Food and Housing Project, and the Berkeley Health Department. By keeping operating costs to a minimum, the Berkeley Holiday Fund ensures that all contributions go directly to help those who need it the most. Last year, they were able to bring a little cheer into the lives of over 1,000 Berkeley citizens distributing over \$92,000. Over the past two years as a result of the ongoing COVID-19 pandemic, they have expanded their Emergency Fund to offer cash assistance to families and individuals that their partner agencies have identified as suffering financial hardship due to COVID-19. Last year, the Emergency Fund raised almost \$48,000 which was distributed among over 340 families and individuals.

The Mayor's office has actively participated in this program for over 25 years by providing application cards and first class postage to Berkeley Holiday Fund recipients. This year the Berkeley Holiday Fund anticipates distributing approximately 1,200 request forms. This item requests the City Council approve an expenditure, not to exceed \$500 of funds from the from the Mayor's office budget to cover reproduction costs and postage.

FINANCIAL IMPLICATIONS

No General Fund impact. \$500 is available from the Mayor's office budget discretionary account.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with adopting this recommendation.

CONTACT PERSON

Mayor Jesse Arreguín 510-981-7100

Attachments:

- 1: Resolution
- 2: Letter from Berkeley Holiday Fund

RESOLUTION NO. ##,###-N.S.

BERKELEY HOLIDAY FUND 2020

WHEREAS, the Berkeley Holiday Fund has been making small grants to Berkeley's neediest citizens for 108 years; and

WHEREAS, last year, the Berkeley Holiday Fund distributed about \$92,000 to over 1,000 Berkeley residents, in addition to raising \$48,000 for their COVID-19 Emergency Fund that was distributed to over 340 families and individuals; and

WHEREAS, Berkeley Holiday Fund partners with 29 Berkeley service agencies including the Center for Elder Independence, the YMCA, Berkeley Food and Housing Project, and the Berkeley Health Department; and

WHEREAS, this year, the Berkeley Holiday Fund has expanded their Emergency Fund to offer cash assistance to families and individuals that their partner agencies have identified as suffering financial hardship due to COVID-19 and the Shelter in Place Orders; and

WHEREAS, the Berkeley Mayor's Office has supported the Berkeley Holiday Fund's efforts for over 25 years by reproducing request forms and providing first class postage costs; and; and

WHEREAS, Mayor Arreguin has surplus funds in his office expenditure account; and

WHEREAS, the Berkeley Holiday Fund seeks funds in the amount of \$500 to provide application cards and first class postage to Berkeley Holiday Fund recipients; and

WHEREAS, the provision of such services would fulfill the following municipal public purpose of providing services to low income residents of the City of Berkeley.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that funds relinquished by the Mayor and Councilmembers from their Council Office Budget up to \$500 per office shall be granted to the Berkeley Holiday Fund for providing application cards and first class postage to Berkeley Holiday Fund recipients.



BERKELEY HOLIDAY FUND

Post Office Box 9779 ♦ Berkeley, California 94709

www.BerkeleyHolidayFund.org

HONORARY CHAIRPERSON
Jesse Arreguin, Mayor of Berkeley

EXECUTIVE BOARD
Andrew T. Williams, Co-Chairman
Linda V. Williams, Co-Chairman
Virginia Meyer, Secretary
Judith L. Bloom, CPA, Treasurer
Jo Bradley
Bob Dixon
Julie Durkee
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J. Park
James and Ruth Reynolds
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Rigel Robinson
Bruce and Teddy Schwab
Margaret and Contee Seely
Robert Smith and Janet Huseby
Timothy Stokes and Andrea Lewis
Bibi Tiphane
Susan Wengraf
E. William and Mary Alice Yund

September 12, 2021

The Honorable Jesse Arreguin
Mayor of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Dear Mayor Arreguin:

On behalf of the Board of the Berkeley Holiday Fund, I want to thank the Mayor's office for its continuing, generous support for the Fund's annual disbursement of holiday gifts to Berkeley's neediest citizens. And to you personally for serving as the Honorary Chair Person of the Fund. For 108 years the Fund has solicited donations from the citizens of Berkeley and now partners with more than thirty local social service agencies to identify Berkeley citizens in need of help during the holidays.

Last year, with your help, we were able to offer much needed cheer during the holiday season by sending checks totaling almost \$92,000 and to more than 1,000 individuals and families in Berkeley. In addition, we launched a special appeal to our donors to support a Covid-19 Emergency Fund which when combined with our emergency funds allowed us to distribute almost \$48,000 to over 340 families and individuals.

We are requesting that you continue your longstanding support for our efforts. For at least the last twenty-five years the Mayor's Office has aided the Holiday Fund. We are grateful for your support of the Berkeley Holiday Fund as our Honorary Chairman and the support of the City Council members as Sponsors.

This year we anticipate distributing approximately 1,200 checks to individuals and families, While we fund every request we receive, the number of requests from agencies varies from year to year, and we only send one check to individuals or families recommended by multiple agencies.

Since this expenditure requires Council approval, we are formally requesting \$500 in support and are asking for your help in obtaining that approval.

In past years some council members have added funds from their office accounts. We deeply appreciate their support.

Thank you again for all the support and encouragement you have provided in the past to this truly unique Berkeley institution.

Regards,

Andrew T. Williams
Co-Chairperson



Office of the Mayor

CONSENT CALENDAR

November 9, 2021

To: Honorable Members of the City Council

From: Mayor Jesse Arreguín (Author), Councilmember Hahn (Co-Sponsor) and Councilmember Wengraf (Co-Sponsor)

Subject: United Against Hate Week 2021

RECOMMENDATION

- 1) Adopt a Resolution declaring November 14th – 20th, 2021 as United Against Hate Week
- 2) Adopt a Resolution approving the D-13 expenditure in an amount not to exceed \$250 per Councilmember, to Not in Our Town for United Against Hate Week.

BACKGROUND

Starting in Berkeley in 2017 in response to far-right rallies, United Against Hate was originally a poster campaign that has since transformed into an annual event. The goal for United Against Hate Week is to provide communities with the tools, resources, and support they need to create locally driven actions to stand united against growing intolerance. This annual week of activities and follow up events are designed to not just raise awareness about the dangers of hate and the need for respect and civil discourse, but to help community members build stronger connections with civic leaders, businesses, and schools, so that deeper engagement can continue year-round.

Not in Our Town is a non-profit that serves communities across the country working to build safety, inclusion and equity for all. They are the facilitating organization for United Against Hate Week, and are requesting donations from each jurisdiction participating in this year's event. Funds raised from these jurisdictions will be used for the printing of signs, communications, and promotion of the event and will leverage additional foundation and grant funding.

FINANCIAL IMPLICATIONS

\$250 from the Mayor's D-13 account and other Councilmembers who wish to contribute.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with adopting this recommendation.

CONTACT PERSON

Mayor Jesse Arreguín 510-981-7100

Attachments:

- 1: Resolution Proclaiming November 24-30 as United Against Hate Week
- 2: D-13 Resolution

RESOLUTION NO. ##,###-N.S.

COMMEMORATING UNITED AGAINST HATE WEEK 2021

WHEREAS, the United States is a nation of immigrants, whose strength comes from its diversity; and

WHEREAS, the Constitution enshrines equality on all individuals, regardless of race, gender, orientation, religion, or political view; and

WHEREAS, recent rhetoric has generated a toxic environment that encourages the propagation of racist, xenophobic, anti-Semitic, sexist, homophobic, Islamophobic, and other bigoted views by emboldened hate groups and individuals;

WHEREAS, deep divisions within our country are the result of extreme ideology, further strengthening a cycle of mistrust and suspicion fueled by fear, anxiety, and insecurity; and

WHEREAS, the number of hate crimes across the United States has increased to the highest level in 12 years according to the 2020 FBI's annual Hate Crimes Report, with hate crimes against African Americans and Asian Americans especially increasing; and

WHEREAS, the City of Berkeley is dedicated to preventing and opposing hate and intolerance in our communities. Berkeley started United Against Hate Week in 2017, which has since expanded into a national movement; and

WHEREAS, education, compassion, and cooperation are key to unlocking understanding and embracing differences between people, with United Against Hate Week an important step in bridging divisions and strengthening our communities.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby proclaims November 14-20, 2021 as United Against Hate Week in the City of Berkeley.

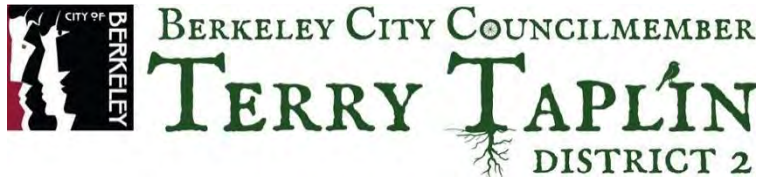
RESOLUTION NO. ##,###-N.S.

AUTHORIZING THE EXPENDITURE OF SURPLUS FUNDS FROM THE OFFICE EXPENSE ACCOUNTS OF THE MAYOR AND COUNCILMEMBERS FOR NOT IN OUR TOWN'S UNITED AGAINST HATE WEEK

WHEREAS, Mayor Jesse Arreguin has surplus funds in his office expenditure account; and

WHEREAS, a California non-profit tax exempt corporation Not in Our Town seeks funds to provide the following public services: Promotion and distribution of information relating to 2021's United Against Hate Week on November 14-20.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that funds relinquished by the Mayor and Councilmembers from their Council Office Budget up to \$250 per office shall be granted to Not in Our Town.



CONSENT CALENDAR
DATE: November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Taplin (Author), Councilmember Bartlett (Co-sponsor),
Councilmember Robinson (Co-sponsor) and Councilmember Hahn (Co-sponsor)

Subject: Affordable Housing Overlay

RECOMMENDATION

Council refers to the City Manager and the Planning Commission to consider an Affordable Housing Overlay for 100% affordable housing and seek to integrate it into the ongoing Housing Element process in anticipation of the 2023-2031 RHNA cycle. Staff should consider revisions to the zoning code and General Plan, permitting increased height and density for 100% affordable housing developments, including specific consideration of labor and design/form standards, to achieve the underlying goals:

1. Exceeding standards set forth in California Government Code Section 65915 (AB-1763) with additional local height and density incentives, including waivers and modifications similar to those vested in state density bonus law, with ministerial approval for qualifying 100% affordable projects deed-restricted for Low, Very Low, Extremely Low, and Moderate Income households (exclusive of manager's unit) pursuant to AB-1763, and maintaining demolition restrictions consistent with state law, specifying:
 - a. In R3, R4, MU-R, and all C-prefixed zoning districts, a local density bonus (granted in addition to, but not compounding with, any State density bonus[es]) with standards reflective of whatever State density bonus a project would be entitled to under the provisions of AB 1763 (2019), waiving limits on floor area ratio, and permitting up to 80% lot coverage; and study additional incentives in these zones;
 - b. In R-1, R-1A, R-2, and R-2A zones, a local bonus for qualifying projects inclusive of existing density bonuses, waiving limits on floor area ratio, and permitting up to 80% lot coverage; and study project feasibility in these zones;
 - c. Create General Plan amendments that allow for 100% affordable qualifying projects to increase density while avoiding inconsistencies with General Plan densities;
 - d. Skilled and trained workforce standards as defined by SB-7 (Atkins, 2021) for qualifying projects with at least 50,000 square feet of total floor area;
2. Exempting parcels with Designated City, State, and Federal Historic Landmarks;

3. Exempting parcels in Very High Fire Hazard Severity Zones (VHFHSZ) as determined by the California Department of Forestry and Fire Protection (CalFire), and in City of Berkeley Fire Zones 2 and 3;
4. Develop objective design standards or form-based standards for qualifying projects to receive ministerial approval, including guidelines for architectural details with respect to neighborhood context, massing, and building facades; materials, color, and finishes; open space, public art, and landscaping; circulation and outdoor lighting; 20' average building setback above the fourth floor (or 45') from any property line that is adjacent to a low or low-to-medium residential district; utilities; interiors; financial feasibility, and environmental sustainability, to be implemented with the following provisions:
 - a. Solicit community input, including through public outreach to be conducted in the Housing Element update process, for design standards that would ensure consistency with the City of Berkeley's architectural quality;
 - b. Establish an advisory Design Review process through the Design Review Committee (DRC). An applicant may elect to return for advisory comment up to two more times. For projects with fewer than 150 units, the City shall review and approve, based on consistency with objective standards, an affordable housing application within 90 days of submission. After 60 days, the City shall provide the applicant with an exhaustive list of objective standards not met by the project, and how the standards could or should be met. For projects with 150 units or more, these time frames shall be 90 and 180 days, respectively. The time under these provisions will toll between the City's issuance of a letter describing inconsistency with objective standards and the time necessary for the applicant to respond to those items.

POLICY COMMITTEE RECOMMENDATION

On October 7, 2021 the Land Use, Housing & Economic Development policy committee took the following action: M/S/C (Robinson/Hahn) Positive recommendation to approve the item as submitted in supplemental material from the Author; revising the first paragraph of the recommendation to read *“Council refers to the City Manager and the Planning Commission to consider an Affordable Housing Overlay for 100% affordable housing and seek to integrate it into the ongoing Housing Element process in anticipation of the 2023-2031 RHNA cycle. Staff should consider revisions to the zoning code and General Plan, permitting increased height and density for 100% affordable housing developments, including specific consideration of labor and design/form standards, to achieve the underlying goals:”*; and adding the words *“or form-based standards”* to bullet 4 of the recommendation.

BACKGROUND

Berkeley has made insufficient progress on meeting its state-mandated Regional Housing Need Allocation (RHNA) goals for low- and moderate-income housing in the

2014-2022 RHNA cycle. As recently as the city's 2020¹ Housing Pipeline Report, the city had only fulfilled 23% of its moderate-income RHNA goals, 21% of its RHNA goals for Very-Low Income households, and a mere 4% for Low-Income households. Berkeley's next RHNA cycle is estimated to mandate roughly 3 times as many units² as the previous cycle's total of 2,959 units across all income tiers. SB-330 by Sen. Nancy Skinner (D-Berkeley), passed in 2019, requires municipal general plans to zone adequately to meet residential capacity mandated by RHNA goals and state-certified Housing Elements.

Affordable housing will continue to be a high priority, but nonprofit affordable housing developers may face stiff competition for scarce land with market-rate developers, particularly during an anticipated period of economic recovery. In 2019, Governor Newsom signed AB-1763 by Assembly member David Chiu (D-SF), amending California Government Code 65915 to confer greater fiscal advantages for 100% affordable housing developments through state density bonus law. The bill prohibits minimum parking requirements (which Berkeley has recently removed) and grants an increase of up to 33' in permitted height, with a waiver on density restrictions for projects located within a half-mile of major transit stops.

When the 42-unit affordable housing project at Harpers Crossing opened in Berkeley, at a total project cost of \$18 million, over 700 seniors applied. Without substantial funding and square footage for affordable housing, the City of Berkeley will be increasingly challenged to create enough subsidized housing to meet increasing demand. Increased allowable density and streamlined approvals for affordable housing will also be key to meeting Berkeley's RHNA goals for low- and moderate-income housing.

RATIONALE FOR RECOMMENDATION

As of 2019, development costs in the San Francisco Bay Area averaged \$600,000 for new housing funded by 9% Low Income Housing Tax Credits.³ At this cost, building nearly 4,000 housing units for low- and very low-income households would cost roughly \$2.5 billion, several orders of magnitude larger than the City of Berkeley's General Fund and Measure O bond funding.

Additional density bonuses and ministerial approval could reduce costs for affordable housing and increase Berkeley's capacity to meet its RHNA goals for low- and moderate-income housing. Increasing height limits allows smaller sites to fit enough homes to reach the economy of scale needed for affordable housing. According to an October 2014 report on affordable housing development by several state housing

¹ https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-28_Item_45_Annual_Housing_Pipeline_Report.aspx&sa=U&ved=2ahUKEwjc3tDIntHuAhXWu54KHdyGAtAQFjABegQICRAC&usq=AOvVaw0eXQ4oP5AAL14h0lphPdr

² https://abag.ca.gov/sites/default/files/draft_rhna_allocation_presentation_to_exec_bd_jan_21.pdf

³ Reid, C. (2020). The Costs of Affordable Housing Production: Insights from California's 9% Low-Income Housing Tax Credit Program. *UC Berkeley Turner Center for Housing Innovation*. Retrieved from https://turnercenter.berkeley.edu/wp-content/uploads/pdfs/LIHTC_Construction_Costs_March_2020.pdf

agencies, “for each 10 percent increase in the number of units, the cost per unit declines by 1.7 percent.”⁴ A 2020 study by UC Berkeley’s Turner Center on affordable housing projects funded by 9% Low Income Housing Tax Credits reported: “On average, efficiencies of scale translate into a reduction of about \$1,162 for every additional unit in a project.”⁵

Increased density and streamlined, predictable permitting processes through ministerial review can increase the amount of affordable housing that limited public subsidies are able to provide. By-right permitting is associated with increased housing supply and price elasticity⁶ and lower “soft costs,” which is particularly beneficial to projects funded by Low Income Housing Tax Credits (LIHTC)⁷, with complex financing structures that may risk loss of funding due to uncertainty and delays in the permit process.⁸

There is existing precedent in the state of California for meeting low-income RHNA goals with an Affordable Housing Overlay. In eastern Contra Costa County, the newly-incorporated city of Oakley established an Affordable Housing Overlay in 2005, which has yielded 7 affordable housing developments totaling 509 housing units combined as of 2019.⁹ Despite local opposition to low-income housing, the AHO enabled the city to obtain state certification for its first 2001-2007 Housing Element, procure funding from the county, and meet its low-income RHNA goals by rezoning 16.3 acres for multifamily housing.

According to the Association of Bay Area Governments (ABAG), 28 jurisdictions in the 9-county Bay Area have some form of Housing Overlay Zone policy.¹⁰

According to a 2010 fact sheet by Public Advocates and East Bay Housing Organizations (EBHO), “the more valuable the developer incentives included in a Housing Overlay Zone, the more effective the HOZ will be in encouraging production of homes that people can afford. Desirable incentives both motivate developers to take

⁴ California Department of Housing and Community Development, et al. (2014). Affordable Housing Cost Study: Analysis of the Factors that Influence the Cost of Building Multi-Family Affordable Housing in California. Retrieved from https://www.treasurer.ca.gov/ctcac/affordable_housing.pdf

⁵ See footnote 3.

⁶ Mayer, C. J., & Somerville, C. T. (2000). Land use regulation and new construction. *Regional Science and Urban Economics*, 30(6), 639–662. doi:10.1016/s0166-0462(00)00055-7

⁷ Hoyt, H. (2020). More is Less? An Inquiry into Design and Construction Strategies for Addressing Multifamily Housing Costs. *Joint Center for Housing Studies of Harvard University*. Retrieved from https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_gramlich_design_and_construction_strategies_multifamily_hoyt_2020_3.pdf

⁸ Kendall, M. (2019, Nov. 24). Is California’s most controversial new housing production law working? *Mercury News*. Retrieved from <https://www.mercurynews.com/2019/11/24/is-californias-most-controversial-new-housing-production-law-working/>

⁹ UC Berkeley Turner Center for Housing Innovation. (2019). Affordable Housing Overlays: Oakley. Retrieved from https://turnercenter.berkeley.edu/wp-content/uploads/2020/10/Affordable_Housing_Overlay_Zones_Oakley.pdf

¹⁰ <http://housing.abag.ca.gov/policysearch>

advantage of the HOZ, and reduce development costs to allow construction of more affordable homes.”¹¹

The City Council of Cambridge, Massachusetts passed an Affordable Housing Overlay amendment to its zoning code in October of 2020.¹² The City Council of Somerville, MA passed a similar zoning ordinance in December of 2020. These zoning overlays permit greater height and density for ministerial approval 100% Below Market-Rate housing developments, following objective design criteria, in residential and commercial zones. The intent of these ordinances is to increase the availability of infill sites with an advantage for affordable housing development where nonprofit and public entities may otherwise be unable to compete in the private market, as well as promoting a more equitable distribution of affordable housing in cities where class and racial segregation still mirrors the historical legacy of redlining and Jim Crow-era racial covenants.

These ordinances preserve open space requirements and comport with restrictions on historic districts. The Somerville¹³ and Cambridge¹⁴ Overlays were overwhelmingly supported by nonprofit affordable housing developers and activists. The city of Boston is now considering similar proposals.¹⁵

Prior to the introduction of the city’s Affordable Housing Overlay policy, Somerville City Councilor Ben Ewen-Campen, chair of the council’s Land Use Committee, directed city staff to survey the region’s affordable housing. “Overwhelmingly, we heard about two obstacles,” Ewen-Campen wrote.¹⁶

First, and most obviously, is the cost of land. Today, it is nearly impossible for any non-profit housing developer to purchase property in Somerville. This is no surprise: they are competing against “market rate” developers and investors who can afford to pay far more because they’ll soon be making windfall profits in our red-hot real estate market. Second, the funding agencies that support affordable housing are looking for predictability and certainty in the projects they support. This

¹¹ http://www.friendsofrpe.org/files/HOZ_Fact_Sheet_FINAL_7-27-10%282%29.pdf

¹² Sennott, A. (2020). Mayor: ‘An important social justice moment.’ Councilors pass Affordable Housing Overlay after more than 20 community meetings. *WickedLocal.com*. Retrieved from <https://www.wickedlocal.com/story/cambridge-chronicle-tab/2020/10/06/an-important-social-justice-moment-cambridge-councilors-pass-affordable-housing-overlay/114657068/>

¹³ Taliesin, J. (2020). Somerville moves to facilitate local affordable housing development. *WickedLocal.com*. Retrieved from <https://www.wickedlocal.com/story/somerville-journal/2020/11/23/residents-support-citys-move-ease-affordable-housing-development/6328944002/>

¹⁴ Eisner, D. (2020). The Historic Affordable Housing Overlay Is about to Pass. How Did It Overcome so Many Obstacles? *A Better Cambridge*. Retrieved from <https://www.abettercambridge.org/the-historic-affordable-housing-overlay-is-about-to-pass-how-did-it-overcome-so-many-obstacles>

¹⁵ Logan, T. (2020). Boston to consider looser zoning for affordable housing. *The Boston Herald*. Retrieved from <https://www.bostonglobe.com/2020/08/24/business/boston-mull-looser-zoning-affordable-housing/>

¹⁶ Ewen-Campen, B. (2020). We need a city-wide ‘Affordable Housing Overlay District’ in Somerville. *The Somerville Times*. Retrieved from <https://www.thesomervilletimes.com/archives/103539>

means that the uncertainty, delays, and discretionary nature of the permitting process in Somerville can be a major issue when attempting to secure funding. Together, these two obstacles mean that new affordable units in Somerville are almost always created by market rate developers through Somerville's "20% inclusionary zoning" policy, which is absolutely necessary but nowhere near sufficient to meet Somerville's goals for affordability.

Affordable housing nonprofits in California face similar fiscal and regulatory barriers to developing much-needed low- and moderate-income housing. While Berkeley does not have an abundance of vacant and/or publicly-owned land close to transit to help meet these goals, an Affordable Housing Overlay permitting more density for residential uses on commercial corridors for 100% affordable housing can tap into a larger subset of commercial parcels with residential potential in the city. According to a study by the UC Berkeley Turner Center for Housing Innovation, mid-sized cities in the San Francisco Bay Area have an average of 32.4% of land zoned for commercial uses, and this land tends to be evenly distributed between high- and low-opportunity neighborhoods as defined by the state's Tax Credit Allocation Committee.¹⁷

An overlay for 100% affordable housing with density bonuses and ministerial review would be critical for ensuring that residential zoning does not exclude affordable housing for low- and moderate-income households from high-opportunity neighborhoods, a necessary precondition for the city to comply with fair housing law.

Pursuant to Assembly Bill 686 (Santiago) passed in 2018, jurisdictions are required to produce housing elements that comply with the Affirmatively Furthering Fair Housing rule published by the U.S. Department of Housing and Urban Development (HUD) on July 16, 2015. The bill defines this requirement in the context of housing elements as "taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."¹⁸

Zoning standards that prohibit densities needed for more affordable housing in high-opportunity neighborhoods risk exacerbating gentrification and displacement. According to research by the UC Berkeley Urban Displacement Project, 83% of today's gentrifying areas were rated "hazardous" or "declining" by the Home Owners Loan Corporation (HOLC), in part due to their Black and Asian populations, and denied federal mortgage insurance in the agency's infamous redlining maps of the early 20th Century. "Desirable"

¹⁷ Romem, I. & Garcia, D. (2020). Residential Redevelopment of Commercially Zoned Land in California. *UC Berkeley Turner Center for Housing Innovation*. Retrieved from <https://turnercenter.berkeley.edu/wp-content/uploads/2020/12/Residential-Redevelopment-of-Commercially-Zoned-Land-in-California-December-2020.pdf>

¹⁸ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB686

neighborhoods with federal mortgage insurance were restricted to white homebuyers, and 75% of those neighborhoods are still measurably exclusionary today.¹⁹

The Urban Displacement Project has also reported that “subsidized housing is twice as effective as market-rate housing in mitigating displacement,” and Cash & Zuk (2019) recommend “equitable development considerations” which include “open[ing] up high-opportunity neighborhoods to low-income households.”²⁰ Additionally, the researchers recommend local preference or right to return policies “to stabilize neighborhoods as new developments take root,” and the City of Berkeley has implemented a local preference policy as part of the Adeline Corridor Specific Plan.²¹

As the Home for All SMC Housing Overlay Zone fact sheet explains: “In locations where the zoning doesn’t allow residential development, HOZs can enable housing construction while avoiding the lengthy process of amending a general plan.”²² This proposal only refers broad recommendations for general plan amendments to the Planning Commission to align intended outcomes of the Affordable Housing Overlay with general plan revisions that will result from the upcoming Housing Element update, but a robust Overlay can continue to promote 100% affordable housing development in future cycles when general plan amendments are not under consideration.

Additionally, an enhanced density bonus program with robust skilled and trained workforce requirements can incorporate consistent labor standards²³ into beneficial economies of scale.

ALTERNATIVES CONSIDERED

Due to aforementioned state laws, there is no alternative in which the City of Berkeley does not rezone certain areas to meet its upcoming RHNA goals and have a certified Housing Element. While the city could simply abide by the standards set forth in AB-1763 with no additional incentives or streamlining for 100% affordable housing, this would risk insufficiently prioritizing low- and moderate-income housing, and is inconsistent with goals already identified by the City Manager’s office to reduce homelessness and housing insecurity.

The City Manager’s 1000 Person Plan to End Homelessness²⁴ includes among its strategic recommendations:

¹⁹ Cash, A. (2020). Redlining in Berkeley: the Past is Present. *Berkeley Rent Stabilization Board*. Retrieved from [https://www.cityofberkeley.info/uploadedFiles/Rent_Stabilization_Board/Level_3_-_General/SPECIAL_Item%206_Redlining%20in%20Berkeley%20presentation_02.20.20_FINAL\(2\).pdf](https://www.cityofberkeley.info/uploadedFiles/Rent_Stabilization_Board/Level_3_-_General/SPECIAL_Item%206_Redlining%20in%20Berkeley%20presentation_02.20.20_FINAL(2).pdf)

²⁰ Cash, A & Zuk, M. (2019). Investment Without Displacement: From Slogan to Strategy. *Shelterforce*. Retrieved from <https://shelterforce.org/2019/06/21/investment-without-displacement-from-slogan-to-strategy/>

²¹ https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Land_Use_Division/Adeline%20Corridor%20Specific%20Plan%20Nov.%202020.pdf

²² <https://homeforallsmc.org/toolkits/housing-overlay-zones/>

²³ https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB7

²⁴ https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-26_Item_20_Referral_Response_1000_Person_Plan.aspx

“Continue implementing changes to Berkeley’s Land Use, Zoning, and Development Review Requirements for new housing with an eye towards alleviating homelessness. If present economic trends continue, the pace with which new housing is currently being built in Berkeley will likely not allow for a declining annual homeless population. Berkeley should continue to streamline development approval processes and reform local policies to help increase the overall supply of housing available.”

ENVIRONMENTAL IMPACTS

Research from UC Berkeley scholars and the CoolClimate Network²⁵ finds that urban infill offers one of the greatest potential policy levers for municipalities to reduce their greenhouse gas emissions. Incentives for affordable housing, such as density bonuses, also offer potential to reduce per capita VMT by increasing housing options in Berkeley and shortening commute times for a greater share of the local workforce. In an analysis of 252 California Cities, Durst (2021) finds that “each additional affordable housing incentive is associated with a 0.37 percentage point decrease in the share of workers who commute more than 30 minutes.”²⁶

An Affordable Housing Overlay coupled with the city’s Local Preference policy could reduce Berkeley’s transportation emissions by reducing per capita VMT pursuant to goals established in the city’s Climate Action Plan.

FISCAL IMPACTS

TBD.

The City Manager’s 1000 Person Plan to End Homelessness notes that the fiscal impact of land use reform “could not be quantified” at the time the report was issued.

CONTACT

Councilmember Terry Taplin (District 2), 510-983-7120, ttaplin@cityofberkeley.info

ATTACHMENTS/SUPPORTING MATERIALS

1. Berkeley AHO Infographic with art by by Alfred Twu (reflects previous draft)
2. Cambridge, MA: Ordinance No. 2020-8
3. Assembly Bill 1763 (2019)

²⁵ Jones, C. et al. (2017). Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities. *Urban Planning*, 3(2). doi:10.17645/up.v3i2.1218.

²⁶ Durst, N. J. (2021). Residential Land Use Regulation and the Spatial Mismatch between Housing and Employment Opportunities in California Cities. *Terner Center for Housing Innovation*. Retrieved from <http://californialanduse.org/download/Durst%20Residential%20Land%20Use%20Regulation%202020.pdf>

Low Density Zones (R-1, R-1A, R-2, R-2A)



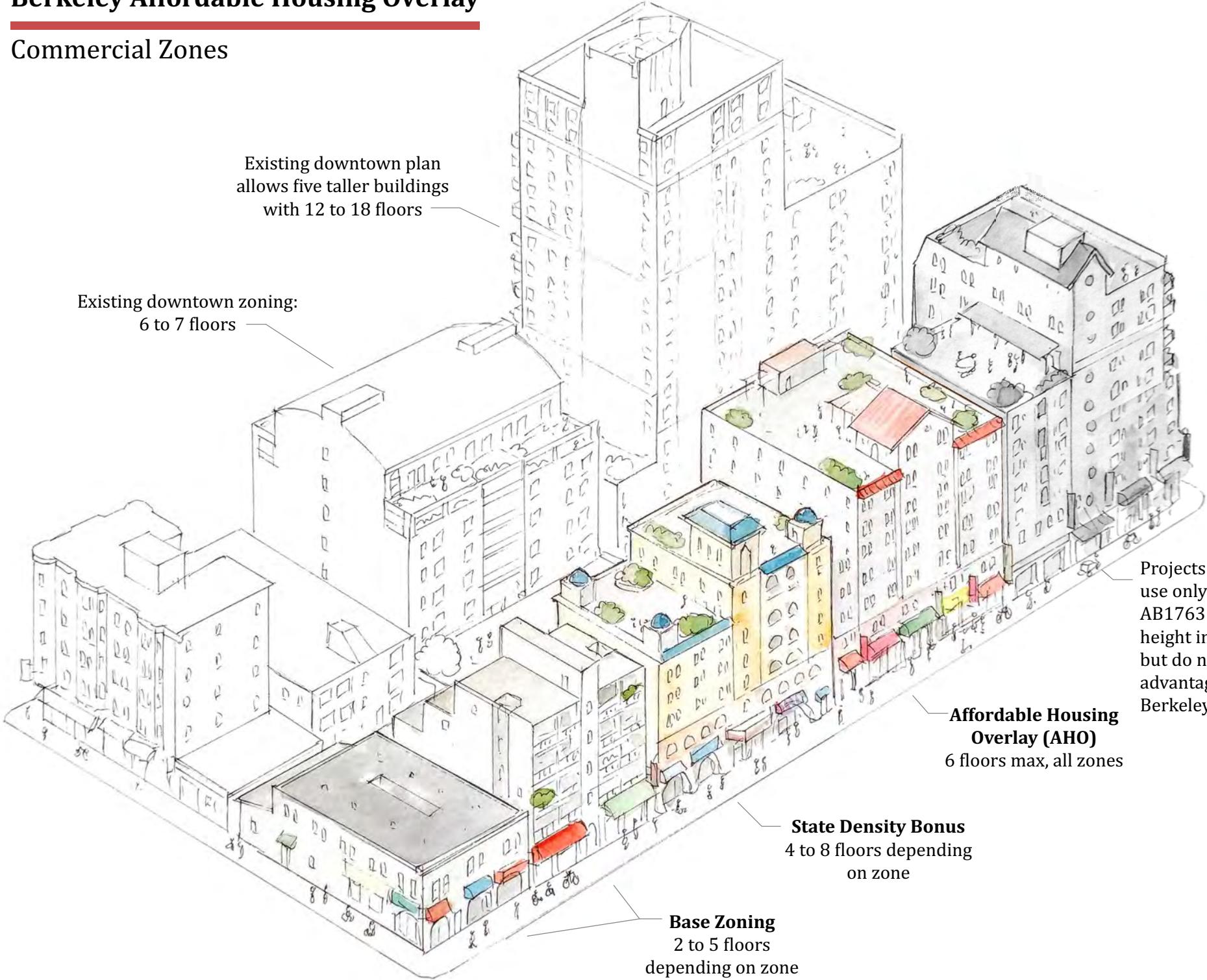
Medium Density Zones (R-3, R-4)



Commercial Zones

Existing downtown plan allows five taller buildings with 12 to 18 floors

Existing downtown zoning: 6 to 7 floors



Projects that choose to use only state law AB1763 may have more height in some zones, but do not get other advantages of using the Berkeley AHO

Affordable Housing Overlay (AHO)
6 floors max, all zones

State Density Bonus
4 to 8 floors depending on zone

Base Zoning
2 to 5 floors depending on zone

ORDINANCE NO. 2020-8 – First Publication

CITY OF CAMBRIDGE

In the Year Two Thousand and Twenty

AN ORDINANCE

ORDERED: That the attached proposed zoning ordinance establishing an Affordable Housing Overlay be submitted by the City Council, and that it be referred to the Committee on Ordinances and the Planning Board for public hearings, as provided in Chapter 40A, Section 5 of the Massachusetts General Laws, to wit:

ORDERED: That the Cambridge City Council amend Section 2.000, DEFINITIONS, of the Zoning Ordinance of the City of Cambridge amended to insert the following definitions alphabetically:

Affordable Housing Overlay (AHO). A set of modified development standards set forth in Section 11.207.3 of this Zoning Ordinance intended to allow incremental increases in density, limited increases in height, and relaxation of certain other zoning limitations for residential developments in which all units are made permanently affordable to households earning up to 100% of area median income.

Affordable Housing Overlay (AHO) Dwelling Unit. A dwelling unit within an AHO Project for which occupancy is restricted to an AHO Eligible Household and whose rent or initial sale price is established by the provisions of Section 11.207.3 of this Zoning Ordinance.

Affordable Housing Overlay (AHO) Eligible Household. A household whose gross household income does not exceed the amounts set forth in Section 11.207.3 of this Zoning Ordinance.

Affordable Housing Overlay (AHO) Project. The construction of a new building or buildings and/or the modification of an existing building or buildings resulting in single-family, two-family, townhouse, or multifamily dwellings within which each dwelling unit is an AHO Dwelling Unit subject to the standards and restrictions set forth in Section 11.207 of this Zoning Ordinance.

Grade. The mean finished ground elevation of a lot measured either around the entire perimeter of the building or along any existing wall facing a public street, which ground elevation is maintained naturally without any structural support.

Ground Story or Ground Floor. The lowest Story Above Grade within a building. Story. That portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above.

Story Above Grade. A Story whose highest point is more than 4 feet above the Grade.

Story Below Grade. Any Story that is lower than the Ground Story of a building.

ORDERED: That the Cambridge City Council amend of the Zoning Ordinance of the City of Cambridge, by inserting a new section 11.207, **AFFORDABLE HOUSING OVERLAY**, to read as follows:

11.207.1 Purpose and Intent

The purpose of this Section is to promote the public good by supporting the development of housing that is affordable to households earning up to 100% of area median income. The intent of this Section is to allow incremental increases in density, limited increases in height, and relaxation of certain other zoning limitations for residential developments in which all units are made permanently affordable to households earning up to 100% of area median income (referred to as “AHO Projects,” as defined in Article 2.000 of this Zoning Ordinance); to incentivize the reuse of existing buildings in order to create AHO Projects that are more compatible with established neighborhood character; to promote the city’s urban design objectives in Section 19.30 of this Zoning Ordinance while enabling AHO Projects to be permitted as-of-right, subject to non-binding advisory design consultation procedures that follow all design objectives set forth within this Zoning Ordinance and the results of the design review process shall be provided to the Cambridge Affordable Housing Trust; and to apply such standards throughout the City, to promote city planning goals of achieving greater socioeconomic diversity and a more equitable distribution of affordable housing citywide.

11.207.2 Applicability

- (a) The provisions set forth in this Section shall apply to AHO Projects, as defined in Article 2.000 of this Zoning Ordinance, in all zoning districts except Open Space Districts.
- (b) An AHO Project shall be permitted as-of-right if it meets all of the standards set forth in this Affordable Housing Overlay in place of the requirements otherwise applicable in the zoning district. Any development not meeting all of

the standards set forth in this Affordable Housing Overlay shall be subject to the requirements otherwise applicable in the zoning district, including any requirements for special permits.

11.207.3 Standards for Eligibility, Rent, and Initial Sale Price for AHO Dwelling Units

- (a) All dwelling units in an AHO Project shall comply with the standards for AHO Dwelling Units as set forth in this Section.
- (b) For all AHO Dwelling Units:
 - (i) AHO Dwelling Units shall be rented or sold only to AHO Eligible Households, with preference given to Cambridge residents, and former Cambridge residents who experienced a no-fault eviction in Cambridge in the last twelve (12) months, in accordance with standards and procedures related to selection, asset limits, and marketing established by the Community Development Department (CDD) and applicable state funding requirements.
 - (ii) AHO Dwelling Units shall be created and conveyed subject to recorded covenants approved by CDD guaranteeing the permanent availability of the AHO Dwelling Units for AHO Eligible Households.
- (c) For rental AHO Dwelling Units:
 - (i) The gross household income of an AHO Eligible Household upon initial occupancy shall be no more than one-hundred percent (100%) of AMI.
 - (ii) At least eighty percent (80%) of AHO Dwelling Units within the project shall be occupied by AHO Eligible Households whose gross household income upon initial occupancy is no more than eighty percent (80%) of AMI.
 - (iii) Rent, including utilities and any other fees routinely charged to tenants and approved by CDD, shall not exceed thirty percent (30%) of the gross household income of the AHO Eligible Household occupying the AHO Dwelling Unit or other similar standard pursuant to an applicable housing subsidy program which has been approved by CDD.

- (iv) After initial occupancy, the gross household income of an AHO Eligible Household shall be verified annually, or on such other basis required by an applicable housing subsidy program which has been approved by CDD, to determine continued eligibility and rent, in accordance with policies, standards, and procedures established by CDD.
 - (v) An AHO Eligible Household may continue to rent an AHO Dwelling Unit after initial occupancy even if the AHO Eligible Household's gross household income exceeds the eligibility limits set forth above, but may not exceed one hundred twenty percent (120%) of AMI for more than one year after that Eligible Household's gross household income has been verified to exceed such percentage, unless otherwise restricted pursuant to an applicable housing subsidy program which has been approved by CDD.
 - (vi) Notwithstanding the requirements set forth in (i) through (v) above, an owner may voluntarily choose to charge a lower rent than as provided herein for AHO Dwelling Units.
- (d) For owner-occupied AHO Dwelling Units:
- (i) The gross household income of an AHO Eligible Household upon initial occupancy shall be no more than one-hundred percent (100%) of AMI.
 - (ii) At least fifty percent (50%) of AHO Dwelling Units shall be sold to AHO Eligible Households whose gross household income upon initial occupancy is no more than eighty percent (80%) of AMI.
 - (iii) The initial sale price of an AHO Dwelling Unit shall be approved by CDD and shall be determined to ensure that the monthly housing payment (which shall include debt service at prevailing mortgage loan interest rates, utilities, condominium or related fees, insurance, real estate taxes, and parking fees, if any) shall not exceed thirty percent (30%) of the monthly income of:
 - 1) A household earning ninety percent (90%) of AMI, in the case of an AHO Dwelling Unit to be sold to an AHO Eligible Household whose income upon initial

occupancy is no more than one-hundred percent (100%) of AMI; or

- 2) A household earning seventy percent (70%) of AMI, in the case of an AHO Dwelling Unit to be sold to an AHO Eligible Household whose income upon initial occupancy is no more than eighty percent (80%) of AMI
- (e) An AHO Project meeting the standards set forth herein as approved by CDD shall not be required to comply with the Inclusionary Housing Requirements set forth in 11.203 of this Zoning Ordinance.

11.207.4 Use

- (a) In all zoning districts, an AHO Project may contain single-family, two-family, townhouse, or multifamily dwellings as-of-right. Townhouse and Multifamily Special Permit procedures shall not apply.
- (b) An AHO Project may contain active non-residential uses on the ground floor as they may be permitted as-of-right in the base zoning district or the overlay district(s) that are applicable to a lot, which for the purpose of this Section shall be limited to Institutional Uses listed in Section 4.33, Office Uses listed in Section 4.34 Paragraphs a. through e., and Retail and Consumer Service uses listed in Section 4.35 that provide services to the general public.

11.207.5 Development Standards

11.207.5.1 General Provisions

- (a) For the purposes of this Section, the phrase “District Development Standards” shall refer to the development standards of the base zoning district as they may be modified by the development standards of all overlay districts (with the exception of this Affordable Housing Overlay) that are applicable to a lot.
- (b) District Dimensional Standards shall include the most permissive standards allowable on a lot, whether such standards are permitted as-of-right or allowable by special permit. A District Dimensional Standard that is allowable by special permit shall include any nondiscretionary requirements or limitations that would otherwise apply.

- (c) An AHO Project that conforms to the following development standards shall not be subject to other limitations that may be set forth in Article 5.000 or other Sections of this Zoning Ordinance, except as otherwise stated in this Section.

11.207.5.2 Dimensional Standards for AHO Projects

11.207.5.2.1 Building Height and Stories Above Grade. For an AHO Project, the standards set forth below shall apply in place of any building height limitations set forth in the District Development Standards.

- (a) Where the District Dimensional Standards set forth a maximum residential building height of forty (40) feet or less, an AHO Project shall contain no more than four (4) Stories Above Grade and shall have a maximum height of forty-five (45) feet, as measured from existing Grade. For AHO Projects containing active non-residential uses on the ground floor, the maximum height may be increased to fifty (50) feet but the number of Stories Above Grade shall not exceed four (4) stories.
- (b) Where the District Dimensional Standards set forth a maximum residential building height of more than forty (40) feet but not more than fifty (50) feet, an AHO Project shall contain no more than six (6) Stories Above Grade and shall have a maximum height of sixty-five (65) feet, as measured from existing Grade, except as further limited below. For AHO Projects containing active non-residential uses on the ground floor, the maximum height may be increased to seventy (70) feet but the number of Stories Above Grade shall not exceed six (6) stories.
 - (i) Except where the AHO Project abuts a non-residential use, portions of an AHO Project that are within thirty-five (35) feet of a district whose District Dimensional Standards allow a maximum residential building height of forty (40) feet or less shall be limited by the provisions of Paragraph (a) above, except that if the AHO project parcel extends into that District, then the height limitation shall only extend thirty five (35) feet from the property line.
- (c) Where the District Dimensional Standards set forth a maximum residential building height of more than fifty (50) feet, an AHO Project shall contain no more than seven (7) Stories Above Grade and shall have a maximum height

of eighty (80) feet, as measured from existing Grade, except as further limited below.

- (i) Except where the AHO Project abuts a non-residential use, portions of an AHO Project that are within thirty-five (35) feet of a district whose District Dimensional Standards allow a maximum residential building height of forty (40) feet or less shall be reduced to a minimum of five (5) Stories Above Grade or a maximum height of sixty (60) feet, as measured from existing Grade, except that if the AHO project parcel extends into that District, then the height limitation shall only extend thirty five (35) feet from the property line.
- (d) The Height Exceptions set forth in Section 5.23 of this Zoning Ordinance shall apply when determining the building height of an AHO Project.

11.207.5.2.2 Residential Density

- (a) Where the District Dimensional Standards establish a maximum floor area ratio (FAR) of less than 1.00, an AHO Project shall not exceed an FAR of 2.00. Otherwise, there shall be no maximum FAR for an AHO Project.
- (b) There shall be no minimum lot area per dwelling unit for an AHO Project.

11.207.5.2.3 Yard Setbacks

- (a) For the purpose of this Section, the applicable District Dimensional Standards shall not include yard setback requirements based on a formula calculation as provided in Section 5.24.4 of the Zoning Ordinance, but shall include non-derived minimum yard setback requirements set forth in Article 5.000 or other Sections of this Zoning Ordinance.
- (b) Front Yards. An AHO Project shall have a minimum front yard setback of 15 feet, except where the District Dimensional Standards establish a less restrictive requirement, or may be reduced to the average of the front yard setbacks of the four (4) nearest pre-existing principal buildings that contain at least two Stories Above Grade and directly front the same side of the street as the AHO Project, or may be reduced to a minimum of ten (10) feet in the case of an AHO Project on a corner lot. Where the District Dimensional Standards set forth different requirements for residential and non-residential uses, the

non-residential front yard setback requirement shall apply to the entire AHO Project if the Ground Story contains a non-residential use as set forth in Section 11.207.4 Paragraph (b) above; otherwise, the residential front yard setback shall apply.

- (c) Side Yards. An AHO Project shall have a minimum side yard setback of seven and one-half (7.5) feet, or may be reduced to the minimum side yard setback set forth in the District Dimensional Standards for residential uses that is not derived by formula if it is less restrictive.
- (d) Rear Yards. An AHO Project shall have a minimum rear yard setback of twenty (20) feet, or may be reduced to the minimum rear yard setback set forth in the District Dimensional Standards for residential uses that is not derived by formula if it is less restrictive.
- (e) Projecting eaves, chimneys, bay windows, balconies, open fire escapes and like projections which do not project more than three and one-half (3.5) feet from the principal exterior wall plane, and unenclosed steps, unroofed porches and the like which do not project more than ten (10) feet beyond the line of the foundation wall and which are not over four (4) feet above Grade, may extend beyond the minimum yard setback.
- (f) Bicycle parking spaces, whether short-term or long-term, and appurtenant structures such as coverings, sheds, or storage lockers may be located within a required yard setback but no closer than seven and one-half (7.5) feet to an existing principal residential structure on an abutting lot.

11.207.5.2.4 Open Space

- (a) Except where the District Dimensional Standards establish a less restrictive requirement or as otherwise provided below, the minimum percentage of open space to lot area for an AHO Project shall be thirty percent (30%). However, the minimum percentage of open space to lot area may be reduced to no less than fifteen percent (15%) if the AHO Project includes the preservation and protection of an existing building included on the State Register of Historic Places.
- (b) The required open space shall be considered Private Open Space but shall be subject to the limitations set forth below and shall not be subject to the dimensional and other limitations set forth in Section 5.22 of this Zoning

Ordinance. Private Open Space shall exclude parking and driveways for automobiles.

- (c) All of the required open space that is located at grade shall meet the definition of Permeable Open Space as set forth in this Zoning Ordinance.
- (d) The required open space shall be located at Grade or on porches and decks that are no higher than the floor elevation of the lowest Story Above Grade, except that up to twenty five percent (25%) of the required open space may be located at higher levels, such as balconies and decks, only if it is accessible to all occupants of the building.
- (e) For the purpose of this Affordable Housing Overlay, area used for covered or uncovered bicycle parking spaces that are not contained within a building shall be considered Private Open Space.

11.207.5.3 Standards for Existing Buildings

A building that is in existence as of the effective date of this Ordinance and does not conform to the standards set forth in Section 11.207.5.2 above may be altered, reconstructed, extended, relocated, and/or enlarged for use as an AHO Project as-of-right in accordance with the standards set forth below. Except as otherwise stated, the required dimensional characteristics of the building and site shall be those existing at the time of the conversion to an AHO Project if they do not conform to the standards of Section 11.207.5.2. The following modifications shall be permitted as-of-right, notwithstanding the limitations set forth in Article 8.000 of this Zoning Ordinance:

- (a) Construction occurring entirely within an existing structure, including the addition of Gross Floor Area within the interior of the existing building envelope that may violate or further violate FAR limitations set forth in Section 11.207.5.2, and including any increase to the number of dwelling units within the existing building, provided that the resulting number of Stories Above Grade is not more than the greater of the existing number of Stories Above Grade or the existing height of the building divided by 10 feet.
- (b) The relocation, enlargement, or addition of windows, doors, skylights, or similar openings to the exterior of a building.

- (c) The addition of insulation to the exterior of an existing exterior wall to improve energy efficiency, provided that the resulting exterior plane of the wall shall either conform to the yard setback standards set forth in Section 11.207.5.2 above or shall not intrude more than eight (8) inches further into the existing yard setback and provided that the lot shall either conform to the open space standards set forth in Section 11.207.5.2 or shall not decrease the existing open space by more than 5% or 100 square feet, whichever is greater.
- (d) The installation of exterior features necessary for the existing structure to be adapted to meet accessibility standards for persons with disabilities, including but not limited to walkways, ramps, lifts, or elevators, which may violate or further violate of the dimensional requirements set forth in Section 11.207.5.2.
- (e) The repair, reconstruction, or replacement of any preexisting nonconforming portions of a building including but not limited to porches, decks, balconies, bay windows and building additions, provided that the repair, reconstruction or replacement does not exceed the original in footprint, volume, or area.
- (f) Any other alterations, additions, extensions, or enlargements to the existing building that are not further in violation of the dimensional requirements set forth in Section 11.207.5.2 above.

11.207.6 Parking and Bicycle Parking

The limitations set forth in Article 6.000 of this Zoning Ordinance shall be modified as set forth below for an AHO Project.

11.207.6.1 Required Off-Street Accessory Parking

- (a) There shall be no required minimum number of off-street parking spaces for an AHO Project except to the extent necessary to conform to other applicable laws, codes, or regulations.
- (b) An AHO Project of greater than 20 units, for which no off-street parking is provided shall provide or have access to either on-street or off-street facilities that can accommodate passenger pick-up and drop-off by motor vehicles and short-term loading by moving vans or small delivery trucks. The Cambridge Traffic, Parking, and Transportation Department shall certify to the Superintendent of Buildings

that the AHO Project is designed to reasonably accommodate such activity without causing significant hazard or congestion. The Cambridge Director of Traffic, Parking, and Transportation shall have the authority to promulgate regulations for the implementation of the provisions of this Paragraph.

11.207.6.2 Accessory Parking Provided Off-Site

- (a) Off-street parking facilities may be shared by multiple AHO Projects, provided that the requirements of this Section are met by all AHO Dwelling Units served by the facility and the facility is within 1,000 feet of all AHO Projects that it serves.
- (b) Off-street parking facilities for an AHO Project may be located within existing parking facilities located within 1,000 feet of the AHO Project and in a district where parking is permitted as a principal use or where the facility is a pre-existing nonconforming principal use parking facility, provided that the owner of the AHO Project shall provide evidence of fee ownership, a long-term lease agreement or renewable short-term lease agreement, recorded covenant, or comparable legal instrument to guarantee, to the reasonable satisfaction of the Superintendent of Buildings, that such facilities will be available to residents of the AHO Project.

11.207.6.3 Modifications to Design and Layout Standards for Off-Street Parking

- (a) Notwithstanding Section 6.43.2, parking spaces may be arranged in tandem without requiring a special permit, provided that no more than two cars may be parked within any tandem parking space.
- (b) Notwithstanding Section 6.43.6, owners of adjacent properties may establish common driveways under mutual easements without requiring a special permit.
- (c) Notwithstanding Paragraph 6.44.1(a), on-grade open parking spaces may be located within ten (10) feet but not less than five (5) feet from the Ground Story of a building on the same lot or seven and one-half (7.5) feet from the Ground Story of a building on an adjacent lot without requiring a special permit, provided that such parking spaces are screened from buildings on abutting lots by a fence or other dense year-round visual screen.

- (d) Notwithstanding Paragraph 6.44.1(b), on-grade open parking spaces and driveways may be located within five (5) feet of a side or rear property line without requiring a special permit, provided that screening is provided in the form of a fence or other dense year-round visual screen at the property line, unless such screening is waived by mutual written agreement of the owner of the lot and the owner of the abutting lot.

11.207.6.4 Modifications to Bicycle Parking Standards

- (a) Notwithstanding Section 6.104, long-term or short-term bicycle parking spaces may be located anywhere on the lot for an AHO Project or on an adjacent lot in common ownership or under common control.
- (b) Notwithstanding Section 6.107.5, up to 20 long-term bicycle parking spaces may be designed to meet the requirements for Short-Term Bicycle Parking Spaces, so long as they are covered from above to be protected from precipitation.
- (c) The requirement for short-term bicycle parking shall be waived where only four or fewer short-term bicycle parking spaces would otherwise be required.
- (d) The number of required bicycle parking spaces shall be reduced by half, up to a maximum reduction of 28 spaces, where a standard-size (19-dock) Public Bicycle Sharing Station is provided on the lot or by the developer of the AHO Project on a site within 500 feet of the lot, with the written approval of the City if located on a public street or other City property, or otherwise by legally enforceable mutual agreement with the owner of the land on which the station is located as approved by the Community Development Department. If additional Public Bicycle Sharing Station docks are provided, the number of required bicycle parking spaces may be further reduced at a rate of 0.5 bicycle parking space per additional Public Bicycle Sharing Station dock, up to a maximum reduction of half of the required number of spaces.
- (e) For AHO Dwelling Units created within an existing building, bicycle parking spaces meeting the standards of this Zoning Ordinance shall not be required but are encouraged to be provided to the extent practical given the limitations of the existing structure. Bicycle parking spaces shall be provided, as required by this Zoning Ordinance, for

dwelling units in an AHO Project that are constructed fully outside the envelope of the existing structure.

11.207.6.5 Transportation Demand Management

An AHO Project not providing off-street parking at a ratio of 0.4 space per dwelling unit or more shall provide, in writing, to the Community Development Department a Transportation Demand Management program containing the following measures, at a minimum:

- (a) Offering either a free annual membership in a Public Bicycle Sharing Service, at the highest available tier where applicable, or a 50% discounted MBTA combined subway and bus pass for six months or pass of equivalent value, to up to two individuals in each household upon initial occupancy of a unit.
- (b) Providing transit information in the form of transit maps and schedules to each household upon initial occupancy of a unit, or providing information and a real-time transit service screen in a convenient common area of the building such as an entryway or lobby.

11.207.7 Building and Site Design Standards for New Development

11.207.7.1 General Provisions

- (a) Except where otherwise stated, the Project Review requirements set forth in Article 19.000 of this Zoning Ordinance and any design standards set forth in Section 19.50 or elsewhere in the Zoning Ordinance shall be superseded by the following standards for an AHO Project.
- (b) The following design standards shall apply to new construction and to additions to existing structures. Except as otherwise provided, an existing building that is altered or moved to accommodate an AHO Project shall not be subject to the following standards, provided that such alterations do not create a condition that is in greater nonconformance with such standards than the existing condition.

11.207.7.2 Site Design and Arrangement

- (a) The area directly between the front lot line and the principal wall plane of the building nearest to the front lot line shall consist of any combination of landscaped area, hardscaped area accessible to pedestrians and bicyclists,

and usable spaces such as uncovered porches, patios, or balconies. Parking shall not be located within such area, except for driveway access which shall be limited to a total of thirty (30) feet of width for any individual driveway for each one hundred (100) feet of lot frontage.

- (b) Pedestrian entrances to buildings shall be visible from the street, except where the building itself is not visible from the street due to its location. All pedestrian entrances shall be accessible by way of access routes that are separated from motor vehicle access drives.
- (c) A building footprint exceeding two hundred and fifty (250) feet in length, measured parallel to the street, shall contain a massing recess extending back at least fifteen (15) feet in depth measured from and perpendicular to the front lot line and at least fifteen (15) feet in width measured parallel to the front lot line so that the maximum length of unbroken façade is one hundred fifty (150) feet.

11.207.7.3 Building Façades

- (a) At least twenty percent (20%) of the area of building façades facing a public street or public open space shall consist of clear glass windows. For buildings located in a Business A (BA), Business A-2 (BA-2), Business B (BB) or Business C (BC) zoning district, this figure shall be increased to thirty percent (30%) for non-residential portions of the building, if any.
- (b) Building façades shall incorporate architectural elements that project or recess by at least two feet from the adjacent section of the façade. Such projecting or recessed elements shall occur on an average interval of 40 linear horizontal feet or less for portions of the façade directly facing a public street, and on an average interval of 80 linear horizontal feet or less for other portions of the façade. Such projecting or recessed elements shall not be required on the lowest Story Above Grade or on the highest Story Above Grade, and shall not be required on the highest two Stories Above Grade of a building containing at least six Stories Above Grade. The intent is to incorporate elements such as bays, balconies, cornices, shading devices, or similar architectural elements that promote visual interest and residential character, and to allow variation at the ground floor and on upper floors where a different architectural treatment may be preferable.

11.207.7.4 Ground Stories and Stories Below Grade

- (a) The elevation at floor level of the Ground Story shall be at the mean Grade of the abutting public sidewalk, or above such mean Grade by not more than four feet. Active non-residential uses at the Ground Story shall be accessible directly from the sidewalk without requiring use of stairs or a lift. The requirements of this paragraph shall not apply if it is determined by the City Engineer that a higher Ground Story elevation is necessary for the purpose of flood protection.
- (b) Where structured parking is provided within the Ground Story of a building, the portion of the building immediately behind the front wall plane shall consist of residential units, common areas, or other populated portions of the building in order to screen the provided parking over at least seventy-five percent (75%) of the length of the façade measured parallel to the street and excluding portions of the façade used for driveway access. On a corner lot, the requirements of this Paragraph shall only apply along one street.
- (c) The façade of a Ground Story facing a public street shall consist of expanses no longer than twenty-five (25) feet in length, measured parallel to the street, which contain no transparent windows or pedestrian entryways.
- (d) If the Ground Story is designed to accommodate active non-residential uses, the following additional standards shall apply:
 - (i) the height of the Ground Story for that portion of the building containing active non-residential uses shall be at least fifteen (15) feet;
 - (ii) the depth of the space designed for active non-residential uses shall be at least thirty-five (35) feet on average measured from the portion of the façade that is nearest to the front lot line in a direction perpendicular to the street, and measured to at least one street in instances where the space abuts two or more streets; and
 - (iii) that portion of the Ground Story façade containing active non-residential uses shall consist of at least thirty percent (30%) transparent glass windows or, if the use is a retail or consumer service establishment, at least thirty percent (30%) transparent glass windows, across the combined façade on both streets in the case of a corner lot.

- (e) Ground Stories shall be designed to accommodate at least one space, with a total frontage equaling at least fifty percent (50%) of the existing retail frontage, for an active non-residential use, which may include retail or consumer establishments as well as social service facilities supporting the mission of the owner of the AHO Project, on sites that are located in a Business base zoning district, and where the project site contains or has contained a retail and or consumer service use at any point within the past two years prior to application for a building permit for an AHO Project.
- (f) Private living spaces within dwelling units, including bedrooms, kitchens, and bathrooms, may only be contained within Stories Above Grade. Stories Below Grade may only contain portions of dwelling units providing entries, exits, or mechanical equipment, or common facilities for residents of the building, such as lobbies, recreation rooms, laundry, storage, parking, bicycle parking, or mechanical equipment

11.207.7.5 Mechanical Equipment, Refuse Storage, and Loading Areas

- (a) All mechanical equipment, refuse storage, or loading areas serving the building or its occupants that are (1) carried above the roof, (2) located at the exterior building wall or (3) located outside the building, shall meet the requirements listed below. Mechanical equipment includes, but is not limited to, ventilation equipment including exhaust fans and ducts, air conditioning equipment, elevator bulkheads, heat exchangers, transformers and any other equipment that, when in operation, potentially creates a noise detectable off the lot. The equipment and other facilities: (a) Shall not be located within any required setback. This Paragraph (a) shall not apply to electrical equipment whose location is mandated by a recognized public utility, provided that project plans submitted for review by the City identify a preferred location for such equipment.
- (b) When on the ground, shall be permanently screened from view from adjacent public streets that are within 100 feet of the building, or from the view from abutting property in separate ownership at the property line. The screening shall consist of a dense year-round screen equal or greater in height at the time of installation than the equipment or facilities to be screened, or a fence of equal or greater

height that is comparable in quality to the materials used on the principal facades of the building, with no more than twenty-five (25) percent of the face of the fence open with adjacent planting.

- (c) When carried above the roof, shall be set back from the principal wall plane by a dimension equal to at least the height of the equipment and permanently screened from view, from the ground, from adjacent public streets and any abutting residentially used lot or lots in a residential zoning district. The screening shall be at least seventy-five percent (75%) opaque and uniformly distributed across the screening surface, or opaque to the maximum extent permissible if other applicable laws, codes, or regulations mandate greater openness.
- (d) Shall meet all city, state and federal noise regulations, as applicable, as certified by a professional acoustical engineer if the Department of Inspectional Services deems such certification necessary.
- (e) That handle trash and other waste, shall be contained within the building or screened as required in this Section until properly disposed of.

11.207.7.6 Environmental Design Standards

- (a) This Section shall not waive the Green Building Requirements set forth in Section 22.20 of this Zoning Ordinance that may otherwise apply to an AHO Project.
- (b) Where the provisions of the Flood Plain Overlay District apply to an AHO Project, the performance standards set forth in Section 20.70 of this Zoning Ordinance shall apply; however, a special permit shall not be required.
- (c) An AHO Project shall be subject to other applicable laws, regulations, codes, and ordinances pertaining to environmental standards.
- (d) New outdoor light fixtures installed in an AHO Project shall be fully shielded and directed to prevent light trespass onto adjacent residential lots.

11.207.8 Advisory Design Consultation Procedure

Prior to application for a building permit, the developer of an AHO Project shall comply with the following procedure, which is intended to provide an opportunity for non-binding community and staff input into the design of the project.

- (a) The intent of this non-binding review process is to advance the City's desired outcomes for the form and character of AHO Projects. To promote the City's goal of creating more affordable housing units, AHO Projects are permitted to have a greater height, scale, and density than other developments permitted by the zoning for a given district. This procedure is intended to promote design outcomes that are compatible with the existing neighborhood context or with the City's future planning objectives for the area.
- (b) The City's "Design Guidelines for Affordable Housing Overlay," along with other design objectives and guidelines established for the part of the city in which the AHO Project is located, are intended to inform the design of AHO Projects and to guide the Planning Board's consultation and report as set forth below. It is intended that designers of AHO Projects, City staff, the Planning Board, and the general public will be open to creative variations from any detailed provisions set forth in such objectives and guidelines as long as the core values expressed are being served.
- (c) At least two community meetings shall be scheduled at a time and location that is convenient to residents in proximity to the project site. The Community Development Department (CDD) shall be notified of the time and location of such meetings, and shall give notification to abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the lot on which the AHO Project is proposed and to any individual or organization who each year files with CDD a written request for such notification, or to any other individual or organization CDD may wish to notify.
 - (i) The purpose of the first community meeting shall be for the developer to share the site and street context analysis with neighborhood residents and other interested parties prior to building design, and receive feedback from community members.
 - (ii) The purpose of the subsequent community meeting(s) shall be to present preliminary project designs, answer questions from neighboring residents and other interested members of the public, and receive feedback on the design. The date(s), time(s), location(s), attendance, materials presented, and comments received at such

meeting(s) shall be documented and provided to CDD.

- (d) Following one or more such community meeting(s), the developer shall prepare the following materials for review by the Planning Board. CDD shall review to certify that the submitted written and graphic materials provide the required information in sufficient detail. All drawings shall be drawn to scale, shall include a graphic scale and north arrow for orientation, and shall provide labeled distances and dimensions for significant building and site features.
- (i) A context map indicating the location of the project and surrounding land uses, including transportation facilities.
 - (ii) A context analysis, discussed with CDD staff, including existing front yard setbacks, architectural character, and unique features that inform and influence the design of the AHO Project.
 - (iii) An existing conditions site plan depicting the boundaries of the lot, the locations of buildings, open space features, parking areas, trees, and other major site features on the lot and abutting lots, and the conditions of abutting streets.
 - (iv) A proposed conditions site plan depicting the same information above as modified to depict the proposed conditions, including new buildings (identifying building entrances and uses on the ground floor and possible building roof deck) and major anticipated changes in site features.
 - (v) A design statement on how the proposed project attempts to reinforce existing street/context qualities and mitigates the planned project's greater massing, height, density, &c.
 - (vi) Floor plans of all proposed new buildings and existing buildings to remain on the lot.
 - (vii) Elevations and cross-section drawings of all proposed new buildings and existing buildings to remain on the lot, depicting the distances to lot lines and the heights of surrounding buildings, and labeling the proposed materials on each façade elevation.

- (viii) A landscape plan depicting and labeling all hardscape, permeable, and vegetated areas proposed for the site along with other structures or appurtenances on the site.
 - (ix) Plans of parking and bicycle parking facilities, as required by Section 6.50 of this Zoning Ordinance.
 - (x) Materials palettes cataloguing and depicting with photographs the proposed façade and landscape materials.
 - (xi) Existing conditions photographs from various vantage points on the public sidewalk, including photos of the site and of the surrounding urban context.
 - (xii) Proposed conditions perspective renderings from a variety of vantage points on the public sidewalk, including locations adjacent to the site as well as longer views if proposed buildings will be visible from a distance.
 - (xiii) A dimensional form, in a format provided by CDD, along with any supplemental materials, summarizing the general characteristics of the project and demonstrating compliance with applicable zoning requirements.
 - (xiv) A brief project narrative describing the project and the design approach, and indicating how the project has been designed in relation to the citywide urban design objectives set forth in Section 19.30 of the Zoning Ordinance, any design guidelines that have been established for the area, and the “Design Guidelines for Affordable Housing Overlay.”
 - (xv) Viewshed analysis and shadow studies that show the impact on neighboring properties with existing Solar Energy Systems.
 - (xvi) An initial development budget that shows anticipated funding sources and uses including developer fee and overhead.
- (e) Within 65 days of receipt of a complete set of materials by CDD, the Planning Board shall schedule a design consultation as a general business matter at a public meeting and shall give notification to abutters, owners of land directly opposite on any public or private street or

way, and abutters to the abutters within three hundred feet of the property line of the lot on which the AHO Project is proposed and to any individual or organization who each year files with CDD a written request for such notification, or to any other individual or organization CDD may wish to notify. The materials shall be made available to the public in advance, and the Planning Board may receive written comments prior to the meeting from City staff, abutters, and members of the public.

- (f) At the scheduled design consultation, the Planning Board shall hear a presentation of the proposal from the developer and oral comments from the public. The Board may ask questions or seek additional information from the developer or from City staff.
- (g) The Planning Board shall evaluate the proposal for general compliance with the requirements of this Section, for consistency with City development guidelines prepared for the proposal area and the “Design Guidelines for Affordable Housing Overlay,” for appropriateness in terms of other planned or programmed public or private development activities in the vicinity, and for consistency with the Citywide Urban Design Objectives set forth in Section 19.30. The Board may also suggest specific project adjustments and alterations to further the purposes of this Ordinance. The Board shall communicate its findings in a written report provided to the developer and to CDD within 20 days of the design consultation.
- (h) The developer may then make revisions to the design, in consultation with CDD staff, and shall submit a revised set of documents along with a narrative summary of the Planning Board’s comments and changes made in response to those comments.
- (i) The Planning Board shall review and discuss the revised documents at a second design consultation meeting, which shall proceed in accordance with Paragraphs (c) and (d) above. Following the second design consultation, the Planning Board may submit a revised report and either the revised report or if there are no revisions the initial report shall become the final report (the “Final Report”). Any additional design consultations to review further revisions may occur only at the discretion and on the request of the developer or the Cambridge Affordable Housing Trust.

- (j) The Final Report from the Planning Board shall be provided to the Superintendent of Buildings to certify compliance with the procedures set forth herein.

11.207.9 Implementation of Affordable Housing Overlay

- (a) The City Manager shall have the authority to promulgate regulations for the implementation of the provisions of this Section 11.207. There shall be a sixty-day review period, including a public meeting, to receive public comments on draft regulations before final promulgation.
- (b) The Community Development Department may develop standards, design guidelines, and procedures appropriate to and consistent with the provisions of this Sections 11.207 and the above regulations.

11.207.10 Enforcement of Affordable Housing Overlay

The Community Development Department shall certify in writing to the Superintendent of Buildings that all applicable provisions of this Section have been met before issuance of any building permit for any AHO Project, and shall further certify in writing to the Superintendent of Buildings that all documents have been filed and all actions taken necessary to fulfill the requirements of this Section before the issuance of any certificate of occupancy for any such project.

11.207.11 Review of Affordable Housing Overlay

- (a) Annual Report. CDD shall provide an annual status report to the City Council, beginning eighteen (18) months after ordination and continuing every year thereafter. The report shall contain the following information:
 - (i) List of sites considered for affordable housing development under the Affordable Housing Overlay, to the extent known by CDD, including site location, actions taken to initiate an AHO Project, and site status;
 - (ii) Description of each AHO Project underway or completed, including site location, number of units, unit types (number of bedrooms), tenure, and project status; and
 - (iii) Number of residents served by AHO Projects.
- (b) Five-Year Progress Review. Five (5) years after ordination, CDD shall provide to the City Council, Planning Board and

the Affordable Housing Trust, for its review, a report that assesses the effectiveness of the Affordable Housing Overlay in increasing the number of affordable housing units in the city, distributing affordable housing across City neighborhoods, and serving the housing needs of residents. The report shall also assess the effectiveness of the Advisory Design Consultation Procedure in gathering meaningful input from community members and the Planning Board and shaping AHO Projects to be consistent with the stated Design Objectives. The report shall evaluate the success of the Affordable Housing Overlay in balancing the goal of increasing affordable housing with other City planning considerations such as urban form, neighborhood character, environment, and mobility. The report shall discuss citywide outcomes as well as site-specific outcomes.

Passed to a second reading as amended at the City Council meeting held on September 14, 2020 and on or after October 5, 2020 the question comes on passage to be ordained.

Attest:- Anthony I. Wilson
City Clerk

Assembly Bill No. 1763

CHAPTER 666

An act to amend Section 65915 of the Government Code, relating to housing.

[Approved by Governor October 9, 2019. Filed with Secretary of State October 9, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1763, Chiu. Planning and zoning: density bonuses: affordable housing.

Existing law, known as the Density Bonus Law, requires a city or county to provide a developer that proposes a housing development within the jurisdictional boundaries of that city or county with a density bonus and other incentives or concessions for the production of lower income housing units, or for the donation of land within the development, if the developer agrees to construct a specified percentage of units for very low income, low-income, or moderate-income households or qualifying residents and meets other requirements. Existing law provides for the calculation of the amount of density bonus for each type of housing development that qualifies under these provisions.

This bill would additionally require a density bonus to be provided to a developer who agrees to construct a housing development in which 100% of the total units, exclusive of managers' units, are for lower income households, as defined. However, the bill would provide that a housing development that qualifies for a density bonus under its provisions may include up to 20% of the total units for moderate-income households, as defined. The bill would also require that a housing development that meets these criteria receive 4 incentives or concessions under the Density Bonus Law and, if the development is located within ½ of a major transit stop, a height increase of up to 3 additional stories or 33 feet. The bill would generally require that the housing development receive a density bonus of 80%, but would exempt the housing development from any maximum controls on density if it is located within ½ mile of a major transit stop. The bill would prohibit a housing development that receives a waiver from any maximum controls on density under these provisions from receiving a waiver or reduction of development standards pursuant to existing law, other than as expressly provided in the bill. The bill would also make various nonsubstantive changes to the Density Bonus Law.

Existing law requires that an applicant for a density bonus agree to, and that the city and county ensure, the continued affordability of all very low and low-income rental units that qualified the applicant for a density bonus for at least 55 years, as provided. Existing law requires that the rent for

lower income density bonus units be set at an affordable rent, as defined in specified law.

This bill, for units, including both base density and density bonus units, in a housing development that qualifies for a density bonus under its provisions as described above, would instead require that the rent for at least 20% of the units in that development be set at an affordable rent, defined as described above, and that the rent for the remaining units be set at an amount consistent with the maximum rent levels for a housing development that receives an allocation of state or federal low-income housing tax credits from the California Tax Credit Allocation Committee.

Existing law, upon the request of the developer, prohibits a city, county, or city and county from requiring a vehicular parking ratio for a development meeting the eligibility requirements under the Density Bonus Law that exceeds specified ratios. For a development that consists solely of rental units, exclusive of a manager's unit or units, with an affordable housing cost to lower income families, as provided in specified law, and that is a special needs housing development, as defined, existing law limits that vehicular parking ratio to 0.3 spaces per unit.

This bill would instead, upon the request of the developer, prohibit a city, county, or city and county from imposing any minimum vehicular parking requirement for a development that consists solely of rental units, exclusive of a manager's unit or units, with an affordable housing cost to lower income families and is either a special needs housing development or a supportive housing development, as those terms are defined.

By adding to the duties of local planning officials with respect to the award of density bonuses, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 65915 of the Government Code, as amended by Chapter 937 of the Statutes of 2018, is amended to read:

65915. (a) (1) When an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall comply with this section. A city, county, or city and county shall adopt an ordinance that specifies how compliance with this section will be implemented. Failure to adopt an ordinance shall not relieve a city, county, or city and county from complying with this section.

(2) A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an

additional report or study that is not otherwise required by state law, including this section. This subdivision does not prohibit a local government from requiring an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e), and parking ratios, as described in subdivision (p).

(3) In order to provide for the expeditious processing of a density bonus application, the local government shall do all of the following:

(A) Adopt procedures and timelines for processing a density bonus application.

(B) Provide a list of all documents and information required to be submitted with the density bonus application in order for the density bonus application to be deemed complete. This list shall be consistent with this chapter.

(C) Notify the applicant for a density bonus whether the application is complete in a manner consistent with the timelines specified in Section 65943.

(D) (i) If the local government notifies the applicant that the application is deemed complete pursuant to subparagraph (C), provide the applicant with a determination as to the following matters:

(I) The amount of density bonus, calculated pursuant to subdivision (f), for which the applicant is eligible.

(II) If the applicant requests a parking ratio pursuant to subdivision (p), the parking ratio for which the applicant is eligible.

(III) If the applicant requests incentives or concessions pursuant to subdivision (d) or waivers or reductions of development standards pursuant to subdivision (e), whether the applicant has provided adequate information for the local government to make a determination as to those incentives, concessions, or waivers or reductions of development standards.

(ii) Any determination required by this subparagraph shall be based on the development project at the time the application is deemed complete. The local government shall adjust the amount of density bonus and parking ratios awarded pursuant to this section based on any changes to the project during the course of development.

(b) (1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (f), and, if requested by the applicant and consistent with the applicable requirements of this section, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e), and parking ratios, as described in subdivision (p), when an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:

(A) Ten percent of the total units of a housing development for lower income households, as defined in Section 50079.5 of the Health and Safety Code.

(B) Five percent of the total units of a housing development for very low income households, as defined in Section 50105 of the Health and Safety Code.

(C) A senior citizen housing development, as defined in Sections 51.3 and 51.12 of the Civil Code, or a mobilehome park that limits residency based on age requirements for housing for older persons pursuant to Section 798.76 or 799.5 of the Civil Code.

(D) Ten percent of the total dwelling units in a common interest development, as defined in Section 4100 of the Civil Code, for persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the development are offered to the public for purchase.

(E) Ten percent of the total units of a housing development for transitional foster youth, as defined in Section 66025.9 of the Education Code, disabled veterans, as defined in Section 18541, or homeless persons, as defined in the federal McKinney-Vento Homeless Assistance Act (42 U.S.C. Sec. 11301 et seq.). The units described in this subparagraph shall be subject to a recorded affordability restriction of 55 years and shall be provided at the same affordability level as very low income units.

(F) (i) Twenty percent of the total units for lower income students in a student housing development that meets the following requirements:

(I) All units in the student housing development will be used exclusively for undergraduate, graduate, or professional students enrolled full time at an institution of higher education accredited by the Western Association of Schools and Colleges or the Accrediting Commission for Community and Junior Colleges. In order to be eligible under this subclause, the developer shall, as a condition of receiving a certificate of occupancy, provide evidence to the city, county, or city and county that the developer has entered into an operating agreement or master lease with one or more institutions of higher education for the institution or institutions to occupy all units of the student housing development with students from that institution or institutions. An operating agreement or master lease entered into pursuant to this subclause is not violated or breached if, in any subsequent year, there are not sufficient students enrolled in an institution of higher education to fill all units in the student housing development.

(II) The applicable 20-percent units will be used for lower income students. For purposes of this clause, “lower income students” means students who have a household income and asset level that does not exceed the level for Cal Grant A or Cal Grant B award recipients as set forth in paragraph (1) of subdivision (k) of Section 69432.7 of the Education Code. The eligibility of a student under this clause shall be verified by an affidavit, award letter, or letter of eligibility provided by the institution of higher education that the student is enrolled in, as described in subclause (I), or by the California Student Aid Commission that the student receives or is eligible for financial aid, including an institutional grant or fee waiver, from the college or university, the California Student Aid Commission, or the federal government shall be sufficient to satisfy this subclause.

(III) The rent provided in the applicable units of the development for lower income students shall be calculated at 30 percent of 65 percent of the area median income for a single-room occupancy unit type.

(IV) The development will provide priority for the applicable affordable units for lower income students experiencing homelessness. A homeless service provider, as defined in paragraph (3) of subdivision (d) of Section 103577 of the Health and Safety Code, or institution of higher education that has knowledge of a person's homeless status may verify a person's status as homeless for purposes of this subclause.

(ii) For purposes of calculating a density bonus granted pursuant to this subparagraph, the term "unit" as used in this section means one rental bed and its pro rata share of associated common area facilities. The units described in this subparagraph shall be subject to a recorded affordability restriction of 55 years.

(G) One hundred percent of the total units, exclusive of a manager's unit or units, are for lower income households, as defined by Section 50079.5 of the Health and Safety Code, except that up to 20 percent of the total units in the development may be for moderate-income households, as defined in Section 50053 of the Health and Safety Code.

(2) For purposes of calculating the amount of the density bonus pursuant to subdivision (f), an applicant who requests a density bonus pursuant to this subdivision shall elect whether the bonus shall be awarded on the basis of subparagraph (A), (B), (C), (D), (E), (F), or (G) of paragraph (1).

(3) For the purposes of this section, "total units," "total dwelling units," or "total rental beds" does not include units added by a density bonus awarded pursuant to this section or any local law granting a greater density bonus.

(c) (1) (A) An applicant shall agree to, and the city, county, or city and county shall ensure, the continued affordability of all very low and low-income rental units that qualified the applicant for the award of the density bonus for 55 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program.

(B) (i) Except as otherwise provided in clause (ii), rents for the lower income density bonus units shall be set at an affordable rent, as defined in Section 50053 of the Health and Safety Code.

(ii) For housing developments meeting the criteria of subparagraph (G) of paragraph (1) of subdivision (b), rents for all units in the development, including both base density and density bonus units, shall be as follows:

(I) The rent for at least 20 percent of the units in the development shall be set at an affordable rent, as defined in Section 50053 of the Health and Safety Code.

(II) The rent for the remaining units in the development shall be set at an amount consistent with the maximum rent levels for a housing development that receives an allocation of state or federal low-income housing tax credits from the California Tax Credit Allocation Committee.

(2) An applicant shall agree to, and the city, county, or city and county shall ensure that, the initial occupant of all for-sale units that qualified the applicant for the award of the density bonus are persons and families of very low, low, or moderate income, as required, and that the units are offered at an affordable housing cost, as that cost is defined in Section 50052.5 of the Health and Safety Code. The local government shall enforce an equity sharing agreement, unless it is in conflict with the requirements of another public funding source or law. The following apply to the equity sharing agreement:

(A) Upon resale, the seller of the unit shall retain the value of any improvements, the downpayment, and the seller's proportionate share of appreciation. The local government shall recapture any initial subsidy, as defined in subparagraph (B), and its proportionate share of appreciation, as defined in subparagraph (C), which amount shall be used within five years for any of the purposes described in subdivision (e) of Section 33334.2 of the Health and Safety Code that promote home ownership.

(B) For purposes of this subdivision, the local government's initial subsidy shall be equal to the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any downpayment assistance or mortgage assistance. If upon resale the market value is lower than the initial market value, then the value at the time of the resale shall be used as the initial market value.

(C) For purposes of this subdivision, the local government's proportionate share of appreciation shall be equal to the ratio of the local government's initial subsidy to the fair market value of the home at the time of initial sale.

(3) (A) An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; subject to any other form of rent or price control through a public entity's valid exercise of its police power; or occupied by lower or very low income households, unless the proposed housing development replaces those units, and either of the following applies:

(i) The proposed housing development, inclusive of the units replaced pursuant to this paragraph, contains affordable units at the percentages set forth in subdivision (b).

(ii) Each unit in the development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a lower or very low income household.

(B) For the purposes of this paragraph, "replace" shall mean either of the following:

(i) If any dwelling units described in subparagraph (A) are occupied on the date of application, the proposed housing development shall provide at least the same number of units of equivalent size to be made available at

affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy. If the income category of the household in occupancy is not known, it shall be rebuttably presumed that lower income renter households occupied these units in the same proportion of lower income renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database. For unoccupied dwelling units described in subparagraph (A) in a development with occupied units, the proposed housing development shall provide units of equivalent size to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as the last household in occupancy. If the income category of the last household in occupancy is not known, it shall be rebuttably presumed that lower income renter households occupied these units in the same proportion of lower income renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(ii) If all dwelling units described in subparagraph (A) have been vacated or demolished within the five-year period preceding the application, the proposed housing development shall provide at least the same number of units of equivalent size as existed at the highpoint of those units in the five-year period preceding the application to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those persons and families in occupancy at that time, if known. If the incomes of the persons and families in occupancy at the highpoint is not known, it shall be rebuttably presumed that low-income and very low income renter households occupied these units in the same proportion of low-income and very low income renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(C) Notwithstanding subparagraph (B), for any dwelling unit described in subparagraph (A) that is or was, within the five-year period preceding the application, subject to a form of rent or price control through a local government's valid exercise of its police power and that is or was occupied

by persons or families above lower income, the city, county, or city and county may do either of the following:

(i) Require that the replacement units be made available at affordable rent or affordable housing cost to, and occupied by, low-income persons or families. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(ii) Require that the units be replaced in compliance with the jurisdiction's rent or price control ordinance, provided that each unit described in subparagraph (A) is replaced. Unless otherwise required by the jurisdiction's rent or price control ordinance, these units shall not be subject to a recorded affordability restriction.

(D) For purposes of this paragraph, "equivalent size" means that the replacement units contain at least the same total number of bedrooms as the units being replaced.

(E) Subparagraph (A) does not apply to an applicant seeking a density bonus for a proposed housing development if the applicant's application was submitted to, or processed by, a city, county, or city and county before January 1, 2015.

(d) (1) An applicant for a density bonus pursuant to subdivision (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county. The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:

(A) The concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.

(C) The concession or incentive would be contrary to state or federal law.

(2) The applicant shall receive the following number of incentives or concessions:

(A) One incentive or concession for projects that include at least 10 percent of the total units for lower income households, at least 5 percent for very low income households, or at least 10 percent for persons and families of moderate income in a common interest development.

(B) Two incentives or concessions for projects that include at least 20 percent of the total units for lower income households, at least 10 percent for very low income households, or at least 20 percent for persons and families of moderate income in a common interest development.

(C) Three incentives or concessions for projects that include at least 30 percent of the total units for lower income households, at least 15 percent for very low income households, or at least 30 percent for persons and families of moderate income in a common interest development.

(D) Four incentives or concessions for projects meeting the criteria of subparagraph (G) of paragraph (1) of subdivision (b). If the project is located within one-half mile of a major transit stop, as defined in subdivision (b) of Section 21155 of the Public Resources Code, the applicant shall also receive a height increase of up to three additional stories, or 33 feet.

(3) The applicant may initiate judicial proceedings if the city, county, or city and county refuses to grant a requested density bonus, incentive, or concession. If a court finds that the refusal to grant a requested density bonus, incentive, or concession is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that has a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that would have an adverse impact on any real property that is listed in the California Register of Historical Resources. The city, county, or city and county shall establish procedures for carrying out this section that shall include legislative body approval of the means of compliance with this section.

(4) The city, county, or city and county shall bear the burden of proof for the denial of a requested concession or incentive.

(e) (1) In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section. Subject to paragraph (3), an applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section, and may request a meeting with the city, county, or city and county. If a court finds that the refusal to grant a waiver or reduction of development standards is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health, safety, or the physical

environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards that would have an adverse impact on any real property that is listed in the California Register of Historical Resources, or to grant any waiver or reduction that would be contrary to state or federal law.

(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

(3) A housing development that receives a waiver from any maximum controls on density pursuant to clause (ii) of subparagraph (D) of paragraph (3) of subdivision (f) shall not be eligible for, and shall not receive, a waiver or reduction of development standards pursuant to this subdivision, other than as expressly provided in subparagraph (D) of paragraph (2) of subdivision (d) and clause (ii) of subparagraph (D) of paragraph (3) of subdivision (f).

(f) For the purposes of this chapter, “density bonus” means a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, no increase in density. The amount of density increase to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b).

(1) For housing developments meeting the criteria of subparagraph (A) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Low-Income Units	Percentage Density Bonus
10	20
11	21.5
12	23
13	24.5
14	26
15	27.5
17	30.5
18	32
19	33.5
20	35

(2) For housing developments meeting the criteria of subparagraph (B) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Very Low Income Units	Percentage Density Bonus
5	20
6	22.5
7	25
8	27.5
9	30
10	32.5
11	35

(3) (A) For housing developments meeting the criteria of subparagraph (C) of paragraph (1) of subdivision (b), the density bonus shall be 20 percent of the number of senior housing units.

(B) For housing developments meeting the criteria of subparagraph (E) of paragraph (1) of subdivision (b), the density bonus shall be 20 percent of the number of the type of units giving rise to a density bonus under that subparagraph.

(C) For housing developments meeting the criteria of subparagraph (F) of paragraph (1) of subdivision (b), the density bonus shall be 35 percent of the student housing units.

(D) For housing developments meeting the criteria of subparagraph (G) of paragraph (1) of subdivision (b), the following shall apply:

(i) Except as otherwise provided in clause (ii), the density bonus shall be 80 percent of the number of units for lower income households.

(ii) If the housing development is located within one-half mile of a major transit stop, as defined in subdivision (b) of Section 21155 of the Public Resources Code, the city, county, or city and county shall not impose any maximum controls on density.

(4) For housing developments meeting the criteria of subparagraph (D) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Moderate-Income Units	Percentage Density Bonus
10	5
11	6
12	7
13	8
14	9
15	10
16	11
17	12
18	13
19	14
20	15
21	16
22	17
23	18
24	19

25	20
26	21
27	22
28	23
29	24
30	25
31	26
32	27
33	28
34	29
35	30
36	31
37	32
38	33
39	34
40	35

(5) All density calculations resulting in fractional units shall be rounded up to the next whole number. The granting of a density bonus shall not require, or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval.

(g) (1) When an applicant for a tentative subdivision map, parcel map, or other residential development approval donates land to a city, county, or city and county in accordance with this subdivision, the applicant shall be entitled to a 15-percent increase above the otherwise maximum allowable residential density for the entire development, as follows:

Percentage Very Low Income	Percentage Density Bonus
10	15
11	16
12	17
13	18
14	19
15	20
16	21
17	22
18	23
19	24
20	25
21	26
22	27
23	28
24	29
25	30
26	31
27	32

28	33
29	34
30	35

(2) This increase shall be in addition to any increase in density mandated by subdivision (b), up to a maximum combined mandated density increase of 35 percent if an applicant seeks an increase pursuant to both this subdivision and subdivision (b). All density calculations resulting in fractional units shall be rounded up to the next whole number. Nothing in this subdivision shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to donate land as a condition of development. An applicant shall be eligible for the increased density bonus described in this subdivision if all of the following conditions are met:

(A) The applicant donates and transfers the land no later than the date of approval of the final subdivision map, parcel map, or residential development application.

(B) The developable acreage and zoning classification of the land being transferred are sufficient to permit construction of units affordable to very low income households in an amount not less than 10 percent of the number of residential units of the proposed development.

(C) The transferred land is at least one acre in size or of sufficient size to permit development of at least 40 units, has the appropriate general plan designation, is appropriately zoned with appropriate development standards for development at the density described in paragraph (3) of subdivision (c) of Section 65583.2, and is or will be served by adequate public facilities and infrastructure.

(D) The transferred land shall have all of the permits and approvals, other than building permits, necessary for the development of the very low income housing units on the transferred land, not later than the date of approval of the final subdivision map, parcel map, or residential development application, except that the local government may subject the proposed development to subsequent design review to the extent authorized by subdivision (i) of Section 65583.2 if the design is not reviewed by the local government before the time of transfer.

(E) The transferred land and the affordable units shall be subject to a deed restriction ensuring continued affordability of the units consistent with paragraphs (1) and (2) of subdivision (c), which shall be recorded on the property at the time of the transfer.

(F) The land is transferred to the local agency or to a housing developer approved by the local agency. The local agency may require the applicant to identify and transfer the land to the developer.

(G) The transferred land shall be within the boundary of the proposed development or, if the local agency agrees, within one-quarter mile of the boundary of the proposed development.

(H) A proposed source of funding for the very low income units shall be identified not later than the date of approval of the final subdivision map, parcel map, or residential development application.

(h) (1) When an applicant proposes to construct a housing development that conforms to the requirements of subdivision (b) and includes a childcare facility that will be located on the premises of, as part of, or adjacent to, the project, the city, county, or city and county shall grant either of the following:

(A) An additional density bonus that is an amount of square feet of residential space that is equal to or greater than the amount of square feet in the childcare facility.

(B) An additional concession or incentive that contributes significantly to the economic feasibility of the construction of the childcare facility.

(2) The city, county, or city and county shall require, as a condition of approving the housing development, that the following occur:

(A) The childcare facility shall remain in operation for a period of time that is as long as or longer than the period of time during which the density bonus units are required to remain affordable pursuant to subdivision (c).

(B) Of the children who attend the childcare facility, the children of very low income households, lower income households, or families of moderate income shall equal a percentage that is equal to or greater than the percentage of dwelling units that are required for very low income households, lower income households, or families of moderate income pursuant to subdivision (b).

(3) Notwithstanding any requirement of this subdivision, a city, county, or city and county shall not be required to provide a density bonus or concession for a childcare facility if it finds, based upon substantial evidence, that the community has adequate childcare facilities.

(4) “Childcare facility,” as used in this section, means a child daycare facility other than a family daycare home, including, but not limited to, infant centers, preschools, extended daycare facilities, and schoolage childcare centers.

(i) “Housing development,” as used in this section, means a development project for five or more residential units, including mixed-use developments. For the purposes of this section, “housing development” also includes a subdivision or common interest development, as defined in Section 4100 of the Civil Code, approved by a city, county, or city and county and consists of residential units or unimproved residential lots and either a project to substantially rehabilitate and convert an existing commercial building to residential use or the substantial rehabilitation of an existing multifamily dwelling, as defined in subdivision (d) of Section 65863.4, where the result of the rehabilitation would be a net increase in available residential units. For the purpose of calculating a density bonus, the residential units shall be on contiguous sites that are the subject of one development application, but do not have to be based upon individual subdivision maps or parcels. The density bonus shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located.

(j) (1) The granting of a concession or incentive shall not require or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, study, or other discretionary approval. For purposes of this subdivision, “study” does not include reasonable documentation to establish eligibility for the concession or incentive or to demonstrate that the incentive or concession meets the definition set forth in subdivision (k). This provision is declaratory of existing law.

(2) Except as provided in subdivisions (d) and (e), the granting of a density bonus shall not require or be interpreted to require the waiver of a local ordinance or provisions of a local ordinance unrelated to development standards.

(k) For the purposes of this chapter, concession or incentive means any of the following:

(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(2) Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable and actual cost reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(l) Subdivision (k) does not limit or require the provision of direct financial incentives for the housing development, including the provision of publicly owned land, by the city, county, or city and county, or the waiver of fees or dedication requirements.

(m) This section does not supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Any density bonus, concessions, incentives, waivers or reductions of development standards, and parking ratios to which the applicant is entitled under this section shall be permitted in a manner that is consistent with this section and Division 20 (commencing with Section 30000) of the Public Resources Code.

(n) If permitted by local ordinance, nothing in this section shall be construed to prohibit a city, county, or city and county from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section or from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section.

(o) For purposes of this section, the following definitions shall apply:

(1) “Development standard” includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.

(2) “Maximum allowable residential density” means the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.

(p) (1) Except as provided in paragraphs (2), (3), and (4), upon the request of the developer, a city, county, or city and county shall not require a vehicular parking ratio, inclusive of handicapped and guest parking, of a development meeting the criteria of subdivisions (b) and (c), that exceeds the following ratios:

(A) Zero to one bedroom: one onsite parking space.

(B) Two to three bedrooms: two onsite parking spaces.

(C) Four and more bedrooms: two and one-half parking spaces.

(2) Notwithstanding paragraph (1), if a development includes the maximum percentage of low-income or very low income units provided for in paragraphs (1) and (2) of subdivision (f) and is located within one-half mile of a major transit stop, as defined in subdivision (b) of Section 21155 of the Public Resources Code, and there is unobstructed access to the major transit stop from the development, then, upon the request of the developer, a city, county, or city and county shall not impose a vehicular parking ratio, inclusive of handicapped and guest parking, that exceeds 0.5 spaces per bedroom. For purposes of this subdivision, a development shall have unobstructed access to a major transit stop if a resident is able to access the major transit stop without encountering natural or constructed impediments.

(3) Notwithstanding paragraph (1), if a development consists solely of rental units, exclusive of a manager’s unit or units, with an affordable housing cost to lower income families, as provided in Section 50052.5 of the Health and Safety Code, then, upon the request of the developer, a city, county, or city and county shall not impose a vehicular parking ratio, inclusive of handicapped and guest parking, that exceeds the following ratios:

(A) If the development is located within one-half mile of a major transit stop, as defined in subdivision (b) of Section 21155 of the Public Resources Code, and there is unobstructed access to the major transit stop from the development, the ratio shall not exceed 0.5 spaces per unit.

(B) If the development is a for-rent housing development for individuals who are 62 years of age or older that complies with Sections 51.2 and 51.3 of the Civil Code, the ratio shall not exceed 0.5 spaces per unit. The development shall have either paratransit service or unobstructed access, within one-half mile, to fixed bus route service that operates at least eight times per day.

(4) Notwithstanding paragraphs (1) and (8), if a development consists solely of rental units, exclusive of a manager's unit or units, with an affordable housing cost to lower income families, as provided in Section 50052.5 of the Health and Safety Code, and the development is either a special needs housing development, as defined in Section 51312 of the Health and Safety Code, or a supportive housing development, as defined in Section 50675.14 of the Health and Safety Code, then, upon the request of the developer, a city, county, or city and county shall not impose any minimum vehicular parking requirement. A development that is a special needs housing development shall have either paratransit service or unobstructed access, within one-half mile, to fixed bus route service that operates at least eight times per day.

(5) If the total number of parking spaces required for a development is other than a whole number, the number shall be rounded up to the next whole number. For purposes of this subdivision, a development may provide onsite parking through tandem parking or uncovered parking, but not through onstreet parking.

(6) This subdivision shall apply to a development that meets the requirements of subdivisions (b) and (c), but only at the request of the applicant. An applicant may request parking incentives or concessions beyond those provided in this subdivision pursuant to subdivision (d).

(7) This subdivision does not preclude a city, county, or city and county from reducing or eliminating a parking requirement for development projects of any type in any location.

(8) Notwithstanding paragraphs (2) and (3), if a city, county, city and county, or an independent consultant has conducted an areawide or jurisdictionwide parking study in the last seven years, then the city, county, or city and county may impose a higher vehicular parking ratio not to exceed the ratio described in paragraph (1), based upon substantial evidence found in the parking study, that includes, but is not limited to, an analysis of parking availability, differing levels of transit access, walkability access to transit services, the potential for shared parking, the effect of parking requirements on the cost of market-rate and subsidized developments, and the lower rates of car ownership for low-income and very low income individuals, including seniors and special needs individuals. The city, county, or city and county shall pay the costs of any new study. The city, county, or city and county

shall make findings, based on a parking study completed in conformity with this paragraph, supporting the need for the higher parking ratio.

(9) A request pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

(q) Each component of any density calculation, including base density and bonus density, resulting in fractional units shall be separately rounded up to the next whole number. The Legislature finds and declares that this provision is declaratory of existing law.

(r) This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

O



BERKELEY CITY COUNCILMEMBER
TERRY TAPLÍN
 DISTRICT 2

CONSENT CALENDAR
 Nov. 9, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Taplin (Author), Councilmember Bartlett (Co-Sponsor), Mayor Arreguin (Co-Sponsor) and Councilmember Wengraf (Co-Sponsor)

Subject: Budget Referral: Berkeley Ceasefire

RECOMMENDATION

1. Refer to the Fiscal Year 2023 budget process \$200,000 for consulting costs to develop a Gun Violence Intervention (GVI) program, commonly known as “Operation Ceasefire.”
2. Refer to the City Manager the development of a Gun Violence Intervention program with technical support from experienced consultants solicited by a Request For Proposals (RFP), community service providers including faith groups and violence intervention programs, hospital intervention programs, life coaching programs, Berkeley Housing Authority, Berkeley YouthWorks, Berkeley Police Department, Alameda County Workforce Development Board, Alameda County District Attorney’s Office, Alameda County Probation, California’s Office of the Attorney General, US Attorney’s Office, US Marshals Service, US Department of Justice, and other jurisdictions and agencies in the region as needed; and consider an alternate Urban Gun Violence Disruption Strategy such as the Peacemaker Fellowships program as implemented in the cities of Richmond, Stockton, and Sacramento.

FINANCIAL IMPLICATIONS

\$200,000 one-time expenditure for Fiscal Year 2023; future operating costs to be determined. This may be a fiscally prudent investment when accounting for potential cost savings of reduced gun violence. According to the Everytown Economic Cost of Gun Violence Calculator Tool, a single gun homicide directly costs state taxpayers \$1 million, and costs Californians \$9 million when including externalities imposed on family members, survivors, and the community at large.¹

CURRENT SITUATION AND ITS EFFECTS

Gun Violence Intervention is a Strategic Plan Priority Project, advancing our goal to create a resilient, safe, connected, and prepared city.

The City of Berkeley saw 36 reports of gunfire by the end of September 2021, 10 more than the same period in 2020—a 38% year-over-year increase. On October 27, 2021, the City Council passed a referral to the Community Engagement Process to Reimagine

¹ <https://everytownresearch.org/report/economic-cost-calculator/>

Public Safety to Create an Interjurisdictional Group Violence Intervention Program, or “Operation Ceasefire,” to Reduce Gun Violence. To date, the Reimagining Public Safety Task Force has not released recommendations for such a program. However, it is worth noting that Ceasefire programs are themselves defined by community engagement.

BACKGROUND

The National Network for Safe Communities defines GVI programs as “a partnership of law enforcement, community members, and social service providers with a common goal but distinct roles,” each role “conveying a powerful community message about disapproval for violence and in support of community aspirations; concrete opportunities for both immediate and longer term assistance and support; and clear prior notice of the legal risks associated with continued violence.”²

In the City of Stockton, the local police department established Operation Peacemaker in 1997, collaborating with federal law enforcement agencies, clergy members, and community groups. In the five years that the program operated, Stockton saw a 43% decrease in the average annual homicide rate.³

Intervention programs in neighboring cities of Oakland and Richmond are credited with enabling major reductions in homicide and gunfire rates. Oakland’s Ceasefire program was established in 2012, and by 2018, the city’s gun violence and homicides had fallen by 50%, the lowest rate in decades.⁴ Sadly, Oakland’s gunfire and homicide rates have increased substantially since the onset of the COVID-19 pandemic.⁵

² <https://nnscommunities.org/wp-content/uploads/2020/08/GVI-Issue-Brief-1.pdf>

³ Braga, A. A. (2008). Pulling levers focused deterrence strategies and the prevention of gun homicide. *Journal of criminal justice*, 36(4), 332-343.

⁴ <https://giffords.org/wp-content/uploads/2019/05/Giffords-Law-Center-A-Case-Study-in-Hope.pdf>

⁵ Neilson, S. (2021, Sept. 29). Homicides increased in Bay Area major cities in 2020. Are they coming down? *San Francisco Chronicle*. Retrieved Oct. 15, 2021 from <https://www.sfchronicle.com/crime/article/Homicides-increased-in-Bay-Area-major-cities-in-16494869.php>

THE CEASEFIRE STRATEGY'S ACTIONS ARE CONTINUOUS & STRATEGIC

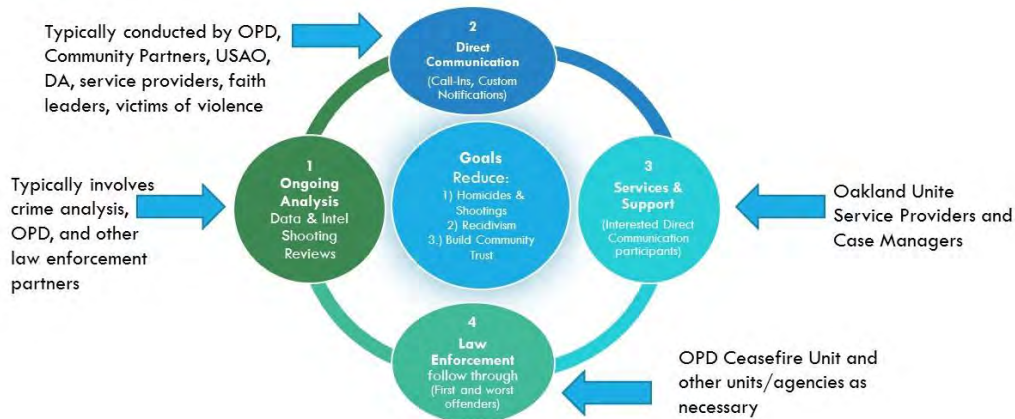


Figure 1. Oakland Ceasefire model

Oakland Unite, a division of the City of Oakland’s Human Services Department, manages Oakland Ceasefire “through a public health and trauma-informed approach.” Further: “As a funder and direct service provider, Oakland Unite coordinates a network of 26 community-based organizations that provide comprehensive, culturally-responsive support services including Intensive Life Coaching, Employment and Education Support, Crisis Response, Violence Interruption/Street Outreach, and Community Engagement.”⁶

In addition to traditional services such as mental health, trauma care, education, and street outreach, these programs organize “call-ins” in which community leaders and local residents affected by gun violence can interface directly with group members to share their pain, explore paths to personal transformation, and discuss commitments to a safer community. These programs develop a framework to identify leaders with moral authority in affected communities to develop violence prevention strategies that build up collective autonomy and resilience. Law enforcement can also identify violent offenders in the community and compel them to attend call-ins as terms of their parole. Alternatively, service providers can also schedule flexible in-person visits to address social determinants of violent crime.

In the City of Richmond, the Office of Neighborhood Safety (ONS) was established in 2007, precipitating a 61% reduction in gun violence over the following five years. By 2019, Richmond saw a 65% decrease in homicides and an 85% decrease in shootings resulting in injury.⁷ ONS works with the nonprofit Advance Peace to provide Peacemaker Fellowships, an eighteen-month program with wraparound services and

⁶ <https://www.oaklandca.gov/topics/oaklands-ceasefire-strategy>

⁷ <https://www.advancepeace.org/wp-content/uploads/2020/03/AP-Richmond-Impact-2019.pdf>

street outreach for individuals involved in violent conflicts in the community, without law enforcement intervention. In contrast to Ceasefire programs, Advance Peace focuses on change through individuals by developing a LifeMAP (Management Action Plan), rather than group “call-ins” through peer networks. Advance Peace also hires formerly incarcerated individuals to work as Neighborhood Change Agents who provide violence interruption services, street outreach and service referrals directly in the community, rather than bifurcating violence interruption and case management.⁸ Advance Peace has successfully replicated the Fellowship model in the cities of Stockton and Sacramento, with funding of up to \$500,000 over 4 years for implementation and evaluation.⁹

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

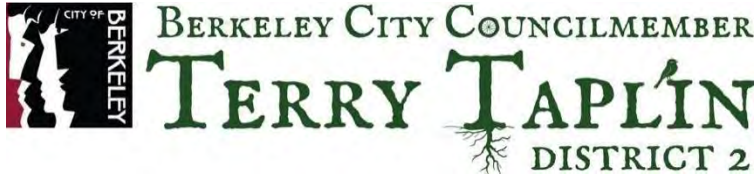
None.

CONTACT PERSON

Councilmember Taplin Council District 2 510-981-7120

⁸ <https://www.advancepeace.org/wp-content/uploads/2020/08/ap-focused-deterrence-v1-1.pdf>

⁹ <https://www.advancepeace.org/wp-content/uploads/2017/04/1-OnePager-Media.pdf>



CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council
From: Councilmember Taplin
Subject: Budget Referral: Strawberry Creek Lodge Food Program

RECOMMENDATION

Refer to the Annual Appropriations Ordinance (AAO) #1 budget process \$100,000 for the Strawberry Creek Lodge Food Program.

FINANCIAL IMPLICATIONS

\$100,000.

CURRENT SITUATION AND ITS EFFECTS

Last year, the City of Berkeley provided a grant of \$100,000 to provide subsidized meals for low-income seniors who reside at the Strawberry Creek Lodge, a senior housing apartment complex owned by the Strawberry Creek Lodge Foundation. The Foundation’s planned kitchen repairs have been delayed for 18 months, since the start of the COVID-19 pandemic, and the community needs continuous funding for their meal program.

Renewing the City’s grant for the Strawberry Creek Lodge Food Program is a Strategic Plan Priority Project, advancing our goal to provide housing support services for our most vulnerable community members.

BACKGROUND

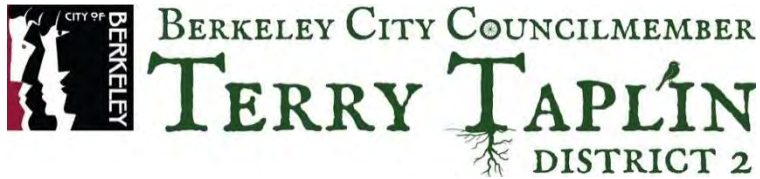
Strawberry Creek Lodge has provided housing for low- and moderate-income housing for 150 seniors since the early 1960s. The City first provided a grant for the Lodge’s meal program in 2020 after an Urgency Item was submitted on November 19, 2019 to amend the budget for Fiscal Year 2020.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

None.

CONTACT PERSON

Councilmember Terry Taplin Council District 2 510-981-7120



CONSENT CALENDAR

November 9th, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Terry Taplin

Subject: Budget Referral: West Berkeley Residential Preferential Parking (RPP)

RECOMMENDATION

That the City Council refers to the FY2023 budget process the funding of increased staffing, new enforcement vehicles, and sign installations necessary for the expansion of the Residential Preferential Parking (RPP) Program out of its current boundaries into West Berkeley, in zones to be identified and authorized by the Traffic Division of the Public Works Department, as well as for the enhancement of enforcement in existing RPP zones.

CURRENT SITUATION AND ITS EFFECTS

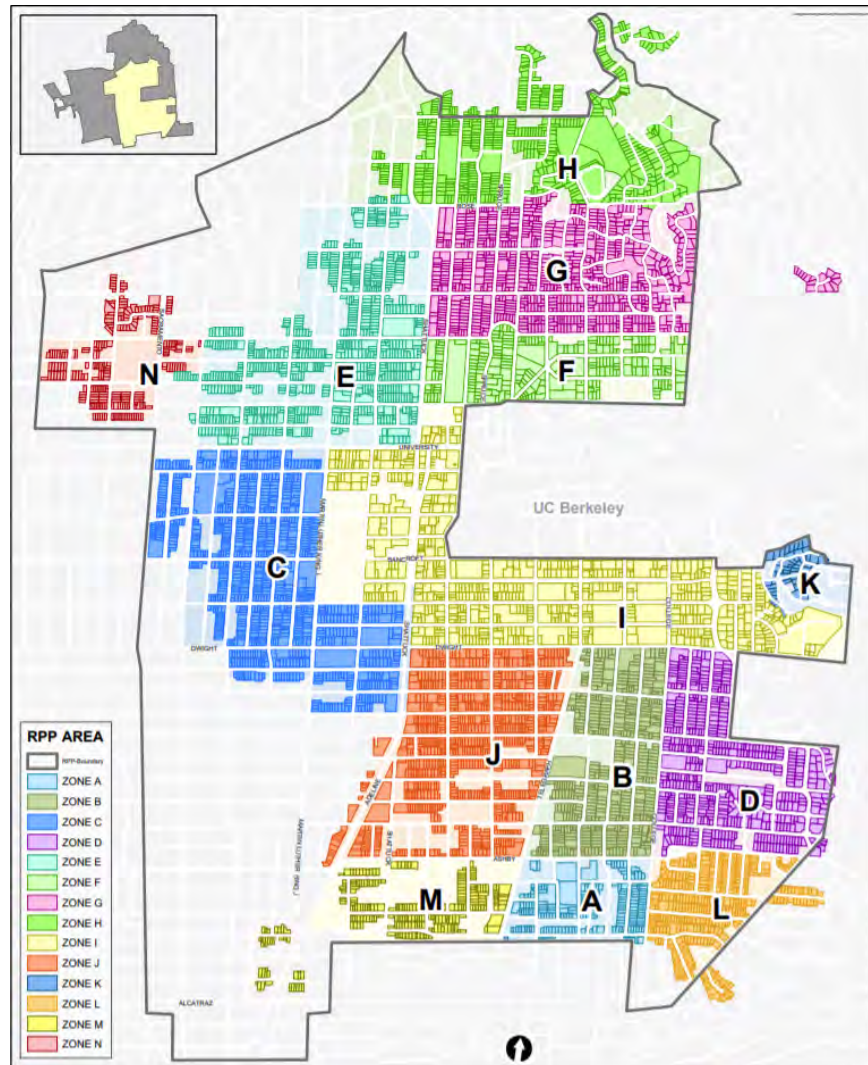
Since 1980, the City of Berkeley's Preferential Parking Program has prioritized parking for vehicles registered to residential addresses in 16 Residential Preferential Parking (RPP) zones. Residents can apply for RPP permits through the City and, once granted, are exempted from the two-hour parking time limit in their designated zone.¹ The current extent of Berkeley's Preferential Parking Program is limited to the residential and commercial areas near the UC Berkeley campus. Currently, the City lacks the funding for robust enforcement of its existing RPP zones and runs an immense deficit on the program partially due to the limited citation revenue that accompanies a lack of enforcement.

The enhancement of the existing RPP enforcement and the expansion of the RPP boundaries into West Berkeley with the addition of new RPP zones is desirable for the City for a number of reasons. For the advancement of Berkeley's climate change, transportation, and public safety goals, the City must do all it can to reduce car traffic originating elsewhere as well as within Berkeley. Studies have shown that car ownership and driving increases where parking is widely available at little cost.² This occurs even in areas with accessible public transportation. In order to reduce local greenhouse gas emissions from car trips, pedestrian and cyclist deaths through the reduction of personal vehicle use and traffic volume on streets used by cyclists and

¹ https://www.cityofberkeley.info/Customer_Service/Home/RPP_Residential_Preferential_Parking.aspx

² <https://bppj.berkeley.edu/2019/12/20/paying-attention-to-residential-parking-why-cities-should-care/>

pedestrians, and encourage transit ridership through added costs for parking, Berkeley must strengthen and expand the RPP program beyond its currently limited scope.



Current RPP boundary and zones.³

FISCAL IMPACTS

All permit fees and citation revenues, including revenue from new enforcement staff, will be deposited in the General Fund. In turn, all new staff and equipment costs will come out of the General Fund. Costs include:

- Six (6) Parking Enforcement Officers (\$124,818 per FTE; total \$748,908/year), and one (1) Parking Enforcement Supervisor at \$138,065/year
- Six (6) parking enforcement vehicles (\$210,000 total), each equipped with standard automated license plate recognition (ALPR) systems at \$78,363 each (\$470,178), annualized over a five-year period
- New RPP sign installation, including labor and materials, at \$23,000 per year

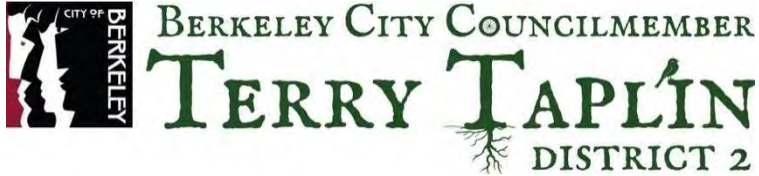
³ [https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_Transportation/RPP_R\(1\).pdf](https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_Transportation/RPP_R(1).pdf)

ENVIRONMENTAL IMPACTS

Increased parking costs and strengthened enforcement is likely to reduce local car traffic and Berkeley's greenhouse gas emissions in turn.

CONTACT

Terry Taplin, Councilmember, District 2, (510) 981-7120

CONSENT CALENDAR

DATE: Nov. 9, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Terry Taplin (Author), Mayor Jesse Arreguín (Co-sponsor), Councilmember Harrison (Co-sponsor), Councilmember Hahn (Co-sponsor)

Subject: Resolution Recognizing Housing as Human Right; Referring to City Manager Several Measures to Begin Developing Social Housing in the City of Berkeley.

RECOMMENDATION

Adopt a resolution recognizing housing as a human right; refer to the City Manager's office several measures to begin developing social housing in the City of Berkeley.

Measures shall include, but not be limited to:

1. Study and report to council on development potential, including density bonuses, for mixed-income housing development starting with the city-owned parcels at 1011 University Ave, and seek information through an RFI or other process on the potential for cross-subsidized limited-equity leasehold and rental models or other social housing development models;
2. Study and return to council a report and, if feasible, a proposal for a Reparative Justice Revolving Loan Fund with affirmative racial justice and anti-displacement goals in coordination with the city's Small Sites Program, including, but not limited to:
 - a. Providing low-interest loans for tenants, nonprofits, limited-equity co-operatives, and community land trusts to acquire real property; support Low Income Housing Tax Credit (LIHTC) funding; develop and/or maintain mixed-income and permanently affordable housing;
 - b. Funding a Local Operating Subsidies Program to provide permanently affordable housing for Very Low and Extremely Low Income households;
 - c. Leveraging local funds with state and regional partnerships through the Bay Area Housing Finance Agency (BAHFA) with the Association of Bay Area Governments (ABAG), Berkeley Housing Authority, Berkeley Unified School District (BUSD) and BART;
 - d. Consider best practices from other agencies and other partnership opportunities;
3. Refer to the budget process up to \$300,000 for one or more consultants to study potential social housing models for the City of Berkeley;

4. Establish a publicly available, user-friendly data dashboard potentially using third-party data visualization tools for monitoring Housing Justice Indicators in the city including, but not limited to:
 - a. State certification of city's Housing Element and progress toward RHNA goals for each income tier in annual Housing Pipeline Reports;
 - b. Housing Element compliance with Affirmatively Furthering Fair Housing (AFFH) rule pursuant to California Government Code Section 65583 and Chapter 15, Section 8899.50 of Division 1 of Title 2, presented with, at a minimum:
 - Citywide and regional affordability as defined by median rents and home prices as share of one-third of the City of Berkeley and Alameda County's median household income in most recent American Community Survey data;
 - Local funding and open BMR housing application slots available to meet housing needs of Moderate, Low-, Very Low-, and Extremely Low-Income households;
 - Anti-displacement metrics using UC Berkeley Displacement Project data and tracking successful applications to affordable housing units in the city using Local Preference policy;
 - Geographic considerations including historic redlining and segregation; Sensitive Communities and High Displacement Risk Areas identified in the 2019 CASA Compact by the Metropolitan Transportation Commission (MTC); and access to economic opportunity as measured by State of California Tax Credit Allocation Committee (TCAC) Opportunity Area Maps;
 - Any other considerations relevant to AFFH compliance and reparative housing justice.

POLICY COMMITTEE RECOMMENDATION

On June 17, 2021 the Land Use, Housing & Economic Development policy committee took the following action: M/S/C (Hahn/Robinson) Qualified positive recommendation that Council approve the item with amendments formally discussed at the meeting and as follows: 1. Including a budget referral of up to \$300,000 and clarifying that the allocation may include one or more consultants; 2. Amending the staff report to remove the portion under "Rationale for Recommendation" beginning with "In Hawaii, Sen. Chang has opted for a more direct route..." and encompassing footnotes 48, 49, and 50; and 3. Amending the Resolution to include record of the "attendant freedoms and entitlements as enumerated by the United Nations"; removing the portion of the Resolution incorporating a referral to the City Manager; and making typographical changes to the Resolution as agreed to by the Author.

BACKGROUND

A Human Right to Housing vs. Property Rights

International law has recognized a right to adequate housing since the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights, establishing freedoms and entitlements that include security of tenure, privacy, affordability, freedom of movement and non-discriminatory access.¹ By definition, the City of Berkeley has not affirmed this right for at least 1,000 homeless residents, with 813 unsheltered according to the 2019 Homeless Point-in-Time Count in Alameda County.² To obtain secure homeownership, the city's December 2020 median home price of \$1.39 million would require an income over three times as high as Berkeley's 2018 median household income of \$80,000.³ Meanwhile, the state of California leads the nation in its share of the homeless population⁴; over half the state's renters and a third of its homeowners are excessively cost-burdened, paying over 30% of their income for housing; and more than two-thirds of Californians facing excessive housing costs are people of color.⁵ According to the California Budget & Policy Center, "Poor housing quality, living in a low-income neighborhood, overcrowding, moving frequently, and homelessness are all associated with adverse health outcomes."⁶

Housing is financialized to an extreme degree that is incompatible with material needs of the general population. Public policy in California and the United States privileges legal rights to financial asset appreciation over a right to humane living standards in sanitary and secure housing.

In urban areas throughout the world, other nations with lower rates of homelessness and housing insecurity provide adequate housing for their citizens through various policies that address housing as public infrastructure. Housing systems are administered in varying degrees of "decommodification,"⁷ ensuring a minimum standard of living through the welfare state above what individuals can obtain through the private market. Different governments approach decommodification of housing to some degree through strategies for subsidizing the supply channel by providing low-

¹ Office of the United Nations High Commissioner for Human Rights. (2009). *Fact Sheet No. 21: The Right to Adequate Housing*. (Rev. 1). United Nations: Geneva. Retrieved from https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf

² https://everyonehome.org/wp-content/uploads/2019/07/ExecutiveSummary_Alameda2019-1.pdf

³ <https://www.zillow.com/berkeley-ca/home-values/>

⁴ Passy, J. (2019). Nearly half of the U.S.'s homeless population live in one state: California. *MarketWatch*. Retrieved from <https://www.marketwatch.com/story/this-state-is-home-to-nearly-half-of-all-people-living-on-the-streets-in-the-us-2019-09-18#>

⁵ Kimberlin, S. (2017). Californians in All Parts of the State Pay More Than They Can Afford for Housing. *California Budget & Policy Center*. Retrieved from <https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/>

⁶ Ramos-Yamamoto, A. (2019). Advancing Health Equity: How State Policymakers Can Increase Opportunities for All Californians to Be Healthy. *California Budget & Policy Center*. Retrieved from <https://calbudgetcenter.org/blog/advancing-health-equity-how-state-policymakers-can-increase-opportunities-for-all-californians-to-be-healthy/>

⁷ Esping-Andersen, G. (1990). *The Three Worlds of Welfare Capitalism*. Princeton, NJ: Princeton University Press. p. 21-23.

cost housing, or the demand channel by supporting consumer purchasing power. Socialization of land rents also emerges as a key strategy for maintaining equitable housing security outcomes in response to sudden exogenous shocks (e.g. supply shocks from natural disasters or demand shocks from public health measures suppressing consumption).

In two case studies, the cities of Vienna and Singapore own and operate public housing development corporations that retain some amount of land title in the common trust in order to stabilize the housing market—either by restricting ownership to leases, or encouraging low-cost rentals and developing on public land holdings. Both also retain a “reserve supply” of land and/or development rights to stabilize housing affordability through recessionary demand shocks. These cities are able to provide housing to any citizen at an affordable cost regardless of their income, effectively reinvesting revenues from higher-income households to subsidize housing for lower incomes. In Tokyo, while housing is more commodified, Japanese federal land-use policy treats housing essentially as a non-durable consumer good, prioritizing its utility as shelter over its potential as a speculative asset.⁸

Vienna and Singapore rank 1st and 25th on the 2019 Mercer Quality of life ranking, respectively, above any city in the United States. Vienna has held the top position for the past ten years.⁹

The United States has tended toward the extreme opposite end in the spectrum of housing commodification. Modern economic policy and property rights have treated housing primarily as means to a guarantee for growing financial asset wealth and enforce a white supremacist caste system.

Subsidies for both supply and demand channels have been historically insufficient while support for American asset wealth primarily in white communities has been more robust and resilient. This has widened the racial wealth gap between white and Black households, and ultimately proved incompatible with universal housing security.

The Great Recession of 2008 effected an abjectly cruel transfer of wealth from lower-income Black homeowners¹⁰ targeted with predatory subprime loans to private equity firms¹¹ buying up large portfolios of “distressed” properties before the economy recovered. This longstanding pattern of usury and community displacement further

⁸ Karlinsky, S. et al. (2020). From Copenhagen to Tokyo: Learning from International Housing Delivery Systems. *SPUR Regional Strategy Briefing Paper*. Retrieved from <https://www.spur.org/publications/white-paper/2020-08-06/copenhagen-tokyo>.

⁹ Mercer. (2019). Quality of life city ranking. Retrieved from <https://mobilityexchange.mercer.com/insights/quality-of-living-rankings>

¹⁰ White, G.B. (2015). The Recession’s Racial Slant. *The Atlantic*. Retrieved from <https://www.theatlantic.com/business/archive/2015/06/black-recession-housing-race/396725/>

¹¹ Warren, E. & Fife, C. (2020). Families see a looming catastrophe. Private equity firms see dollar signs. *The Washington Post*. Retrieved from <https://www.washingtonpost.com/opinions/2020/08/06/nation-is-facing-housing-crisis-private-equity-firms-just-see-dollar-signs/>

has further excluded people of color from the fruits of economic recovery and deepens the racial wealth gap. We risk repeating this process in the current COVID-19 depression, as renters and low-income homeowners face an unprecedented homelessness crisis due to job losses during the pandemic, while relatively affluent cities like Berkeley see median home prices continue to rise.

Local, state and federal governments alike have made routine practice of devaluing or outright destroying black asset wealth for the benefit of more affluent, exclusively white communities, most visibly through usurious redlining and destructive “urban renewal.”¹² Fundamentally, the government has devoted more resources in absolute terms to protecting the right to capital gains of property owners, at the expense of adequate housing and any right to basic living standards for Black people. After a brief wartime period in which public housing was conceived to sustain middle-class households U.S. public housing developments in the mid-20th century were notoriously racially segregated poverty traps located far from public services and economic opportunity, starved of operational funds and “destined to fail.”¹³

The inequities of our current housing crisis are rooted in histories of Jim Crow segregation, mortgage guarantees of the New Deal era, and deflationary policy of the late 1970s. Where neighborhoods were once segregated explicitly by racial covenants and *de jure* statutes, government mortgage guarantees sublimated this segregation into self-reinforcing actuarial assessments promulgated by the Home Owners Loan Corporation (HOLC) and Federal Housing Administration (FHA), established under President Franklin Roosevelt. This practice known as “redlining” infamously denied mortgage credit to primarily Black and Latinx neighborhoods throughout the country, giving more affluent white neighborhoods exclusive access to risk-free mortgage credit while trapping communities of color in poverty. According to UC Berkeley’s Urban Displacement Project, neighborhoods that were once redlined are now at greater risk of gentrification and displacement.¹⁴

The United States and other anglophone countries further commodified housing in order to provide welfare through asset ownership to compensate for stagnation in real purchasing power.¹⁵ In response to high inflation of the 1970s, the Federal Reserve drastically raised interest rates beginning in 1978, triggering a period of deflation that boosted asset prices while suppressing real wages and economic growth. With accompanying deregulation of the financial sector, housing became “financialized” as a special asset class attracting a rush of speculative capital, because it retained the imprimatur of government mortgage guarantees while enjoying fewer capital controls,

¹² Baradaran, M. (2017). *The Color of Money: Black Banks and the Racial Wealth Gap*. Cambridge, MA: Harvard University Press. p. 141.

¹³ Perry-Brown, N. (2020). *How public housing was destined to fail*. Greater Greater Washington. Retrieved from <https://ggwash.org/view/78164/how-public-housing-was-destined-to-fail>

¹⁴ The Legacy of Redlining. (2018). Retrieved from <https://www.urbandisplacement.org/redlining>

¹⁵ Adkins, L. et al. (2019). Class in the 21st century: Asset inflation and the new logic of inequality. *Environment and Planning A: Economy and Space*. doi.org/10.1177/0308518X19873673

practically guaranteeing that household asset wealth would outpace low inflation and stagnating wages.¹⁶ A growing body of research strongly suggests that financialization of housing has intensified business cycle volatility and deepened periodic recessions, as “consumption became more correlated with housing wealth.”¹⁷

In California, voters passed Proposition 13 in 1978, further entrenching wealth inequality with constitutional caps on property tax rates and assessments. Data from 2016 shows that property owners in the state’s wealthiest municipalities such as Palo Alto and Beverly Hills enjoy some of the lowest effective property tax rates, while lower-income inland cities such as Beaumont, Lancaster and Palmdale pay the highest.¹⁸ According to a 2020 study by the Urban Institute, the current property tax system and the lack of “split-roll” assessment also incentivizes underutilization of commercial property and may suppress housing supply.¹⁹

Berkeley pioneered other methods of guaranteeing housing price inflation: single-family zoning was first established in the Elmwood and Claremont neighborhoods to sustain real estate values and exclude racial minorities. The Mason-McDuffie Company developed residential neighborhoods in Berkeley with racial covenants in property deeds preventing lease or sale to anyone of “African or Mongolian descent,” and lobbied for restrictive zoning in 1916 to protect against “disastrous effects of uncontrolled development”²⁰—the implied “disastrous effects” being stable prices and an influx of Black and Chinese residents.

Restrictive zoning reduces multifamily development, constrains supply and enforces a high price floor on dwelling units in high-cost land²¹. A 2015 study by the nonpartisan Legislative Analyst Office found that growth control policies increased home prices by 3-5%.²² Correspondingly, emerging research from UC Berkeley finds evidence that new market-rate development in San Francisco lowered rents by 2% on parcels within

¹⁶ Feygin, Y. (2021). The Deflationary Bloc. *Phenomenal World*. Retrieved from <https://phenomenalworld.org/analysis/deflation-inflation>.

¹⁷ Ryan-Collins, J., et al. (2017). *Rethinking the Economics of Land and Housing*. London, UK: New Economics Foundation.

¹⁸ McLaughlin, R. (2016). Prop 13: Winners and Losers from America’s Legendary Property Tax Revolt. *Trulia*. Retrieved from <https://www.trulia.com/research/prop-13/>

¹⁹ Greene, S. et al. (2020). Housing and Land-Use Implications of Split-Roll Property Tax Reform in California. *Urban Institute*. Retrieved from https://www.urban.org/sites/default/files/publication/102883/housing-and-land-use-implications-of-split-roll-property-tax-reform-in-ca_1.pdf

²⁰ Lory, Maya Tulip. (2013). A History of Racial Segregation, 1878–1960. *The Concord Review*. Retrieved from <http://www.schoolinfosystem.org/pdf/2014/06/04SegregationinCA24-2.pdf>

²¹ Murray, C. & Schuetz, J. (2019). Is California’s Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development. *UC Berkeley Turner Center for Housing Innovation*. (2019).

²² Legislative Analyst Office. (2015). California’s High Housing Costs: Causes and Consequences. Retrieved from <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>

100 meters and reduced displacement risk for renters in that area by 17%,²³ while a 2016 study by UC Berkeley's Urban Displacement Project found that affordable housing has double the effect of mitigating displacement as market-rate housing.²⁴ According to a 2001 study on homelessness in California, "rather modest improvements in the affordability of rental housing or its availability can substantially reduce the incidence of homelessness in the United States."²⁵

Exclusionary zoning effectively limits where and to what extent these effects can occur, maintaining the spatial segregation of redlining after the latter practice was outlawed by the 1968 Fair Housing Act. In a study of 197 metropolitan areas in the United States, UC Merced political scientist Jessica Trounstein has found that restrictive land use policies predicted sustained racial segregation in cities between 1970 and 2006, while larger, sustained white minorities were predictive of cities' resistance to new residential development.²⁶ Research from UC Berkeley's Othering and Belonging Institute finds that single-family zoning in the Bay Area is strongly correlated with high-resource, high-opportunity, and highly segregated communities.²⁷ Karen Chapple, Director of UC Berkeley's Urban Displacement Project, stated in a February 25, 2019 letter to the Berkeley City Council, "the Urban Displacement Project has established a direct connection between the neighborhood designations by the Home Owners Loan Corporation (HOLC), and 75% of today's exclusionary areas in the East Bay... Thus, this historic legacy, compounded by Berkeley's early exclusionary zoning practices, continues to shape housing opportunity and perpetuate inequities today." These inequitable distributions of access to housing and asset appreciation has historically perpetuated and remains a primary factor in country's the racial wealth gap.²⁸

The financialized political economy of housing in the United States is enforced by a doctrine of strong property rights for protecting asset inflation colloquially referred to as "financialization" or "commodification") over rights to material well-being, perpetuating a permanent affordability crisis for most workers who did not already own

²³ Pennington, K. (2021). Does Building New Housing Cause Displacement?: The Supply and Demand Effects of Construction in San Francisco. *Working Paper*. Retrieved from https://www.dropbox.com/s/oplls6utgf7z6ih/Pennington_JMP.pdf?dl=0.

²⁴ Zuk, M. & Chapple, K. (2016). Housing Production, Filtering and Displacement: Untangling the Relationships. *Institute of Governmental Studies Research Brief*. Berkeley, CA: UC Berkeley IGS. Retrieved from https://www.urbandisplacement.org/sites/default/files/images/udp_research_brief_052316.pdf

²⁵ Quigley, J.M. (2001). Homeless in America, Homeless in California. *The Review of Economics and Statistics*. 83(1): 37–51.

²⁶ Trounstein, J. (2020). The Geography of Inequality: How Land Use Regulation Produces Segregation. *American Political Science Review*. Cambridge: Cambridge University Press.

²⁷ Menendian, S., et al. (2020). Single Family Zoning in the Bay Area: Characteristics of Exclusionary Communities. *UC Berkeley Othering & Belonging Institute*. Retrieved from <https://belonging.berkeley.edu/single-family-zoning-san-francisco-bay-area>

²⁸ Darity Jr, W. et al. (2018). What We Get Wrong About the Racial Wealth Gap. *Samuel DuBois Cook Center on Social Equity*. Durham, NC: Duke University. Retrieved from <https://socialequity.duke.edu/wp-content/uploads/2020/01/what-we-get-wrong.pdf>

their homes. This fundamental conflict of moral values and economic rights came into stark display in early 2020, when the group Moms 4 Housing occupied a vacant home in West Oakland owned by Wedgewood Inc., a private equity firm that flipped houses nationwide. In the early hours of January 14, 2020, Alameda County sheriff's deputies enforced an eviction order with guns and armored cars on display, arresting four members of the group who had previously been homeless or housing insecure. On January 20, Oakland Mayor Libby Schaaf and Governor Newsom announced a deal with Wedgewood to sell the house to the Oakland Community Land Trust, and offer first right of refusal to the land trust for its property portfolio in Oakland for permanently affordable housing.²⁹

This political value statement, backed by a real transfer of wealth and rights of secure tenure, does not need to be an *ad hoc* bartering between the sweat equity of community organizers, the bully pulpit of elected officials, and the real physical danger of tactical civil disobedience. These values can instead be operationalized as part of the baseline administration of public services. In response to the Moms 4 Housing success, the state legislature passed SB-1079 by Senator Nancy Skinner (D-Berkeley) in September of 2020, authorizing fines of from \$2,000 to \$5,000 per day on buyers of foreclosed homes left vacant for over 90 days; banning bundled sales of foreclosed houses; and giving tenants, nonprofits, and community land trusts 45 days to match the final highest bid for the property.

Aligning public financing with more inclusive land-use regulations can offer a path to automating these sorts of progressive, reparative distributions of material well-being and housing security at a broader scale.

Social Housing, Housing Elements, and Automatic Stabilizers

The COVID-19 recession has demonstrated the federal government's capacity to quickly respond to sudden shocks, as well as its tragic shortcomings. Through state law, municipalities in California have a much more limited and delayed feedback loop to provide services for the public's needs.

President Joseph R. Biden's 2020 campaign platform included massive increases to federal funding for public housing and the Section 8 housing voucher program.³⁰ If the new Congress and administration can increase housing subsidies through both supply and demand channels to more closely meet present and future needs, the City of Berkeley would have more resources to proactively ensure adequate, stable, and non-discriminatory housing is further guaranteed.

²⁹ La Ganga, M. L. (2020). Evicted Oakland moms will get their house back after a deal with Redondo Beach company. *Los Angeles Times*. Retrieved from <https://www.latimes.com/california/story/2020-01-20/homeless-moms-4-housing-oakland-wedgewood-properties-deal>

³⁰ Biden, J. (2020). The Biden Plan for Investing in our Communities Through Housing. Retrieved from <https://joebiden.com/housing/>

Economists have proposed “automatic stabilizers” to respond to recessions with increased urgency since the Obama Administration’s stimulus efforts following the Great Recession were hamstrung by partisan gridlock in Congress. Federal Reserve economist Claudia Sahm developed the “Sahm rule” for defining the onset of a recession with a specific threshold of sustained unemployment, and a proposal in which this rule could trigger automatic stimulus payments “to broadly support aggregate demand in a recession.”³¹ In her testimony on January 19, 2021 at a confirmation hearing for her appointment to Treasury Secretary, former Federal Reserve chair Janet Yellen stated: “Our current system needs both updating and expansion... Designing and implementing a modern and effective system of automatic stabilizers is an important step to take now, so that we can minimize the negative impacts of any future recessions.”³²

Issuing stimulus payments automatically and universally to households rather than negotiating periodically in partisan politics could prevent widespread poverty among the least fortunate and also blunt a recession’s severity by sustaining consumer demand—stabilizing both material conditions for lower-income households, and consumption writ large. Analogous benchmarks can be operationalized to “stabilize” housing security in the city throughout business cycles and state planning certification periods. For example, urban planner Alain Bertaud has proposed automating updates to land-use policy as a function of land values to programmatically enforce widespread housing affordability.³³ Through a more complex process involving state and local jurisdictions, California’s housing element process now requires cities to submit compliant Housing Elements to the Department of Housing and Community Development (HCD) with a General Plan that adequately zones for sufficient residential capacity to meet their Regional Housing Needs Allocation (RHNA) housing production goals and comply with the Affirmatively Furthering Fair Housing rule. State law therefore offers a framework for “automating” or at least actively monitoring progress toward discrete housing justice outcomes.

Municipal Housing Development and Socialization of Land Rents

Mixed-income municipal housing development has distinct global variants, and is already currently being explored in the United States.

The state legislature of Hawaii is considering a state-led housing development proposal known as ALOHA Homes, modeled after Singapore’s Housing and Development Board (HDB). In Singapore, the resale market for 99-year home leases are regulated to ensure long-term affordability with assistance to help households

³¹ Sahm, C. (2019). Direct Stimulus Payments to Individuals. *The Hamilton Project*. Retrieved from https://www.hamiltonproject.org/assets/files/Sahm_web_20190506.pdf

³² Yellen, J. (2021). Hearing to Consider the Anticipated Nomination of the Honorable Janet L. Yellen to Secretary of the Treasury. *U.S. Senate Committee on Finance*. Retrieved from <https://www.finance.senate.gov/imo/media/doc/Dr%20Janet%20Yellen%20Senate%20Finance%20Committee%20QFRs%2001%2021%202021.pdf>

³³ Bertaud, A. (2018). *Order Without Design: How Markets Shape Cities*. Cambridge, MA: The MIT Press.

exchange their leasehold equity for larger or smaller units throughout the lease term to adapt to changing needs as family members age. Over 80% of Singaporeans live in HDB housing developments.

SB1 by State Senator Stanley Chang (D-Honolulu) would establish a program within the state's housing finance agency to use existing and newly-acquired state lands near public transit to develop high-density housing, "priced at the minimum levels necessary to ensure that the development is revenue-neutral for the State and counties." (See Attachment 2.) Under Senate Bill 24 (2021)³⁴, the state would be authorized to sell leasehold condominiums on 99-year terms restricted to owner-occupied use for Hawaii residents who do not own any other real property. The agency would establish a dedicated revolving fund to provide low-cost loans to support long-term affordability, property maintenance and development. By leasing public land for development while retaining title in the public trust, public agencies can ensure that a proportionate degree of real estate value increased by public investment can in turn be recaptured for the public benefit.

In Austria, over 60% of Vienna's residents live in social housing, consisting of roughly 200,000 municipally-owned housing units and 220,000 nonprofit-owned units. For non-citizens, a minimum of five years' residency is required to apply for a social housing unit, and subsidized units must be for a household's primary residence. Public investments for construction, property management, and preservation of the social housing stock are subsidized by a federal income tax and the state's general fund, as well as a revolving loan fund managed by the Vienna Housing Fund. The Vienna Housing Fund operates as a community-owned nonprofit land bank, established by Social Democrats in the 1920s with large investments in public land in response to a housing shortage following the First World War. The self-sustaining nonprofit entity acquires existing housing or develops new projects with the aim of long-term affordability.

The Vienna Housing Fund is a major entity developing thousands of new housing units every year, while buying and selling real property on the open market. It maintains a two-year reserve of land to stabilize its property portfolio throughout real estate market cycles. The Vienna Housing Fund collaborates with the municipal government and nonprofit housing developers to provide affordable housing on public land via low-interest loans for new developments³⁵, with loan payments reinvested into a revolving loan fund for future loans and subsidies.

Vienna also indirectly subsidizes private development by arranging land transfers and low-interest loans with private firms through a competitive bidding process, in which a

³⁴ https://www.capitol.hawaii.gov/session2021/bills/SB24_.htm

³⁵ Wohnpartner Wien. (2019). Vienna Social Housing – Tools of Success. Retrieved from https://socialhousing.wien/fileadmin/user_upload/20190325_Einlagebla__tter_Gesamt_Englisch.pdf

jury panel evaluates applicants' projects based on criteria for design, sustainability, and affordability. The city rents a portion of the units at affordable rents to lower-income residents, but means-testing is only applied at the initial move-in. Effectively, Vienna's social housing program subsidizes affordable affordable housing through the supply channel rather than the demand channel (i.e. by subsidizing tenants themselves). Unlike Singapore, the city of Vienna's land-use planning promotes rentals over private homeownership, but similarly favors community longevity, recreational facilities, and supportive services. In 2016, the Social Democratic Party of Austria introduced the "wohnbauoffensive"³⁶—an initiative to streamline construction and permitting to increase housing production by 30%.

In California, AB-387 also known as "the Social Housing Act of 2021" by Assemblymembers Lee (D-San Jose) and Wicks (D-Oakland), sets forth the intent to "establish the California Housing Authority for the purpose of developing mixed-income rental and limited equity homeownership housing and mixed-use developments to address the shortage of affordable homes for low and moderate-income households." (See Attachment 4.) Importantly, state revenue bonds for infrastructure projects do not require voter approval.

There are already examples in present-day California of revolving funds for community land reinvestment that sustain communities across the state. In Palm Springs, the Agua Caliente Band of Cahuilla Indians own and lease land to nearly 20,000 people and businesses in a non-contiguous checkerboard arrangement, with up to 99-year leases for residential development.³⁷ At a larger scale, University of California and California State University systems develop and manage large portfolios of student housing across the state. The universities own tens of thousands of rental beds and dwelling units in urban, suburban and rural jurisdictions. Each UC campus prepares and implements a capital management plan to develop property for rental housing—plans which include revolving reinvestments in their existing portfolio.³⁸ In Berkeley and neighboring jurisdictions, BART is planning for housing development on BART property by leasing land to private and nonprofit developers, using the land-lease model as leverage to achieve the agency's goal of 35% Below Market-Rate housing systemwide.³⁹ The Berkeley Unified School District is also exploring the potential to develop workforce housing on its properties.⁴⁰

³⁶ Stadt Wien Press service. (2016). "More, faster, cheaper and sustainable" – the City of Vienna is launching an additional housing offensive. Retrieved from <https://www.wien.gv.at/presse/2016/02/17/mehr-schneller-preiswert-und-nachhaltig-stadt-wien-startet-eine-zusaetzliche-wohnbau-offensive>

³⁷ Murphy, R. (2016). Half of Palm Springs sits on rented land. What happens if the leases end? *Desert Sun*. Retrieved from <https://www.desertsun.com/story/money/real-estate/2016/09/22/palm-springs-agua-caliente-land-lease/87944598/>.

³⁸ University of California. (2019). Capital Financial Plan 2019-25. Retrieved from https://ucop.edu/capital-planning/_files/capital/201925/2019-25-cfp.pdf

³⁹ BART Board of Directors. (2016). Transit-Oriented Development Performance Measures and Targets. Retrieved from https://www.bart.gov/sites/default/files/docs/B-%20TOD%20Performance%20Targets%202040%20Adopted%2012-1-16_0.pdf

RATIONALE FOR RECOMMENDATION

Homelessness and housing insecurity are the result of deliberate but diffuse policy choices. The feasibility of permanently guaranteeing housing security in Berkeley remains unknown, but our community nevertheless recognizes the imperative to make different policy choices to that end. The City of Berkeley can build on the precedents and procedures established in state law, affirm housing as a human right, and enforce concrete goals toward reparative housing justice as a permanent mandate of our municipal public service.

Public housing development corporations in California could make both short-term and permanent impacts on housing affordability, construction sector employment, and other equity-based outcomes, while operating under standard land-use planning processes already being streamlined under state law.

Moreover, the ability to remain revenue-neutral with rents from a broader range of incomes offers the opportunity to fund a Local Operating Subsidy Program (LOSP)⁴¹ to provide ongoing funding for deeper affordability in deed-restricted housing. The City and County of San Francisco established such a program in 2004, providing its first grants for 100% supportive housing in 2006 with a focus on covering operating deficits for supportive housing in Low Income Housing Tax Credit (LIHTC) projects.⁴²

Recent state legislation such as SB-35 (2017) and SB-330 (2019) already reform municipal land-use authority to support housing production within measurable benchmarks, limiting local discretion in permitting and zoning according to standards set by the Regional Housing Need Allocation (RHNA) process, the Housing Accountability Act (HAA), and the state Housing Element process.⁴³ The state legislature has also moved to increase affordable housing financing for municipalities by establishing the Bay Area Housing Finance Authority (BAHFA) in 2019; and in Senate Constitutional Amendment 2 (2021) by Sen. Ben Allen (D-Santa Monica), proposing removal of the state constitutional requirement for local referendum approval “low-rent” housing with more than 50% of its funding from the local jurisdiction. State law under AB-686 (2018) also requires cities to meet the goals of the Obama Administration’s Affirmatively Furthering Fair Housing rule under the 1968 Fair Housing Act in their housing elements and general plans.

⁴⁰ Doocy, S. (2018). School District Employee Housing in California. *UC Berkeley Turner Center for Housing Innovation*. Retrieved from <https://turnercenter.berkeley.edu/research-and-policy/school-district-employee-housing-in-california/>

⁴¹ <https://www.localhousingsolutions.org/act/housing-policy-library/operating-subsidies-for-affordable-housing-developments-overview/operating-subsidies-for-affordable-housing-developments/>

⁴²

<https://sfmohcd.org/sites/default/files/Documents/MOH/Asset%20Management/LOSP%20Policies%20Procedures%20Manual.pdf>

⁴³ Elmendorf, C. et al. (2020). Superintending Local Constraints on Housing Development: How California Can Do It Better. *UC Davis Legal Studies Research Paper Series*.

Under California Government Code Section 65583(c), state Housing Element law now requires in part:⁴⁴

A program that sets forth a schedule of actions during the planning period, each with a timeline for implementation...that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, the provision of regulatory concessions and incentives, the utilization of appropriate federal and state financing and subsidy programs when available...

This subsection requires the program to include, for AFFH compliance:

...an assessment of fair housing in the jurisdiction that shall include all of the following components:

- (i) A summary of fair housing issues in the jurisdiction and an assessment of the jurisdiction's fair housing enforcement and fair housing outreach capacity.*
- (ii) An analysis of available federal, state, and local data and knowledge to identify integration and segregation patterns and trends, racially or ethnically concentrated areas of poverty, disparities in access to opportunity, and disproportionate housing needs within the jurisdiction, including displacement risk.*
- (iii) An assessment of the contributing factors for the fair housing issues identified under clause (ii).*
- (iv) An identification of the jurisdiction's fair housing priorities and goals, giving highest priority to those factors identified in clause (iii) that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance, and identifying the metrics and milestones for determining what fair housing results will be achieved.*
- (v) Strategies and actions to implement those priorities and goals, which may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and protecting existing residents from displacement.*

However, when municipalities have been out of compliance, the Housing Element framework until recently has been ultimately held accountable by private right of action. For example, nonprofit advocates successfully sued the cities of Pleasanton⁴⁵ after it failed to produce a state-compliant Housing Element. But rather than a positive

⁴⁴ https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV§ionNum=65583

⁴⁵ Urban Habitat Program v. City of Pleasanton. No. A118327. Court of Appeal, First District, Division 2, California. (2008).

guarantee to universal housing security, enforcement through private right of action puts the onus on the coordination of constituencies who are by definition with less housing security and less able to assert their diffuse legal rights and entitlements through state and local jurisdictions.

This adversarial legal environment is inconsistent with a public commitment to universal fair housing. To the extent that a municipal government chooses to take on universal entitlements and freedoms to housing as a moral, not legal obligation, it must also devote its real assets to meet this obligation and balance the moral ledger. Local governments can coordinate state authority within their communities and amplify their resources to improve housing outcomes through more inclusive land-use regulations, and an expanded authority as lender and lessor of last resort.

However, the United Nations Office of the High Commissioner for Human Rights (OHCHR) specifies that the right to adequate housing “clearly does not oblige the Government to construct a nation’s entire housing stock.”⁴⁶

Rather, the right to adequate housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee that everyone’s housing is adequate. These measures can require intervention from the Government at various levels: legislative, administrative, policy or spending priorities. It can be implemented through an enabling approach to shelter where the Government, rather than playing the role of housing provider, becomes the facilitator of the actions of all participants in the production and improvement of shelter.

To that end, the City of Berkeley could proactively affirm housing as a human right according to measurable parameters of cost-burden and non-discriminatory access, as well as broader historical data and actionable moral commitments to restorative justice. Rather than *retroactive* enforcement of state housing mandates through private right of action, the City’s administrative departments should continuously monitor the availability, adequacy, and equitable distribution of housing as publicly available Housing Justice Indicators, reevaluating policy tools including public investment and planning and development goals as needed to *proactively* guarantee housing as a basic right. A publicly available, user-friendly data dashboard of Housing Justice Indicators could maintain accountability of the City’s civic institutions in meeting this mandate.

The City Manager’s office has already recommended a strategic focus on streamlining and reforming land use policy to enable a greater scale of housing production in its 1000 Person Plan to Address Homelessness.⁴⁷

⁴⁶ See footnote 1.

⁴⁷ https://www.cityofberkeley.info/Clerk/City_Council/2019/02_Feb/Documents/2019-02-26_Item_20_Referral_Response_1000_Person_Plan.aspx

4. Continue to implement changes to Berkeley's Land Use, Zoning, and Development Review Requirements for new housing with an eye towards alleviating homelessness. If present economic trends continue, the pace with which new housing is currently being built in Berkeley will likely not allow for a declining annual homeless population. Berkeley should continue to streamline development approval processes and reform local policies to help increase the overall supply of housing available, including affordable housing mandated by inclusionary policies.

State and regional agency projects such as the state's Tax Credit Allocation Committee (TCAC) Opportunity Area Maps and the 2019 CASA Compact⁴⁸ by the Metropolitan Transportation Commission (MTC) have established best practices for measuring and mapping economic opportunity, racial segregation, transit access, environmental health, and other positive outcomes for developing policy recommendations.

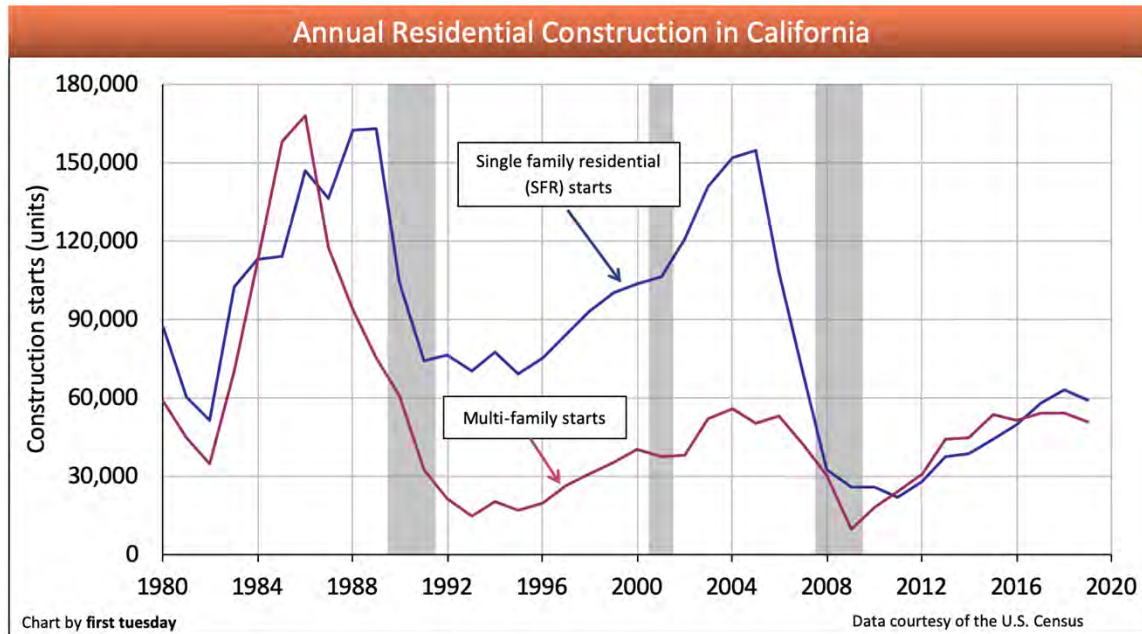
Why Social Housing?

Public development entities enjoy the benefit of longer-term financial horizons that help produce more stable housing outcomes. Unhindered by the fiduciary duty to produce short-term positive returns for private investors, public housing development agencies are not obligated to cease production and layoff construction workers during recessions.

The private market has been incapable of meeting the need for shelter in California across business cycles. Private capital bids up the costs of inputs during upcycles, but financing dries up during recessions as investors flee the volatile market. Recovery in the construction sector is sluggish, but demand for shelter does not disappear. Construction rates collapsed after the Great Recession of 2008, but as of 2020, they had barely recovered to rates of the previous recession of 2001.⁴⁹

⁴⁸ Metropolitan Transportation Commission. (2018). Racial Equity Analysis for the CASA Compact. Retrieved from https://mtc.ca.gov/sites/default/files/Racial_Equity_Analysis_for_the_CASA_Compact.pdf

⁴⁹ The slowing trend in California construction costs. (2019). first tuesday Journal. Retrieved from <https://journal.firsttuesday.us/the-rising-trend-in-california-construction-starts/17939/>



Even in a crudely Keynesian paradigm, these downturns are precisely when the public sector should step in to sustain housing development to meet the need for shelter, sustain employment, and boost aggregate demand. Unfortunately, California's housing market volatility limits the state and local government's resources when they are needed the most. For instance, California's construction workforce in 2017 lagged below its historic peak in 2006, equivalent to the size of the workforce at the start of the economic recovery in 2011.⁵⁰ In contrast, Vienna's social housing program also stabilizes employment in the region by employing 20,000 workers in the building trades.

Compounding this structural deficit, state and local funding sources for affordable housing are pro-cyclical and likelier to see a decline in revenues during economic downturns. Berkeley's inclusionary zoning and Affordable Housing Mitigation Fee produce Below Market-Rate homes or revenues for the Housing Trust Fund contingent on "value capture" policies that rely on the willingness of private capital to invest in the value. The Low Income Housing Tax Credit program (LIHTC), the linchpin of affordable housing financing in the United States, relies on the incentive of corporate tax liability by providing tax credits to large corporations and financial institutions in exchange for equity in low-income housing projects within a finite time horizon. Reductions in corporate profits during recessions and cuts to the corporate tax rate have both reduced the value of these tax credits periodically.⁵¹

⁵⁰ Littlehale, S. (2019). Rebuilding California: The Golden State's Housing Workforce Reckoning. *Smart Cities Prevail*. Retrieved from https://www.smartcitiesprevail.org/wp-content/uploads/2019/01/SCP_HousingReport.0118_2.pdf

⁵¹ Scally, C. et al. (2018). The Low-Income Housing Tax Credits: Past Achievements, Future Challenges. *Urban Institute*. Retrieved from

At the same time, highly leveraged private equity firms that specialize in liquidation of large portfolios or “asset stripping” benefit from volatile recessions that displace lower-income homeowners primarily in communities of color with less liquid capital to sustain riskier mortgage debt. Poorer households, primarily Black and Latinx residents, are more likely to end up trapped in cycles of poverty and homelessness, suffering for the benefit of wealthier and whiter financial institutions.

The Vienna Housing Fund offers a model for building wealth in the local community and affirmatively redressing the historic inequities intensified by cyclical volatility. By providing a revolving low-interest loan fund for tenants, nonprofits, limited equity cooperatives and Community Land Trusts, the City could plan for optimizing housing subsidies and development to meet concrete benchmarks in material outcomes: eliminating involuntary displacement, repairing wealth inequities in communities of color, and targeting market price parity with regional incomes.

Rather than bearing 100% of project costs independently, a municipal fund could seek to partner with state and regional mechanisms for land value redistribution, such as Transit Value Capture Districts (TVCDs)⁵² or Enhanced Infrastructure Finance Districts (EIFDs), which have been studied or proposed for financing affordable housing and other capital costs at BART stations.

As a countercyclical policy to sustain affordable housing financing across market cycles, a municipal revolving loan fund could provide loan guarantees or bridge loans to LIHTC developments to ensure their completion. As a reparative anti-displacement policy, a revolving loan fund could reinforce the city’s Local Preference policy for affordable housing included in the Adeline Corridor Specific Plan by providing favorable loan terms to community land trusts, tenant acquisitions, and nonprofit affordable housing developments that prioritize the return of formerly displaced residents from low-income communities of color. The loan fund can also seek matching funds from the newly-established Bay Area Housing Finance Authority (BAHFA), in direct partnership with the MTC and Association of Bay Area Governments (ABAG). In order to provide more housing security across the economic spectrum, a municipal revolving loan fund can consider more generous loan renegotiation terms or loan forgiveness, including the option of paying loans back to the fund in equity stakes.

The City of Berkeley is fortunate to not find itself in the same conditions as a bombed-out postwar Vienna, which made the consolidation of a large public land portfolio for the Vienna Housing Fund tragically inexpensive. However, Berkeley is blessed with a robust and growing tax base. Initially, such a loan fund may start small, with grants from the City and/or bootstrapped with Berkeley’s existing real property portfolio, but

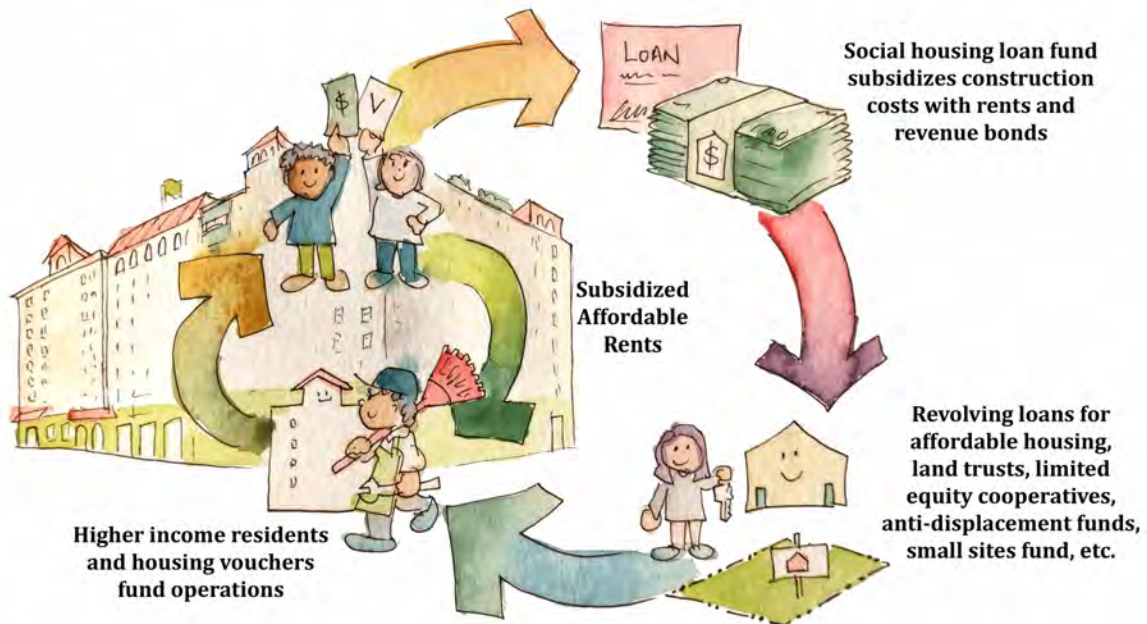
https://www.urban.org/sites/default/files/publication/98761/lihtc_past_achievements_future_challenges_finalized_1.pdf.

⁵² Sagehorn, D. & Hawn, J. (2020). Transit Value Capture for California. *Common Ground California*. Retrieved from http://cacommonground.org/pdf/2020-12_Transit_Value_Capture.pdf

over time it would be able to draw upon its growing portfolio of assets to self-finance operating costs while investing in new affordable housing projects.⁵³

How Social Housing Could Work in Berkeley

Berkeley Social Housing Agency Conceptual Diagram

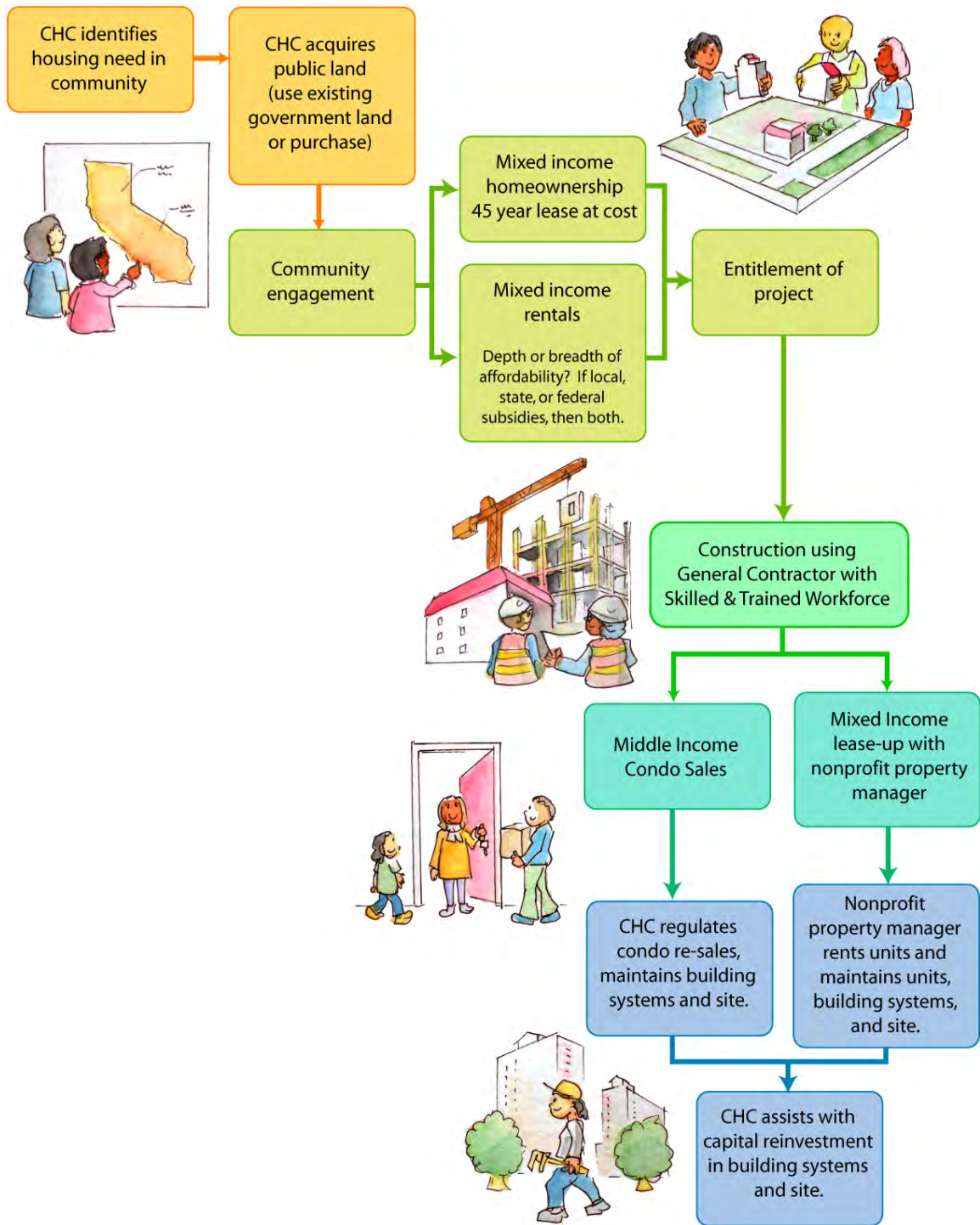


DISCLAIMER: This is not a development proposal, picture is for illustrative purposes only.
- State Density Bonus applied on base zoning at 1011 University Avenue
- Ministerial approval for buildings where 50% or more of the units are Below Market Rate

Illustration courtesy of Alfred Twu

Conceptual Diagram for a California Housing Corporation (CHC)

⁵³ Baxamusa, M. (2020). A New Model for Housing Finance: Public and Private Sectors Working Together to Build Affordability. *Routledge Focus*. p. 123.



Designs by Mark Mollineaux and Alfred Twu⁵⁴

ALTERNATIVES CONSIDERED

⁵⁴ East Bay For Everyone. (2021). California Housing Corporation: The Case for a Public Housing Developer. Retrieved from <https://eastbayforeveryone.org/socialhousing/>

The Berkeley City Council and the city's voters have taken clear steps to invest in housing security and affordable housing production. To the extent that the City is already developing and implementing affordable housing policies, the feasibility of these policy tools would not be mutually exclusive with other public investments and reforms currently underway.

ENVIRONMENTAL AND CLIMATE IMPACTS

Mixed-income housing development adjacent to frequent, reliable public transit and walkable street infrastructure can further the goals of the City's 2017 Climate Action Plan Update⁵⁵, which include:

Goal 4. Increase compact development patterns (especially along transit corridors)

Encouraging sustainable modes of travel such as cycling, walking, and public transit, is fundamentally tied to compact development patterns and the mix of land uses near transit hubs and jobs. For example, evidence shows that people who live near transit drive between 20% and 40% less than those who do not.

The City's 2018 Greenhouse Gas Inventory found that transportation accounted for 60% of Berkeley's greenhouse gas (GHG) emissions.⁵⁶ According to a 2018 Progress Report from the California Air Resources Board: "Even if the share of new car sales that are [zero-emission electric vehicles] grows nearly 10-fold from today, California would still need to reduce VMT [Vehicle Miles Traveled] per capita 25 percent to achieve the necessary reductions for 2030."⁵⁷ A 2019 report by the United Nations' International Resource Panel (IRP) emphasizes curbing suburban sprawl as a strategy to curb GHG emissions in urban areas that can also enhance the material outcomes provided by public services: "Optimizing densities and reducing sprawl also improves the sharing of resources (e.g. shared walls and roofs in apartment blocks) and reduces the distances that need to be covered by infrastructure networks (e.g. shorter pipes), allowing for savings in the materials and costs associated with service provision."⁵⁸

Critically, though, economic integration is vital to promoting an absolute reduction in per capita VMT. Mixed-income development providing transit-accessible housing security across the entire economic spectrum should maximize the potential for both reducing the carbon footprints of affluent, higher-emission households, and preventing

⁵⁵ https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/2017-12-07%20WS%20Item%2001%20Climate%20Action%20Plan%20Update.pdf

⁵⁶ https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-21_Special_Item_05_Climate_Action_Plan_pdf.aspx

⁵⁷ https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf

⁵⁸ United Nations IRP. (2019). The Weight of Cities: Resource Requirements of Future Urbanization. Retrieved from <https://www.resourcepanel.org/reports/weight-cities>

the displacement of poorer, lower-emission households to higher-VMT suburban areas with larger per capita carbon footprints.

While research from UC Berkeley⁵⁹ has found that wealthier households see larger emissions reductions from living in denser urban areas, a recent study of displacement and gentrification in Seattle also found significant increases in GHG emissions when lower-income households were displaced to outer suburbs with higher VMT land-use patterns and longer commutes.⁶⁰ Notably, the same UC Berkeley study evaluates emission reduction potentials of a suite of municipal public policies in 700 California cities. Using the modeling from this study, the California Local Government Policy Tool from the Cool Climate Network shows that urban infill development offers the greatest potential for mitigating Berkeley's GHG emissions.



⁵⁹ Jones et al. (2018). Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities. *Urban Planning*. 3(2). DOI: 10.17645/up.v3i2.1218

⁶⁰ Rice et al. (2020). Contradictions of the Climate-Friendly City: New Perspectives on Eco-Gentrification and Housing Justice. *International Journal of Urban and Regional Research*. 44(1):145-165.

This tool projects GHG reductions based on default assumptions of total policy adoption rate by 2050. If the urban infill policy were adopted at 35%, or half the default assumed rate, it would reduce GHG emissions by roughly 80,000 metric tons of CO₂e by 2030, roughly equivalent to the emissions reduction potential from VMT reduction and heating electrification. With the passage of Ordinance No. 7,672 in 2019, Berkeley Municipal Code Chapter 12.80 prohibits natural gas infrastructure in new buildings in the City of Berkeley. GHG reductions enabled by heating electrification would thus be maximized under this proposal regardless of urban infill policy.

FISCAL IMPACTS

TBD.—Staff time on financial feasibility study. The City Manager's office has projected a \$12.7 million annual cost to achieve strategic goals enumerated in the 1000 Person Plan to End Homelessness by 2023, but the costs of reforming land use to affirmatively further housing justice remains unquantified. Because such a pilot program would aim to include a broader range of income levels and larger projects, project costs may ultimately not be comparable to the Small Sites Program. Feasibility study should aim for a long-term self-sustaining fiscal structure for Reparative Justice Revolving Loan Fund and identify hard costs of gathering, monitoring and planning policy directives in response to Housing Justice Indicators. A budget referral should only proceed following a feasibility study to identify policy and funding goals for monitoring progress toward benchmarks.

CONTACT

Councilmember Terry Taplin (District 2), 510-983-7120, ttaplin@cityofberkeley.info

ATTACHMENTS/SUPPORTING MATERIALS

1. Resolution
2. Senate Bill 1 SD2 (2021), State Senate of Hawaii
3. ALOHA Homes Feasibility Study (2021), Hawai'i Housing Finance and Development Corporation
4. Assembly Bill 387 (2021), State Assembly of California
5. Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 21: The Right to Adequate Housing

RESOLUTION NO. ##,###-N.S.
RECOGNIZING HOUSING AS HUMAN RIGHT

WHEREAS, the United Nations has recognized housing as a human right in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights; and,

WHEREAS, the right to adequate housing includes freedoms such as protection against forced evictions and arbitrary destruction of housing; right to privacy; non-discriminatory choice of residence, and freedom of movement; and,

WHEREAS, the right to adequate housing includes entitlements such as security of tenure, restitution, equal and non-discriminatory access, and civic participation; and,

WHEREAS, the City of Berkeley is working to affirm these freedoms and entitlements for its homeless residents, including 813 unsheltered identified in the 2019 Alameda County point-in-time count; and,

WHEREAS, the state of California and its local and regional governments should have failed to affirm these freedoms and entitlements for the at least 53% of renters who endure excessive cost-burdens, defined as paying over 30% of income for housing, according to the 2017 American Community Survey; and,

WHEREAS, cities around the world including Vienna and Singapore deliver better housing security and quality of life outcomes for their citizens with robust public housing development programs that reinvest revenues from mixed-income housing and real assets to fund operational costs and capital projects; and,

WHEREAS, histories of Jim Crow segregation endure in racial discrimination in the mortgage credit industry and exclusionary land-use policies maintain disproportionate cost burdens and housing insecurity on Black people and low-income communities of color in the United States; and,

WHEREAS, the Berkeley City Council authorized a Missing Middle Report in 2019 on unanimous consent to study reforms to its land-use policies to enable more affordable types times of housing construction, transit-oriented development, and racial and economic inclusion; and,

WHEREAS, the Berkeley City Council authorized a Local Preference policy for affordable housing when it passed the Adeline Corridor Specific Plan in 2020 to enable reparative housing security for low-income communities of color bearing the brunt of displacement and gentrification in Berkeley; and,

WHEREAS, the voters of the City of Berkeley authorized large increases in local funding for affordable housing in 2018 with the overwhelming passage of Measures O and P; and,

WHEREAS, a 2017 Analysis of City-Owned Property for Potential for Housing Development by Berkeley's Health, Housing and Community Services Department identified several publicly owned parcels that would require zoning changes and further study for affordable housing production;

NOW THEREFORE, BE IT RESOLVED, that the City of Berkeley recognizes adequate housing as a human right, with recognition of attendant freedoms and entitlements as enumerated by the United Nations.

THE SENATE
THIRTY-FIRST LEGISLATURE, 2021
STATE OF HAWAII

S.B. NO. ¹
S.D. 2

A BILL FOR AN ACT

RELATING TO HOUSING.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the cost and
2 availability of housing in the State are significant challenges
3 facing Hawaii residents. Although Hawaii has the tenth highest
4 median wage nationally, living expenses are two-thirds higher
5 than the rest of the nation, with the cost of housing being a
6 major contributing factor. According to the Honolulu Board of
7 Realtors, by November 2020, the median price for a single-family
8 home on Oahu had risen to \$872,500, while the median price for
9 condominiums on Oahu had risen to \$420,000. With a simple
10 mortgage calculator and using conservative assumptions on
11 interest rates and down payment amounts, a household needs to
12 earn almost \$170,000 annually to afford to buy a median-priced
13 home on Oahu in 2020, making homeownership out of reach for many
14 of Hawaii's residents, especially first-time buyers.

15 Because of the many barriers hindering the production of
16 new housing, such as geographic limitations, lack of major
17 infrastructure, construction costs, and government regulation,



1 the State and housing developers have not been able to produce
2 enough housing for Hawaii residents. According to a 2015 report
3 from the department of business, economic development, and
4 tourism, the projected long-run estimate of demand for total new
5 housing in Hawaii is between 64,700 to 66,000 for the 2015 to
6 2025 period. The legislature has responded through the passage
7 of various legislation. During the regular session of 2016, the
8 legislature passed a bill enacted as Act 127, Session Laws of
9 Hawaii 2016, that, among other things, established a goal of
10 developing or vesting the development of at least 22,500
11 affordable rental housing units ready for occupancy by the end
12 of 2026. During the regular session of 2017, the legislature
13 passed a bill enacted as Act 54, Session Laws of Hawaii 2017, to
14 expand the types of rental housing projects that can be exempt
15 from general excise tax, thereby encouraging the development of
16 rental housing projects targeted for occupancy by households at
17 or below the one hundred forty per cent area median income
18 level. During the regular session of 2018, the legislature
19 passed a bill enacted as Act 39, Session Laws of Hawaii 2018,
20 that, among other things, provides an estimated total value of
21 \$570,000,000 to address Hawaii's affordable rental housing



1 crisis and is expected to generate more than 25,000 affordable
2 units by the year 2030.

3 Despite these efforts, the amount of new construction of
4 housing, especially for low- to middle-income families,
5 continues to be inadequate, as the supply of housing remains
6 constrained while demand for housing increases. This lack of
7 supply leads to higher housing prices and rents for households
8 of all income levels, leaving all tenants with less disposable
9 income, increasing the personal stress on buyers and renters,
10 and exacerbating overcrowding and homelessness. Given these
11 consequences, the lack of affordable housing requires the
12 concentrated attention of state government at the highest level.

13 The legislature further finds that Singapore faced a
14 housing crisis in the 1940s through 1960s but was subsequently
15 able to provide nearly one million residential units for its
16 citizens. The housing and development board -- the government
17 entity responsible for the rapid increase in housing development
18 -- plans, develops, and constructs the housing units, including
19 commercial, recreational, and social amenities. The result is
20 that units built by the housing and development board house
21 eighty per cent of the resident population and that, overall,



1 ninety per cent of the resident population are owners of their
 2 units. Through government loans, subsidies, and grants and the
 3 use of money saved through a government-run mandatory savings
 4 program, residents are able to purchase residential units at an
 5 affordable price, including options to upgrade to a better
 6 living environment in the future.

7 The legislature further finds that, with Honolulu's
 8 construction of an elevated rail transit system, the State has
 9 an opportunity to enhance Oahu's urban environment and increase
 10 the quality of life for residents by increasing the affordable
 11 housing inventory and eliminating the need for personal
 12 automobiles, among other public benefits. As the largest
 13 landowner of properties along the transit line, with
 14 approximately two thousand acres under the jurisdiction of
 15 various departments, the State must be proactive in establishing
 16 a unified vision and approach toward redevelopment of its
 17 properties to maximize the benefits of state lands available for
 18 redevelopment.

19 The purpose of this Act is to:

- 20 (1) End the housing shortage in Hawaii;



1 (2) Establish the ALOHA homes program to facilitate the
 2 creation of low-cost leasehold homes for sale to
 3 Hawaii residents on state-owned land near public
 4 transit stations; and

5 (3) Authorize the Hawaii housing finance and development
 6 corporation to sell the leasehold interest in
 7 residential condominium units located on state lands
 8 for lease terms of ninety-nine years.

9 SECTION 2. Chapter 201H, Hawaii Revised Statutes, is
 10 amended by adding two new subparts to part II to be
 11 appropriately designated and to read as follows:

12 "B. ALOHA Homes Program

13 **§201H-A Definitions.** As used in this subpart, the
 14 following terms have the following meanings, unless the context
 15 indicates a different meaning or intent:

16 "ALOHA" means affordable, locally owned homes for all.

17 "ALOHA home" means a residential unit within an urban
 18 redevelopment site.

19 "Commercial project" means an undertaking involving
 20 commercial or light industrial development, which includes a
 21 mixed-use development where commercial or light industrial



1 facilities may be built into, adjacent to, under, or above
2 residential units.

3 "Multipurpose project" means a project consisting of any
4 combination of a commercial project, redevelopment project, or
5 residential project.

6 "Owner-occupied residential use" means any use currently
7 permitted in existing residential zones consistent with owner
8 occupancy, but shall not mean renting or subleasing by the owner
9 of an ALOHA home to any tenant or sublessee of any kind.

10 "Project" means a specific work or improvement, including
11 real and personal properties, or any interest therein, acquired,
12 owned, constructed, reconstructed, rehabilitated, or improved by
13 the corporation, including a commercial project, redevelopment
14 project, or residential project.

15 "Public agency" means any office, department, board,
16 commission, bureau, division, public corporation agency, or
17 instrumentality of the federal, state, or county government.

18 "Public facilities" includes streets, utility and service
19 corridors, and utility lines where applicable, sufficient to
20 adequately service developable improvements in an urban
21 redevelopment site, sites for schools, parks, parking garages,



1 sidewalks, pedestrian ways, and other community facilities.

2 "Public facilities" also includes public highways, as defined in

3 section 264-1, storm drainage systems, water systems, street

4 lighting systems, off-street parking facilities, sanitary

5 sewerage systems, facilities to address climate change and sea

6 level rise, as well as the land required for these facilities.

7 "Public facilities" also includes any facility owned and

8 operated by a public agency and having a useful life of at least

9 five years.

10 "Public transit station" means:

11 (1) A station connected to a locally preferred alternative
12 for a mass transit project; or

13 (2) For the city and county of Honolulu, a station of the
14 Honolulu rail transit system.

15 "Redevelopment project" means an undertaking for the
16 acquisition, clearance, replanning, reconstruction, and
17 rehabilitation, or a combination of these and other methods, of
18 an area for a residential project, for an incidental commercial
19 project, and for other facilities incidental or appurtenant
20 thereto, pursuant to and in accordance with this subpart. The
21 term "acquisition, clearance, replanning, reconstruction, and



1 rehabilitation" includes renewal, redevelopment, conservation,
2 restoration, or improvement, or any combination thereof.

3 "Residential project" means a project or that portion of a
4 multipurpose project, including residential dwelling units,
5 designed and intended for the purpose of providing housing and
6 any facilities as may be incidental or appurtenant thereto.

7 **§201H-B ALOHA homes program.** There is established the
8 ALOHA homes program for the purpose of providing low-cost, high-
9 density leasehold homes for sale to Hawaii residents on state-
10 owned lands within a one-mile radius of a public transit
11 station.

12 **§201H-C Urban redevelopment sites; established;**
13 **boundaries.** There shall be established urban redevelopment
14 sites that shall include all state-owned land within a one-mile
15 radius of a public transit station in a county having a
16 population greater than five hundred thousand.

17 **§201H-D Rules; guidelines.** (a) The corporation shall
18 establish rules pursuant to chapter 91 on health, safety,
19 building, planning, zoning, and land use, which shall supersede
20 all other inconsistent ordinances and rules relating to the use,
21 zoning, planning, and development of land and construction



1 thereon. Rules adopted under this section shall follow existing
 2 laws, rules, ordinances, and regulations as closely as is
 3 consistent with standards meeting minimum requirements of good
 4 design, pleasant amenities, health, safety, and coordinated
 5 development. The corporation may provide that lands within
 6 urban redevelopment sites shall not be developed beyond existing
 7 uses or that improvements thereon shall not be demolished or
 8 substantially reconstructed or provide other restrictions on the
 9 use of the lands.

10 (b) The following shall be the principles generally
 11 governing the corporation's action in urban redevelopment sites:

12 (1) The program seeks to produce enough housing to meet
 13 housing demand;

14 (2) Each development may include facilities to replace any
 15 facilities that must be removed for the development's
 16 construction;

17 (3) Developments shall endeavor to be revenue-neutral to
 18 the State and counties, and all revenues generated
 19 shall be used for the purposes of this subpart;

20 (4) The corporation shall consider the infrastructure
 21 burden of each development and the impact of the



1 development on the education system, and any
 2 mitigation actions, prior to construction;

3 (5) The corporation may build infrastructure beyond what
 4 exists in any development under this subpart and may
 5 sell the infrastructure capacity to private sector
 6 developers;

7 (6) The corporation may build common area facilities for
 8 any development undertaken pursuant to this subpart,
 9 which shall be paid through the sales of ALOHA homes
 10 units;

11 (7) Developments shall result in communities that permit
 12 an appropriate land mixture of residential,
 13 commercial, and other uses. In view of the innovative
 14 nature of the mixed use approach, urban design
 15 policies shall be established for the public and
 16 private sectors in the proper development of urban
 17 redevelopment sites; provided that any of the
 18 corporation's proposed actions in urban redevelopment
 19 sites that are subject to chapter 343 shall comply
 20 with chapter 343 and any federal environmental
 21 requirements; provided further that the corporation



1 may engage in any studies or coordinative activities
2 permitted in this subpart that affect areas lying
3 outside urban redevelopment sites where the
4 corporation, in its discretion, decides that those
5 activities are necessary to implement the intent of
6 this subpart. The studies or coordinative activities
7 shall be limited to facility systems, resident and
8 industrial relocation, and other activities engaged in
9 with the counties and appropriate state agencies. The
10 corporation may engage in construction activities
11 outside of urban redevelopment sites; provided that
12 the construction relates to infrastructure development
13 or residential or business relocation activities;
14 provided further that the construction shall comply
15 with the general plan, development plan, ordinances,
16 and rules of the county in which the urban
17 redevelopment site is located;

18 (8) Activities shall be located so as to provide primary
19 reliance on public transportation and pedestrian and
20 bicycle facilities for internal circulation within
21 urban redevelopment sites or designated subareas;



1 (9) Where compatible, land use activities within urban
 2 redevelopment sites, to the greatest possible extent,
 3 shall be mixed horizontally within blocks or other
 4 land areas and vertically as integral units of
 5 multi-purpose structures;

6 (10) Development shall prioritize maximizing density;
 7 provided that development may require a mixture of
 8 densities, building types, and configurations in
 9 accordance with appropriate urban design guidelines
 10 and vertical and horizontal integration of residents
 11 of varying incomes, ages, and family groups that
 12 reflect the diversity of Hawaii.

13 (11) Development shall provide necessary community
 14 facilities, such as parks, community meeting places,
 15 child care centers, schools, educational facilities,
 16 libraries, and other services, within and adjacent to
 17 residential development; provided that any school that
 18 is provided by the corporation as a necessary
 19 community facility shall be exempt from school size
 20 requirements as calculated by recent school site area
 21 averages pursuant to section 302A-1602;



1 (12) Public facilities within urban redevelopment sites
 2 shall be planned, located, and developed so as to
 3 support the redevelopment policies for the sites
 4 established by this subpart and plans and rules
 5 adopted pursuant to it;

6 (13) Development shall be designed, to the extent possible,
 7 to minimize traffic, parking, the use of private
 8 automobiles, and noise;

9 (14) Development shall be subject to chapter 104;

10 (15) On-site and off-site infrastructure funded by the
 11 State or county, as applicable, shall be brought to
 12 the development site; provided that the State and
 13 respective county may be reimbursed for its
 14 infrastructure contributions with proceeds from the
 15 sale of ALOHA homes; and

16 (16) Development shall include the establishment of a
 17 building operating and maintenance program, together
 18 with the funding to cover its cost.

19 (c) ALOHA homes within urban redevelopment sites shall not
 20 be advertised for rent, rented, or used for any purpose other
 21 than owner-occupied residential use; provided that the



1 corporation, by rule, shall establish penalties for violations
2 of this subsection, up to and including forced sale of an ALOHA
3 home.

4 (d) The design and development contracts for ALOHA homes
5 shall be subject to chapter 103D.

6 (e) The corporation shall, in the interest of revenue-
7 neutrality, recoup expenses through the sales of the leasehold
8 interest of ALOHA homes and other revenue sources, including the
9 leasing of commercial space.

10 **§201H-E Sale of the leasehold interest of ALOHA homes;**

11 **rules; guidelines.** (a) The corporation shall adopt rules,
12 pursuant to chapter 91, for the sale of the leasehold interest
13 of ALOHA homes under its control within urban redevelopment
14 sites; provided that each lease shall be for a term of ninety-
15 nine years. The rules shall include the following requirements
16 for an eligible buyer or owner of an ALOHA home within an urban
17 redevelopment site:

18 (1) The person shall be a qualified resident as defined in
19 section 201H-32;

20 (2) The person shall not use the ALOHA home for any
21 purpose other than owner-occupied residential use; and



1 (3) The person, or the person's spouse, or any other
2 person intending to live with the eligible buyer or
3 owner, shall not own any other real property,
4 including any residential and non-residential
5 property, beneficial ownership of trusts, and co-
6 ownership or fractional ownership, while owning an
7 ALOHA home in an urban redevelopment site; provided
8 that an eligible buyer may own real property up to six
9 months after closing on the purchase of an ALOHA home;
10 provided further that an owner of an ALOHA home in the
11 process of selling the ALOHA home may own other real
12 property up to six months prior to closing on the sale
13 of the ALOHA home to an eligible buyer;
14 provided that the rules under this subsection shall not include
15 any requirements or limitations related to an individual's
16 income or any preferences to first-time home buyers. The rules
17 shall include strict enforcement of owner-occupancy, including a
18 prohibition on renting or subleasing an ALOHA home to any tenant
19 or sublessee. Enforcement of the owner-occupancy condition may
20 include requirements for the use of facial recognition,
21 fingerprint authorization, or retina scan technologies, in-



1 person verification of owner-occupants, and prevention of access
 2 to all unauthorized persons. The corporation may also establish
 3 rules for a minimum number of days residents must be physically
 4 present on the premises and a maximum number of days non-
 5 residents may have access to the premises.

6 (b) The median ALOHA homes within urban redevelopment
 7 sites shall be priced at the minimum levels necessary to ensure
 8 that the development is revenue-neutral for the State and
 9 counties. The median ALOHA homes price shall be adjusted
 10 annually for inflation, as determined by the Bureau of Labor
 11 Statistics Consumer Price Index for urban Hawaii.

12 (c) The corporation shall establish waitlists for each
 13 residential development for eligible buyers to determine the
 14 order in which ALOHA homes shall be sold. Waitlist priorities
 15 may include:

- 16 (1) School, college, or university affiliation if the
 17 residential property is a redeveloped school, college,
 18 or university;
- 19 (2) Proximity of an eligible buyer's existing residence to
 20 an ALOHA home within the urban redevelopment site; and



1 (3) Other criteria based on the impact that the
2 development has on the eligible buyer.

3 (d) ALOHA homes within urban redevelopment sites shall be
4 sold only to eligible buyers.

5 (e) An owner of an ALOHA home may sell the ALOHA home;
6 provided that the corporation shall have the right of first
7 refusal to purchase the ALOHA home at a price that is determined
8 by the corporation using the price at which the owner purchased
9 the ALOHA home as the cost basis, adjusted for inflation, as
10 determined by the department of business, economic development,
11 and tourism using the Consumer Price Index for All Urban
12 Consumers for Honolulu, and may include a percentage of the
13 appreciation, if any, in value of the unit based on an appraisal
14 obtained by the corporation. If the corporation does not
15 exercise its right to purchase the ALOHA home, the ALOHA home
16 may be sold by the owner to an eligible buyer; provided that the
17 corporation shall retain seventy-five per cent of all profits
18 from the sale, net of closing and financing costs, using the
19 price at which the owner purchased the ALOHA home, plus
20 documented capital improvements, as the cost basis. Upon the
21 death of the owner of an ALOHA home, the ALOHA home may be



1 transferred to the deceased's heir by devise or as any other
2 real property under existing law.

3 (f) Any ALOHA home developed and sold under this subpart
4 shall not be subject to sections 201H-47, 201H-49, 201H-50, and
5 201H-51.

6 **§201H-F Use of public lands; acquisition of state lands.**

7 (a) If state lands under the control and management of other
8 public agencies are required by the corporation for the purposes
9 of this subpart, the agency having the control and management of
10 those required lands, upon request by the corporation and with
11 the approval of the governor, may convey or lease those lands to
12 the corporation, upon terms and conditions as may be agreed to
13 by the parties.

14 (b) Notwithstanding the foregoing, no public lands shall
15 be conveyed or leased to the corporation pursuant to this
16 section if the conveyance or lease would impair any covenant
17 between the State or any county or any department or board
18 thereof and the holders of bonds issued by the State or that
19 county, department, or board.

20 **§201H-G Acquisition of real property from a county.**

21 Notwithstanding the provision of any law or charter, any county,



1 by resolution of its county council, may, without public
 2 auction, sealed bids, or public notice, sell, lease, grant, or
 3 convey to the corporation any real property owned by the county
 4 that the corporation certifies to be necessary for the purposes
 5 of this subpart. The sale, lease, grant, or conveyance shall be
 6 made with or without consideration and upon terms and conditions
 7 as may be agreed upon by the county and the corporation.

8 Certification shall be evidenced by a formal request from the
 9 corporation. Before the sale, lease, grant, or conveyance may
 10 be made to the corporation, a public hearing shall be held by
 11 the county council to consider the same. Notice of the hearing
 12 shall be published at least six days before the date set for the
 13 hearing in the publication and in the manner as may be
 14 designated by the county council.

15 **§201H-H Condemnation of real property.** The corporation,
 16 upon making a finding that it is necessary to acquire any real
 17 property for its immediate or future use for the purposes of
 18 this subpart, may acquire the property, including property
 19 already devoted to a public use, by condemnation pursuant to
 20 chapter 101. The property shall not thereafter be taken for any
 21 other public use without the consent of the corporation. No



1 award of compensation shall be increased by reason of any
 2 increase in the value of real property caused by the designation
 3 of the urban redevelopment site or plan adopted pursuant to a
 4 designation, or the actual or proposed acquisition, use, or
 5 disposition of any other real property by the corporation.

6 **§201H-I Construction contracts.** The construction
 7 contracts for ALOHA homes shall be subject to chapter 103D.

8 **§201H-J Lease of projects.** Notwithstanding any law to the
 9 contrary, the corporation, without recourse to public auction or
 10 public notice for sealed bids, may lease for a term not
 11 exceeding sixty-five years all or any portion of the real or
 12 personal property constituting a commercial project to any
 13 person, upon terms and conditions as may be approved by the
 14 corporation; provided that all revenues generated from the lease
 15 shall be used to support the purpose of the ALOHA homes program.

16 **§201H-K Dedication for public facilities as condition to**
 17 **development.** The corporation shall establish rules requiring
 18 dedication for public facilities of land or facilities by
 19 developers as a condition of developing real property within
 20 urban redevelopment sites. Where state and county public



1 facilities dedication laws, ordinances, or rules differ, the
2 provision for greater dedication shall prevail.

3 **§201H-L ALOHA homes revolving fund.** There is established
4 the ALOHA homes revolving fund into which all receipts and
5 revenues of the corporation pursuant to this subpart shall be
6 deposited. Proceeds from the fund shall be used for the
7 purposes of this subpart.

8 **§201H-M Expenditures of ALOHA homes revolving fund under**
9 **the corporation exempt from appropriation and allotment.** Except
10 as to administrative expenditures, and except as otherwise
11 provided by law, expenditures from the ALOHA homes revolving
12 fund administered by the corporation may be made by the
13 corporation without appropriation or allotment of the
14 legislature; provided that no expenditure shall be made from and
15 no obligation shall be incurred against the ALOHA homes
16 revolving fund in excess of the amount standing to the credit of
17 the fund or for any purpose for which the fund may not lawfully
18 be expended. Nothing in sections 37-31 to 37-41 shall require
19 the proceeds of the ALOHA homes revolving fund administered by
20 the corporation to be reappropriated annually.



1 **§201H-N Assistance by state and county agencies.** Any
 2 state or county agency may render services for the purposes of
 3 this subpart upon request of the corporation.

4 **§201H-O Lands no longer needed.** Lands acquired by the
 5 corporation from another government agency that are no longer
 6 needed for the ALOHA homes program by the corporation shall be
 7 returned to the previous owner of those lands. Lands acquired
 8 by the corporation from a private party that are owned by the
 9 corporation and designated for the ALOHA homes program but are
 10 subsequently no longer needed for the ALOHA homes program shall
 11 be retained by the corporation.

12 **§201H-P Rules.** The corporation may adopt rules pursuant
 13 to chapter 91 that are necessary for the purposes of this
 14 subpart.

15 C. Leasehold Condominiums on State Lands

16 **§201H-Q Leasehold condominiums on state lands.** (a) The
 17 corporation may sell leasehold units in condominiums organized
 18 pursuant to chapter 514B and developed under this subpart on
 19 state land to a qualified resident, as defined in section
 20 201H-32.



1 (b) The term of the lease may be for ninety-nine years;
2 provided that the corporation may extend or modify the fixed
3 rental period of the lease or extend the term of the lease.

4 (c) The sale of leasehold units shall be subject to
5 sections 201H-47, 201H-49, and 201H-50, except for units sold at
6 fair market value.

7 (d) The powers conferred upon the corporation by this
8 section shall be in addition and supplemental to the powers
9 conferred by any other law, and nothing in this section shall be
10 construed as limiting any powers, rights, privileges, or
11 immunities so conferred."

12 SECTION 3. Chapter 237, Hawaii Revised Statutes, is
13 amended by adding a new section to be appropriately designated
14 and to read as follows:

15 "§237- Exemption of sale of leasehold interest for
16 ALOHA home units. In addition to the amounts exempt under
17 section 237-24, this chapter shall not apply to amounts received
18 from the sale of a leasehold interest in an ALOHA home under
19 chapter 201H, part II, subpart B."

20 SECTION 4. Section 171-2, Hawaii Revised Statutes, is
21 amended to read as follows:



1 **"§171-2 Definition of public lands.** "Public lands" means
2 all lands or interest therein in the State classed as government
3 or crown lands previous to August 15, 1895, or acquired or
4 reserved by the government upon or subsequent to that date by
5 purchase, exchange, escheat, or the exercise of the right of
6 eminent domain, or in any other manner; including lands accreted
7 after May 20, 2003, and not otherwise awarded, submerged lands,
8 and lands beneath tidal waters that are suitable for
9 reclamation, together with reclaimed lands that have been given
10 the status of public lands under this chapter, except:

11 (1) Lands designated in section 203 of the Hawaiian Homes
12 Commission Act, 1920, as amended;

13 (2) Lands set aside pursuant to law for the use of the
14 United States;

15 (3) Lands being used for roads and streets;

16 (4) Lands to which the United States relinquished the
17 absolute fee and ownership under section 91 of the
18 Hawaiian Organic Act prior to the admission of Hawaii
19 as a state of the United States unless subsequently
20 placed under the control of the board of land and
21 natural resources and given the status of public lands



- 1 in accordance with the state constitution, the
- 2 Hawaiian Homes Commission Act, 1920, as amended, or
- 3 other laws;
- 4 (5) Lands to which the University of Hawaii holds title;
- 5 (6) Lands that are set aside by the governor to the Hawaii
- 6 housing finance and development corporation; lands
- 7 leased to the Hawaii housing finance and development
- 8 corporation by any department or agency of the State;
- 9 or lands to which the Hawaii housing finance and
- 10 development corporation in its corporate capacity
- 11 holds title;
- 12 (7) Lands to which the Hawaii community development
- 13 authority in its corporate capacity holds title;
- 14 (8) Lands set aside by the governor to the Hawaii public
- 15 housing authority or lands to which the Hawaii public
- 16 housing authority in its corporate capacity holds
- 17 title;
- 18 (9) Lands to which the department of agriculture holds
- 19 title by way of foreclosure, voluntary surrender, or
- 20 otherwise, to recover moneys loaned or to recover
- 21 debts otherwise owed the department under chapter 167;



1 (10) Lands that are set aside by the governor to the Aloha
 2 Tower development corporation; lands leased to the
 3 Aloha Tower development corporation by any department
 4 or agency of the State; or lands to which the Aloha
 5 Tower development corporation holds title in its
 6 corporate capacity;

7 (11) Lands that are set aside by the governor to the
 8 agribusiness development corporation; lands leased to
 9 the agribusiness development corporation by any
 10 department or agency of the State; or lands to which
 11 the agribusiness development corporation in its
 12 corporate capacity holds title;

13 (12) Lands to which the Hawaii technology development
 14 corporation in its corporate capacity holds title; and

15 (13) Lands to which the department of education holds
 16 title;

17 provided that, except as otherwise limited under federal law and
 18 except for state land used as an airport as defined in section
 19 262-1, public lands shall include the air rights over any
 20 portion of state land upon which a county mass transit project
 21 is developed after July 11, 2005."



1 SECTION 5. Section 171-64.7, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) This section applies to all lands or interest therein
4 owned or under the control of state departments and agencies
5 classed as government or crown lands previous to August 15,
6 1895, or acquired or reserved by the government upon or
7 subsequent to that date by purchase, exchange, escheat, or the
8 exercise of the right of eminent domain, or any other manner,
9 including accreted lands not otherwise awarded, submerged lands,
10 and lands beneath tidal waters that are suitable for
11 reclamation, together with reclaimed lands that have been given
12 the status of public lands under this chapter, including:

13 (1) Land set aside pursuant to law for the use of the
14 United States;

15 (2) Land to which the United States relinquished the
16 absolute fee and ownership under section 91 of the
17 Organic Act prior to the admission of Hawaii as a
18 state of the United States;

19 (3) Land to which the University of Hawaii holds title;

20 (4) Land that is set aside by the governor to the Hawaii
21 housing finance and development corporation; land



1 leased to the Hawaii housing finance and development
 2 corporation by any department or agency of the State;
 3 or land to which the Hawaii housing finance and
 4 development corporation in its corporate capacity
 5 holds title;

6 (5) Land to which the department of agriculture holds
 7 title by way of foreclosure, voluntary surrender, or
 8 otherwise, to recover moneys loaned or to recover
 9 debts otherwise owed the department under chapter 167;

10 (6) Land that is set aside by the governor to the Aloha
 11 Tower development corporation; or land to which the
 12 Aloha Tower development corporation holds title in its
 13 corporate capacity;

14 (7) Land that is set aside by the governor to the
 15 agribusiness development corporation; or land to which
 16 the agribusiness development corporation in its
 17 corporate capacity holds title;

18 (8) Land to which the Hawaii technology development
 19 corporation in its corporate capacity holds title;

20 (9) Land to which the department of education holds title;
 21 and



1 (10) Land to which the Hawaii public housing authority in
2 its corporate capacity holds title."

3 SECTION 6. Chapter 201H, Hawaii Revised Statutes, part II
4 is amended by designating sections 201H-31 to 201H-70 as subpart
5 A and inserting a title before section 201H-31 to read as
6 follows:

7 "A. General Provisions"

8 SECTION 7. Section 302A-1603, Hawaii Revised Statutes, is
9 amended by amending subsection (b) to read as follows:

10 "(b) The following shall be exempt from this section:

- 11 (1) Any form of housing permanently excluding school-aged
- 12 children, with the necessary covenants or declarations
- 13 of restrictions recorded on the property;
- 14 (2) Any form of housing that is or will be paying the
- 15 transient accommodations tax under chapter 237D;
- 16 (3) All nonresidential development; [~~and~~]
- 17 (4) Any development with an executed education
- 18 contribution agreement or other like document with the
- 19 agency for the contribution of school sites or payment
- 20 of fees for school land or school construction[~~-~~]; and



1 (5) Any form of development by the Hawaii housing finance
 2 and development corporation pursuant to chapter 201H,
 3 part II, subpart B."

4 SECTION 8. There is appropriated out of the general
 5 revenues of the State of Hawaii the sum of \$ or so
 6 much thereof as may be necessary for fiscal year 2021-2022 and
 7 the same sum or so much thereof as may be necessary for fiscal
 8 year 2022-2023 to be deposited into the ALOHA homes revolving
 9 fund established pursuant to section 201H-L, Hawaii Revised
 10 Statutes.

11 SECTION 9. There is appropriated out of the ALOHA homes
 12 revolving fund established pursuant to section 201H-L, Hawaii
 13 Revised Statutes, the sum of \$ or so much thereof as
 14 may be necessary for fiscal year 2021-2022 and the same sum or
 15 so much thereof as may be necessary for fiscal year 2022-2023
 16 for the purposes for which the revolving fund is established.

17 The sums appropriated shall be expended by the Hawaii
 18 housing finance and development corporation for the purposes of
 19 this Act.

20 SECTION 10. There is appropriated out of the general
 21 revenues of the State of Hawaii the sum of \$ or so



1 much thereof as may be necessary for fiscal year 2021-2022 and
 2 the same sum or so much thereof as may be necessary for fiscal
 3 year 2022-2023 to fund one full-time equivalent (1.0 FTE)
 4 program manager position, one full-time equivalent (1.0 FTE)
 5 compliance specialist position, and one full-time equivalent
 6 (1.0 FTE) fiscal clerk position within the Hawaii housing
 7 finance and development corporation for the ALOHA homes program.

8 The sums appropriated shall be expended by the department
 9 of business, economic development, and tourism for the purposes
 10 of this Act.

11 SECTION 11. In codifying the new sections added by
 12 section 2 of this Act, the revisor of statutes shall substitute
 13 appropriate section numbers for the letters used in designating
 14 the new sections in this Act.

15 SECTION 12. Statutory material to be repealed is bracketed
 16 and stricken. New statutory material is underscored.

17 SECTION 13. This Act shall take effect on July 1, 2050.



S.B. NO. ¹
S.D. 2

Report Title:

HHFDC; Affordable Housing; ALOHA Homes; Public Land Exemptions; Appropriation

Description:

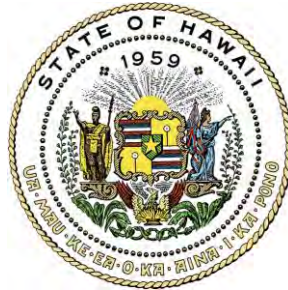
Establishes the ALOHA homes program to develop low-cost homes on state-owned and county-owned land in urban redevelopment sites to be sold in leasehold by the Hawaii housing finance and development corporation (HHFDC) to qualified residents. Exempts certain land from the definition of public lands. Requires HHFDC to gain legislative approval before disposing of certain lands. Provides for the disposition of lands acquired by HHFDC but no longer needed for the ALOHA homes program. Appropriates moneys. Effective 7/1/2050. (SD2)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



ALOHA Homes Implementation Study

PREPARED FOR



HAWAI'I HOUSING FINANCE AND DEVELOPMENT CORPORATION
(HHFDC)

PREPARED BY



HAWAI'I APPLESEED
CENTER FOR LAW & ECONOMIC JUSTICE



**HAWAI'I BUDGET
& POLICY CENTER**

ALOHA Homes Implementation Study

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Executive Summary

One of the defining public policy issues of our day is the inadequacy of housing for Hawai'i's families. The cost of housing is most often cited as the motivation for out-migration of families seeking better economic opportunities in other states and as a primary cause for our high rate of homelessness.

The ALOHA Homes Implementation Study aims to ascertain the feasibility of implementing the proposed ALOHA Homes program and, if feasible, formulate an implementation plan. As part of our research we evaluated key components of the Singapore leasehold housing model to see which could be applied in Hawai'i. Singapore was chosen as an inspiration for the ALOHA Homes bill because it has successfully provided high quality and affordable housing for its more than 5 million citizens, and virtually eliminated homelessness.

In our approach, we did not simply comment on the viability of the Singapore model but sought to provide solutions that could work in Hawai'i. Our research team met with housing experts from developers, to manufacturers, to administrators, to policy problem-solvers in order to assemble best-practices and lessons learned applicable to Hawai'i's unique circumstances. And we asked local consumers, who represent the target group for ALOHA Homes purchases, to weigh in on a proposed affordable leasehold model.

We found that many of the provisions proposed in the ALOHA Homes model would have the potential to address housing needs of middle-income earners that are currently priced out of the housing market and have very limited opportunities for homeownership.

In our analysis we found several key components of the Singapore model that would not be currently feasible in Hawai'i. Notable among these are:

- **Government structure:** Singapore has a highly centralized government with extensive land use authority and limited opportunities for citizen input in development decisions.
- **Cost of Construction:** Singapore is able to build housing and infrastructure at costs that are less than half the costs in Hawai'i, in large part because the construction workforce is dominated by nonunionized immigrant laborers.
- **Significant mortgage subsidies for lower-income residents:** Singapore ensures widespread affordability by reducing the home price for residents with lower incomes. These subsidies aim to keep monthly housing costs at approximately 22% of a resident's income.

The above elements of the Singapore model make some aspects of the current ALOHA Homes bill infeasible or not recommended for Hawai'i. Our findings indicate that other aspects proposed for the ALOHA Homes model which would not be recommended for other reasons.

Key components of the ALOHA Homes bill which are **infeasible** include:

- 1) **Constructing a 2 bedroom/2 bathroom home for \$300,000.**
Analysis: Our research indicates a feasible price to be approximately \$400,000.

2) **Minimum Density of 250 homes per acre.**

Analysis: Due to our government, social, and political structure, imposing a requirement that does not account for local needs or geographic variation would likely be an empty mandate.

3) **Delivering housing to low- and middle-income earners without State Subsidy.**

Analysis: Even at a low price of \$400,000, assuming a subsidy of State lands and district-wide infrastructure, house payments would be affordable to households earning approximately \$80,000 a year, or 80% of area median income for Honolulu.¹ Households with lower incomes would need further mortgage subsidies to make home purchases affordable.

Key components of the ALOHA Homes bill which are feasible, but **not a best practice** for maximizing long-term affordability include:

- 1) **Five-year affordability period.** Owner can sell at market price after five years, and will share 75 percent of the equity with the housing agency. The home is no longer affordable to future buyers.

Analysis: Singapore allows a sale at maximum price to qualified buyers after five years, without losing affordability because the government structure enables constant replacement of affordable homes and public land acquisition. This does not apply to Hawai'i or other places we researched with high citizen engagement in land use decisions.

- 2) **No income restriction.** A person at any income level can purchase an ALOHA home, even though in Singapore there are income restrictions for purchasing new and subsidized homes.

Analysis: Every jurisdiction in the U.S. with below-market housing has an income limit. European cities also generally have income limits, with Helsinki having a low-income preference instead of limit.

Other main program areas which need further consideration before implementation include:

- 1) **Stewardship:** Successful below-market housing programs require management, generally from a non-profit or other third-party organization. The State would need to find a partner.
- 2) **Infrastructure Funding:** Significant public investment in infrastructure is needed to enable housing construction in TOD areas at the prices proposed in this study. The public sector must take a much larger role in this area.
- 3) **State land contribution/Lease end game issues:** The ALOHA Homes Implementation Study proposes a 99-year lease but does not address what happens at the end of the lease term. In Singapore, the government does not extend the lease period but instead re-houses people as the property generally declines in value when the remaining lease period is shorter than 40 years. It is not clear if this would also be the plan for ALOHA Homes.

¹ Assumptions: 3% down payment, 30-year mortgage loan at 3% interest, HOA \$350/month, no PMI, homeowner's insurance \$500. HUD Honolulu Household 100% AMI 2020 is \$101,600

We continue to gather important stakeholder feedback on this issue, but it is clear the use of public lands for residential leasehold ownership is controversial with important legal, political, and financial considerations.

Although some parts of the ALOHA Homes proposal are currently infeasible, the lack of affordable housing is also unsustainable for too many Hawai'i residents. The scarcity of affordable homeownership opportunities for local residents who are earning average or even above-average wages is a frustrating and demoralizing experience, as voiced by one focus group participant- "I've been saving up for years, but it's just not enough." Some people when faced with this reality decide to limit their aspirations and give up on homeownership, while some others move to other states. During our focus group interviews it was striking how many people when presented with the prices and requirements of the leasehold program described in this study responded by saying they felt hopeful. They wanted to be kept informed of program progress and wanted to know where and when the housing would be built.

A state-supported affordable leasehold housing program, that addresses the above obstacles, could fulfill an important housing need for Hawai'i.

Methodology of Study

Project Team

The ALOHA Homes Implementation Study was commissioned by the Hawai'i Housing Finance and Development Corporation (HHFDC), the primary agency responsible for overseeing affordable housing finance and development in Hawai'i. The study was conducted by the Hawai'i Appleseed Center for Law & Economic Justice. The study team included:

- Kenna Stormogipson (Policy and Data Analyst, Hawai'i Budget and Policy Center)
- Williamson Chang, JD (Legal Analyst, UHM William S. Richardson School of Law)
- Dave Freudenberger (Public Finance Consultant, Goodwin Consulting Group)
- Charles Long (Developer and author of "Finance for Real Estate Development")
- Dennis Silva (Planner, Hawai'i Planning LLC)
- Jessica Sato (Freelance Designer)
- Abbey Seitz (Community Planner)
- Steven Miao, (Research Assistant, Hawai'i Budget and Policy Center)
- Jacob Heberle (Summer Intern, Hawai'i Appleseed)
- Arjuna Heim (Fall Intern, Hawai'i Appleseed)

The team members listed above represent a project team with local and regional expertise in housing policy, real estate finances, legal analysis, state housing policy and urban development.

Review of Relevant Housing Studies and Programs

The project team reviewed relevant housing studies and programs to document best practices in the design, distribution and management of affordable housing, both locally and abroad. The team's greatest focus was on public housing and "social housing" programs in Singapore, Vienna and Helsinki. These programs were given most attention because they are state-supported, effective housing delivery systems that provide affordable home-ownership and rental opportunities to low- and middle-income residents. Lessons learned from these publicly supported programs are included throughout the study. In addition to reviewing existing literature and publications about various public housing programs, the project team interviewed government officials from the model jurisdictions when possible.

Local Stakeholder Interviews and Focus Groups

To ensure that this study was centered on local knowledge, the project team conducted more than 30 local stakeholder interviews. Stakeholders represented government agencies, academic institutions, nonprofit organizations, community groups, and private developers that are involved in affordable housing in Hawai'i. Collectively, they provided details about the challenges of and opportunities for different affordable housing delivery systems, addressing costs, community engagement, government accountability and equity concerns. The full list of stakeholders who were interviewed is included in Appendix A.

The project team also gathered input from local residents about a potential ALOHA Homes Program through four one-on-one interviews and four focus groups. Each focus group was held via video conference, lasted approximately 1.5 hours, and included an average of four participants. In total, there were 18 participants. The names of focus group participants engaged in this study are not provided to protect their privacy. Key input from stakeholder interviews and focus groups is referenced throughout the study.

Description of ALOHA Homes Concept

Program History

The proposed ALOHA Homes Program was first championed by State Senator Stanley Chang (District 9), who represents the area stretching from Diamond Head to Hawai'i Kai. As chairman of the Senate Committee on Housing since 2019, Senator Chang has focused much of his attention on ending Hawai'i's housing shortage. He is particularly inspired by the affordable housing model of Singapore, a city-state at the southern tip of Malaysia where it is estimated that over 90 percent of the city's 5.5 million people are homeowners.²

² Phang, S. and Helble, M., (2016). Housing Policies In Singapore. ADBI Working Paper 559. Tokyo: Asian Development Bank Institute. Available: <http://www.adb.org/publications/housing-policies-singapore/>

In early 2019, Senator Chang introduced [Senate Bill 1](#) (“ALOHA Homes Bill”).³ While the ALOHA Homes Bill did not ultimately pass, the state approved legislation to study provisions in the bill in [Act 167](#) (Session Laws of Hawai‘i 2019). As part of Act 167, HHFDC is required to “to study and formulate a plan to implement an ALOHA Homes program to provide low-cost, high-density leasehold homes for sale to Hawai‘i residents on state-owned lands within a one-half mile radius of a public transit station.”⁴ This study is a result of this Act 167 requirement, and our goal is to provide data and analysis to help the State of Hawai‘i implement an affordable leasehold ownership program.

The Original Vision for the ALOHA Homes Program

State Senator Stanley Chang envisioned the ALOHA Homes Program to be based on the following principles, as outlined in the [ALOHA Homes Bill](#):

- **Housing should be affordable for Hawai‘i residents** with incomes at or below 80 percent of the area median income (AMI).⁵ This means a two-bedroom unit could cost no more than approximately \$300,000.
- **Down payments should be nonrestrictive for potential homeowners at 3 percent or less** so that the down payment for a two-bedroom unit would be approximately \$9,000 or less.
- **99-year leasehold tenure** for sales of residential condominiums on state land.
- **Housing should be revenue-neutral for the state** and all expenses should be recouped through the sale of the leasehold interest on ALOHA Homes and other revenue sources.
- **Housing should be high-density residential** to support future transit-oriented development (TOD) on O‘ahu. The ALOHA Homes Bill defined “high-density” as an area that has at least 250 dwelling units per acre. This density is the same as “801 South Street,” two mid-priced condominium towers built in downtown Honolulu between 2015 and 2017. These two towers have a density of roughly 250 homes per acre, with 46 stories reaching 400 feet high. The relatively affordable price of these two towers was due in part to their density, which allowed more apartments to fit on a parcel of land.
- **Housing should be part of mixed land-use communities**, accommodating both residential and commercial uses to promote walkable and livable neighborhoods.
- **Housing should be sited near community amenities** such as parks, community meeting places, childcare centers, schools, educational facilities and libraries.
- **Housing should be owner-occupied** to ensure local residents have the opportunity to build equity and have more control over their housing than they would as renters.
- **Housing should be sited in urban development areas**, to promote smart and sustainable growth in Hawai‘i. The ALOHA Homes Bill defined “urban development sites” as state and county land within county-designated TOD areas or within a half-mile radius of a public transit station in a county that has a population greater than 500,000.
- **There should be no first-time homebuyer or income limits on potential homeowners**, to promote neighborhoods that integrate residents with a variety of incomes and ages.

³ Senate Bill 1, S.D. 2. (2019). Related to Housing. Available here: https://www.capitol.hawaii.gov/session2019/bills/SB1_SD2_.pdf

⁴ Act 167 (H.B. No. 820, H.D. 1, S.D. 1, C.D. 1). (Session Laws of Hawai‘i 2019). Related to Housing. Available here: https://www.capitol.hawaii.gov/session2019/bills/GM1269_.PDF

⁵ Eighty percent of Hawai‘i’s area median income for a family of four in 2020 was \$96,400, according to DBEDT. Available: <https://dbedt.hawaii.gov/hcda/annual-ami-stats/>

- **Homeowners would not own any other real property** to prevent people from using the program primarily as a form of real estate investment. Anyone who currently owns property would be required to sell that property within six months of purchasing a below-market home. This clause emphasizes that the primary purpose of the program is to provide affordable housing and that wealth or equity building is secondary.
- **There would be waitlist preferences** to prioritize people who are affected by the new development, such as local area residents. The program would also prioritize residents affiliated with a school or university if housing is built on land owned by the school or university.
- **Restricted resale to eligible buyers** would ensure that the units are affordable long-term. Home sales would be restricted to buyers who meet the eligibility requirements as outlined above, including to local residents who own no other property.
- **Equity sharing** would provide a fair profit, but not a windfall to the owner who resells a unit. The owner has two options:
 1. The owner can sell the home back to the public agency for the original purchase price plus inflation for Honolulu as determined by the Consumer Price Index.
 2. If the agency does not exercise the right to purchase the home, the owner may sell the property to another qualified buyer at market price and keep 25 percent of the profit, while the public agency would retain 75 percent of the gain.

This equity share provision emphasizes that the purpose of the program is to provide and maintain a supply of affordable housing for local residents. While some profit for the owner is acceptable, it is not the main goal of the program.

Differences Between the ALOHA Homes Program and the Singapore Model

Although similar, there are key differences between Singapore’s Housing and Development Board (HDB) approach to affordable housing and the original vision for the ALOHA Homes Program:

- **Singapore allows less citizen oversight and community involvement.** Generally speaking, the Singaporean government designed HDB with minimal citizen oversight or community involvement. Although the ALOHA Homes Bill does not currently outline any community involvement process, HHFDC must comply with numerous state rules and regulations designed to promote transparency and protect the public interest. Some examples of this include HRS §91 rulemaking procedures, which require agencies to provide the public access to information on and opportunities to inspect and provide input on agency laws and procedures.⁶

Hawai‘i’s Sunshine Laws also require meetings of the HHFDC board to be conducted as “openly as possible.” In contrast, Singapore is one of a minority of countries that does not have “Freedom of Information” laws, for citizens to request government data,⁷ and in general

⁶ Hawai‘i Revised Statutes (HRS) §91-2, Title 8, Public Proceedings and Records, Chapter 91 Administrative Procedure. Available at: https://files.hawaii.gov/dcca/oah/hrs/hrs_oah_91.pdf

⁷ Freedominfo.org A total 119 countries have Freedom of Information laws, but not Singapore.

the level of transparency and public involvement in land use planning in Singapore is much lower than in Hawai'i.

- **Singapore provides income-based subsidies for first-time buyers.** HDB provides income-based subsidies amounting to 20-25 percent of a person's income in order to ensure that mortgages are affordable. For example, a person earning \$2,000 per month would receive a subsidy to reduce their mortgage payment to \$450 a month, but a person earning \$4,000 a month would pay a \$900 monthly mortgage for the same home. Homeownership is made affordable for everyone because initial home prices are based partly on income, not just on the cost of building the home. The ALOHA Homes Bill does not include mortgage subsidies based on income. Instead, it emphasizes that the program is revenue-neutral for the state and the price of the homes is based on the cost of building the units.
- **Singapore has strict eligibility requirements for purchasers of new homes.** Purchasing new affordable housing with 99-year leases in Singapore is heavily regulated by residency, ethnicity, age and income requirements. Singapore eligibility restrictions include:
 - **Minimum age:** A married couple must be at least 21-years-old while the minimum age for a single person is 35-years-old.
 - **Income Restrictions:** Income limits apply to people purchasing a new HDB home. Although top income earners are excluded from the new construction program, there are no income restrictions on the secondary resale market.
 - **Strict Ethnic Quotas:** Singapore supports racial integration through its "Ethnic Integration Policy," which sets quotas for HDB blocks and neighborhoods for the city's major ethnic groups: Malay, Chinese and Indian/Others. The racial quotas are updated periodically to ensure they continue to reflect Singapore's demographics. For example, in 1989 the permissible proportion of HDB apartments for Malays was up to 22 percent in any given neighborhood and 25 percent within an HDB block.⁸ These ethnic quotas also apply to the secondary resale market.

None of the above restrictions apply to ALOHA Homes.

- **The Singapore model is entirely state financed:** The Singapore housing model is entirely financed by the state. No outside funders or investors are involved in building housing. The ALOHA Homes model does not explicitly identify its financing strategy, but says the program must be "revenue-neutral." In Singapore, the housing program is not revenue-neutral, but instead receives considerable subsidies from the government to ensure that almost every working Singapore resident can afford their first home purchase. A 2019 presentation by HDB for the World Bank highlights that affordability is made possible through "generous subsidies

⁸ Koo, A. (2020, August 12). "HDBGuide To Understanding HDB Ethnic Integration Policy (EIP) And Singapore Permanent Resident (SPR) Quota." Dollars and Sense. Available at: <https://dollarsandsense.sg/guide-understanding-hdb-ethnic-integration-policy-eip-singapore-permanent-resident-spr-quota/>

and concessionary loans.”⁹ These subsidies include not only a reduction in the price of the home, but also government issued mortgages with 2.6 percent interest, and down payment support through a government savings account.

In Singapore, subsidies are provided because housing is considered a right of citizenship, much like education and healthcare. As a fundamental right, the government develops tens of thousands of homes a year (15,800 homes in 2018) so that the affordable housing supply meets residents’ needs and no citizen is left homeless.

- **Singapore’s 37 percent payroll tax helps with down payment:** The Singapore government has a mandatory savings plan similar to social security in the United States, in which every employee and employer contributes a portion of a worker’s wages towards a government-managed savings account. The employee contributes 20 percent from each paycheck and the employer puts in 17 percent. The total 37 percent goes to the Central Provident Fund. This wage-based (i.e. payroll) tax is three times the U.S. Social Security tax of 12.4 percent (with 6.2 percent from employees and 6.2 percent from employers).

In Singapore, approximately 62 percent of a person’s Central Provident Fund savings is set aside to be used for a down payment, educational or other personal investments. According to HDB program documents,¹⁰ it takes the average worker three years to accumulate mandatory savings sufficient for a down payment.

The ALOHA Homes proposal does not create a mandatory payroll tax or propose a specific mechanism for helping residents acquire a down payment.

As is evident from the above description, the ALOHA Homes proposal was inspired by the Singapore model but differs significantly in key areas of program design, including owner qualifications, project financing and approval, and mandates and subsidies for leasehold buyers.

Intended Goals of the ALOHA Homes Program

As outlined in the 2019 ALOHA Homes Bill, the intended goals of the ALOHA Homes Program envisioned by Senator Chang are to:

- 1) End the housing shortage in Hawai‘i;
- 2) Facilitate development of affordable leasehold homes on state land near future transit stations;
- 3) Authorize HHFDC to sell residential units as 99-year leasehold properties; and
- 4) Develop an ALOHA Homes demonstration project by July 1, 2025.

⁹ April 2019 presentation to the World Bank, “Affordable Housing Financing and Delivery in Singapore” by Ms. Sia Tze Ming, Deputy Director Housing & Development Board, Singapore.

¹⁰IBID

Feasibility of Key ALOHA Homes Components

Why the Singapore Housing Model Cannot Be Replicated in Hawai'i

Styles of Governance

Singapore: One source¹¹ notes that Singapore enjoys political stability, honest and effective government, and successful economic policies but “is also known for its limited tolerance for opposition or criticism.” Though Singapore does have elections, the People’s Action Party has been in power since independence in 1965 and, by most accounts, is in little danger of being unseated in the near future. With no dissenting opinions from rival political parties or the public, Singapore’s top-down, unified style of government has allowed its Housing & Development Board to construct public housing at a scale uncommon in most democratic nations.

Hawai'i: Though Hawai'i's voters and elected officials are heavily Democratic-leaning, there is much disagreement about public spending and state-run programs. Community sentiment, especially about housing policy, can be sharply divided and strongly expressed. Because developing an adequate supply of affordable housing requires a significant and sustained public infrastructure investment, access to developable land, and community approval, it is difficult to imagine Hawai'i replicating Singapore’s speed and scale of development.

Labor Unions and Wages

Singapore: Singapore’s access to abundant, cheap, migrant labor has allowed it to build housing at a low cost. Singapore is one of the world's biggest net importers of migrant labor,¹² with workers coming primarily from Malaysia, Bangladesh, Nepal, India, China and other Asian nations. Legal constraints keep migrant workers from organizing for better wages and conditions. As a result, Singapore’s migrant construction workers earn notoriously low wages—approximately \$5–20 per hour.¹³

Hawai'i: Hawai'i leads the nation in union membership, with 23.1 percent of the state’s workers in labor unions. Political support for unions is strong.¹⁴ These unions allow workers to negotiate for higher compensation and better working conditions through the power of collective bargaining.¹⁵ In contrast to Singapore’s poorly-paid migrant laborers, Hawai'i’s construction workers earn an average of \$33 per hour.¹⁶

¹¹ <http://factsanddetails.com/southeast-asia/Singapore>

¹² Sacco, M. (2016, February 16). “What Does Singapore Owe Its Migrant Workers?” Carnegie Council for Ethics in International Affairs. Available at: https://www.carnegiecouncil.org/publications/ethics_online/0114

¹³ Kirk, M. (2015, June 9). “The Peculiar Inequality of Singapore's Famed Public Housing.” Bloomberg CityLab. Available at: <https://www.bloomberg.com/news/articles/2015-06-09/for-migrant-workers-in-singapore-it-s-build-high-live>

¹⁴ Sauter, M. (2019, April 10). “Hawaii, New York are strongest states for unions, S. Carolina and N. Carolina are weakest.” USA Today. Available at: <https://www.usatoday.com/story/money/2019/04/10/hawaii-new-york-strongest-states-trade-unions-north-carolina-south-carolina-weakest/39305975/>

¹⁵ Sauter (2019)

¹⁶ Bureau of Labor Statistics (2019), <https://www.bls.gov/oes/>

Construction Costs

Singapore: The average cost for constructing a standard mid-rise or high-rise condominium in Singapore is \$125–150 per square foot.¹⁷

Hawai‘i: The average cost to construct the same kind of multifamily dwelling in Hawai‘i is approximately \$275–400 per square foot, more than double Singapore’s cost of construction.¹⁸ Duplicating Singapore’s cost of construction would require construction wages that are not possible or desirable for Hawai‘i workers.

Models That Can Work in Hawai‘i

After determining that several aspects of the Singapore model cannot be replicated in Hawai‘i, our project team looked at examples of affordable housing programs in Helsinki and Vienna to explore other options that Hawai‘i might draw from. These two places are known for their exceptional affordable housing policies and, similar to Hawai‘i, they have very strong unions, a high cost of construction, and a robust process to engage citizens in planning decisions. Their projects also deal with a high degree of NIMBYism (Not In My Back Yard), which is prominent in Hawai‘i’s development processes.

Vienna, Austria

Cost of construction: \$250–300 per gross square foot¹⁹

Union labor representation: Trade unions are politically influential in Austria, particularly in Vienna.²⁰ Across Austria, there are an estimated 1.4 million employees who are trade union members, the majority of whom reside in Vienna.²¹ The Austrian Trade Union Federation provides various benefits to its members, such as negotiation of collective agreements, safeguarding of social standards and fair wages, and legal services.²²

Citizen engagement in land use decisions: Vienna has a long history of civic engagement in community planning, and it continues to guide urban development today. For example, to overcome recent opposition to city transit service initiatives and other car-free amenities, officials brought residents into the decision-making process by providing community groups and neighborhood associations with small grants (\$5,000) to plan and finance public-space improvement projects.²³

¹⁷ 2019, “Singapore: Quarterly Construction Cost Review” Arcadis Singapore Pte Ltd.

¹⁸ Based on pro-forma analysis of local projects and interviews with Hawai‘i builders and developers

¹⁹ Interview with Kurt Pachinger, Vienna City Administrator, Office of the Executive City Councillor for Housing, Housing Construction, Urban Renewal and Women’s Issues

²⁰ Federal Ministry, Republic of Austria Website. (2020). “Representation of employees”. Available at: <https://www.migration.gv.at/en/living-and-working-in-austria/working/representation-of-employees/>

²¹ Federal Ministry, Republic of Austria Website (2020)

²² Federal Ministry, Republic of Austria Website (2020)

²³ Federal Ministry, Republic of Austria Website (2020)

Public housing rent as a percentage of income: 18–22 percent²⁴

City liveability, housing access: In both 2018 and 2019, Vienna was named the world’s most “liveable city” on the Global Liveability Index.²⁵ This prestigious ranking is due in part to residents’ bountiful access to affordable housing and transportation. According to Bloomberg CityLab, Vienna—a city with approximately 2 million residents—experiences an annual increase of about 25,000 residents and adds approximately 13,000 new units of housing each year to accommodate them.²⁶ Strict land-use regulations have focused growth in existing urban neighborhoods, as opposed to suburban sprawl. Population growth is further supplemented by parks and public spaces and, today, more than half of the city is dedicated to green space.²⁷

Helsinki, Finland

Cost of construction: \$325–400 per gross square foot²⁸

Union labor representation: Trade unions are exceptionally strong in Finland, where 59 percent of the working population are members.²⁹ The average salary for a construction worker in Finland is \$54,500 a year or \$31 per hour, very similar to Hawai’i’s \$33 per hour.³⁰

Citizen engagement in land use decisions: Finland has high citizen engagement in land-use decisions and consequently, it is very difficult to add affordable housing to older neighborhoods. Instead the government housing development agency focuses on incorporating affordable housing into new neighborhoods.³¹

Public housing rent as a percentage of income: 18–28 percent³²

City liveability, housing access: In 2017, Helsinki was ranked as the second most liveable city in Europe, following Vienna.³³ One of the main reasons for this high ranking is a successful housing policy which has ensured affordable housing for almost all residents and virtually eliminated homelessness.³⁴

²⁴ 2019 Presentation for “Boston Initiative on Cities: Global Innovations in Urban Housing Conference April 2019,” by Eva Bauer of Austrian Federation of Limited Profit Housing Associations

²⁵ <https://www.eiu.com/topic/liveability>

²⁶ Dudley, D. (2019, October 29). Secrets of the World’s Most Livable City. Bloomberg CityLab. Available at: <https://www.bloomberg.com/news/articles/2019-10-29/here-s-why-vienna-tops-most-livable-cities-lists>.

²⁷ Dudley (2019)

²⁸ Interview with Housing Finance and Development Centre of Finland, pro-forma of recent project

²⁹ Construction & Labor Workers, Finland | 2020/21 (averagesalarysurvey.com)

³⁰ <https://julkaisut.valtioneuvosto.fi>

³¹ 2020 Interview with Jarmo Linden, Director, Housing Finance and Development Centre of Finland

³² Jan 2020, Presentation of Housing Finance and Development Centre of Finland “Role of ARA in Social Housing and in Actions to Reduce Homelessness in Finland.” Average Finish income from www.statista.com

³³ <https://www.eiu.com/n/campaigns/the-global-liveability-report-2017>

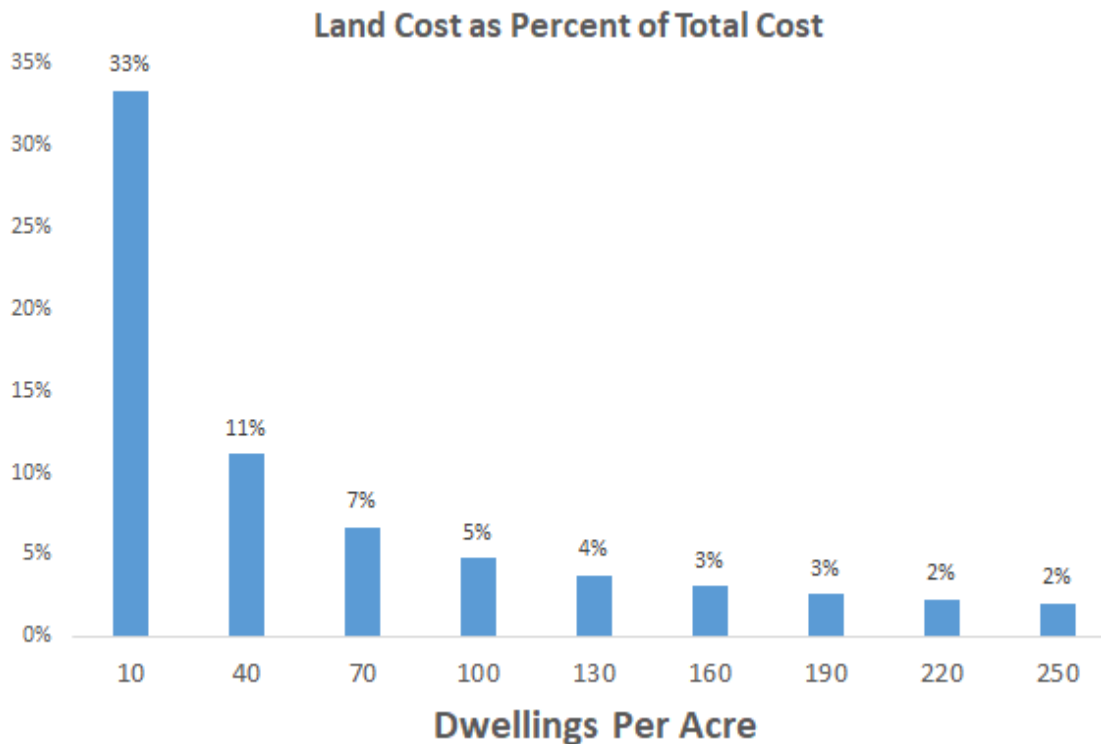
³⁴ 2020, “The Role of Social Housing and Actions to Reduce Homelessness in Finland.” presentation by The Housing Finance and Development Centre of Finland.

Summary: Although Vienna and Helsinki are farther away from Hawai'i than Singapore by location, these cities face many of the social, political, and cost constraints to building new housing that are common in Hawai'i. In many ways, compared to the Singapore model, housing policies in Vienna and Helsinki are more relevant to Hawai'i.

Case studies of Vienna and Helsinki further demonstrate that building new housing is expensive and requires significant community buy-in and participation. For these reasons, best practices from these two municipalities are included when evaluating various components of the ALOHA Homes proposal.

Feasibility of ALOHA Homes Components

High-Density: At Least 250 Units Per Acre



The more dwelling units built per acre, the less impact additional density has on overall costs. Assumptions: \$2 million per acre land cost and construction costs constant \$400,000 per unit.

One approach to cost savings is density, although savings diminish as density increases. The more homes that can be built on a specific parcel, the greater the savings in land costs. For example, if a 1-acre parcel is worth \$2 million and five homes are built, the land cost for each home is \$400,000. However, if 10 homes are built on that same parcel, the land cost per home drops to \$200,000, which could translate into significantly lower prices per home.

If the average cost to build a 1,000 square foot home is about \$400,000, there are significant savings when the density is increased from 10 homes to 40 homes, or even to 70 homes, but the savings greatly diminish after 130 homes per acre.

Density should fit local community needs. In most of the TOD areas on O‘ahu, mid-rise developments would blend in with the surrounding community. The ‘Iwilei, Chinatown and Downtown station areas may have higher density since this is the most urbanized area in the state and is the Central Business District (CBD). The Downtown TOD Neighborhood Plan states: “Develop new housing of varied types, including affordable, family-friendly and mixed-income, to allow a range of household types.” Higher density in the Downtown Honolulu CBD fits with the character of the surrounding district, while a mid-rise of between 100 to 200 homes per acre would be appropriate in areas further from the CBD.

Sense of community: We learned from discussions with developers that projects with high density can lack a sense of community and be less attractive to long-term residents. One developer recounted how a project of 120 homes per acre leased up much more quickly than another project of almost 200 homes per acre in the same neighborhood.

Conclusion: At least 250 homes per acre is only appropriate for some areas. For many TOD areas, a lower density would achieve cost savings, retain a sense of community, and fit the surrounding community.

Public Land Contribution in Transit Oriented Areas

Public land contribution is key: One important practice in all three jurisdictions studied—Helsinki, Vienna and Singapore—is that public land is used for affordable housing. As a result of their investments and long-term vision, each city builds enough quality housing to reasonably match demands. Rents meet affordability standards of no more than 18–26 percent of residents’ incomes. In addition, each jurisdiction has virtually eliminated homelessness.

Use of public lands for long-term affordability: All three jurisdictions use public lands as a way to maintain affordability.

Singapore creates a constant supply of HDB flats to keep prices stable: In Singapore, the government is able to consistently build enough new homes to meet demand. They acquire land and develop train stations, public infrastructure, and other amenities as needed for the new developments. Due to the continual supply of new HDB flats, these public sector homes—which make up about 80 percent of the housing market—have maintained relatively stable prices. Resale prices for HDB flats ended 2020 slightly lower than at the beginning of 2013.³⁵ Of course, this ability to add public infrastructure and housing as needed is very difficult in places with less central government control and a high degree of citizen involvement in land-use decisions.

³⁵ Housing Development Board Data <https://www.hdb.gov.sg/residential/buying-a-flat/resale/getting-started/resale-statistics>

HDB Homes Developed and Re-Sale Price Change

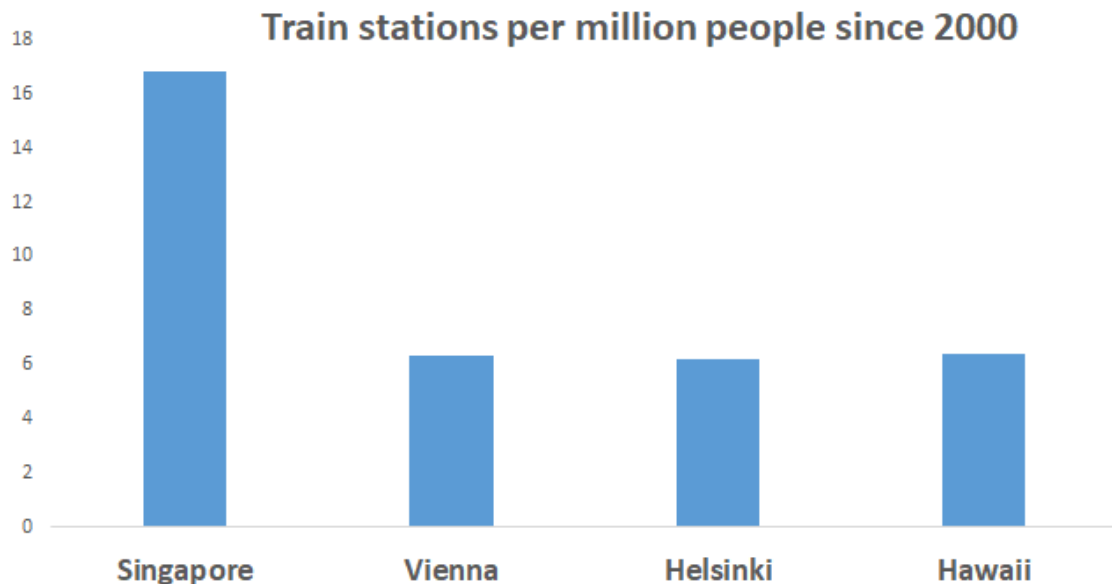


Helsinki and Vienna use price controls to maintain long-term affordability. The government and political structure of Vienna and Helsinki make the process of acquiring new developable land with public infrastructure and transportation more difficult and time intensive. For example, Singapore has added 122 stations to its public transit system since 2000,³⁶ whereas Helsinki has only added 8 and Vienna has added 12.³⁷

As a comparison, Hawai'i is about to complete nine stations of a rail system that has been discussed and planned for over 50 years. The amount of time, resources, and citizen consensus required in Hawai'i for major construction projects is more similar to Vienna and Helsinki than to Singapore.

³⁶<https://landtransportguru.net/singapore-rail-timeline/>

³⁷ https://en.wikipedia.org/wiki/Helsinki_Metro#1982_onwards:_In_service,
https://en.wikipedia.org/wiki/Wien_Hauptbahnhof



Vienna and Helsinki both preserve the affordability of state supported housing by setting price limits. Price increases in rental and for-sale homes that receive government subsidies are generally limited to inflation plus the cost of improvements. The use of public land, financing, and long-term price controls ensures that every new development maintains a significant supply of affordable housing.

Case Study: Planning for affordability: Jätkäsaari in Helsinki, Finland

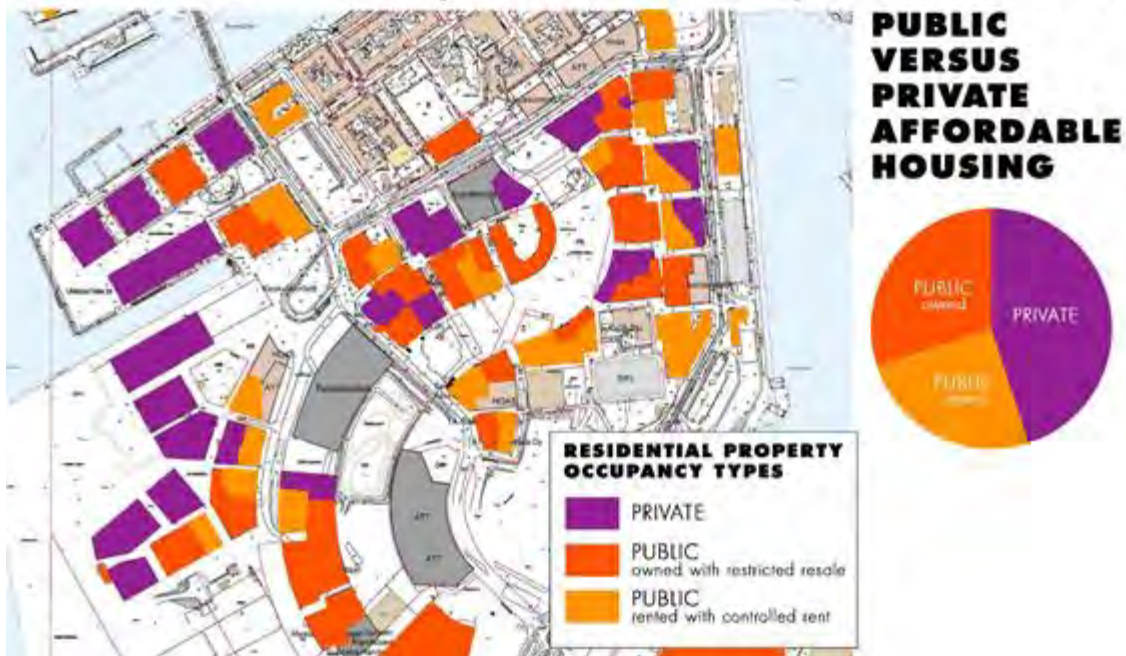
A newly developed waterfront neighborhood in Helsinki provides an excellent example of planning for affordability. Jätkäsaari was an old industrial waterfront neighborhood similar to Honolulu's Kaka'ako neighborhood. In 2010, Helsinki began efforts to transform the area into residential and commercial uses. As part of the development process, the Helsinki planning department purchased most of the land area, and between 2008 and 2019 the city invested more than \$275 million in Jätkäsaari, with another \$240 million budgeted for future development. The planning department sold about 45 percent of the land to the private market, and reserved the remaining land area for publicly-funded housing and other public purposes.

After the land-use decisions had been made, the municipality financed the construction of 60 new apartment buildings that were a mix of rental housing and shared equity ownership with restricted resale prices. Once construction is completed, it is estimated that Jätkäsaari will be home to 21,000 residents and offer jobs to 6,000 people.³⁸

To create a more equitable neighborhood, the public and private housing developments were integrated throughout the area.

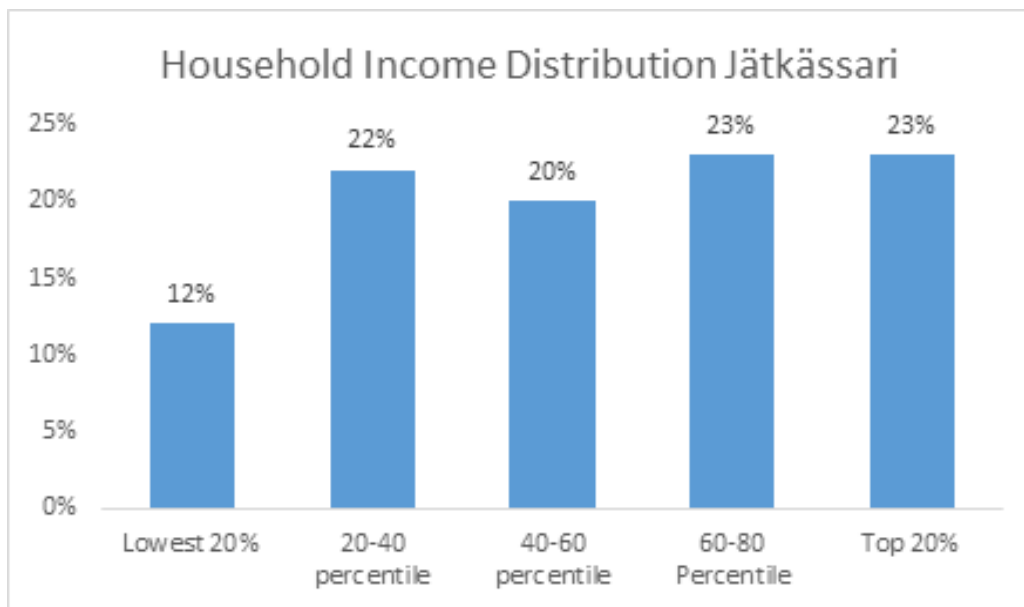
³⁸ Helsinki Municipal Website. (2020). Jätkäsaari. Available at: <https://www.uuttahelsinki.fi/fi/jatkasaari>

JÄTKÄSSARI, HELSINKI, FINLAND



This map by housing type clearly shows how Helsinki has planned for long-term affordability: more than half of the land and residential homes are publicly supported and will remain affordable for the life of the building.

Not only will this neighborhood maintain affordable housing, but it also ensures income diversity of residents by developing a mix of private housing and state subsidized rental and for-sale properties. Jätkäsaari is not a poor neighborhood or a wealthy neighborhood: it is a mixed neighborhood where the percentage of households in the various income quartiles is remarkably evenly distributed.



Vienna uses similar land-use and pricing strategies to maintain housing affordability.

“What makes Vienna unique is that you cannot tell how much someone earns simply by looking at their home address.” –Kathrin Gaál, Vienna’s Councilor of Housing ³⁹

Although Singapore, Vienna and Helsinki employ different strategies to maintain affordable pricing, all three use a combination of public land and publicly-funded infrastructure as the starting point.

Public Lands in Transit-Oriented Development Areas: A Tremendous Opportunity

The State of Hawai‘i is the largest landowner along the new 21-station rail system being built on O‘ahu. Between various state agencies, there are approximately 2,000 acres of land within a half a mile of the rail line.⁴⁰ Additionally, state and county land near bus transit corridors on neighbor islands offer opportunities for transit-oriented development and affordable housing.⁴¹ For example, Maui is developing a new bus transit hub on state lands, with the opportunity to build affordable housing on more than 5 acres of adjacent state lands. University of Hilo in Hawai‘i County, has land which could be used for student housing, and Kaua‘i is developing affordable housing on county lands at Lima Ola in ‘Ele‘ele.

Buyer Restrictions

The ALOHA Homes Bill proposes several restrictions related to the home purchaser. The following is the analysis of each restriction based on best practices from other jurisdictions.

Buyer owns no other real property. Home is primarily a place to live.

Purpose: When it takes considerable public resources to develop affordable housing, it is important that housing be **primarily** developed as a place for residents to live, not a wealth building vehicle. Restricting ownership to buyers with no other property supports the concept that housing is an essential human need and an important public purpose. Permitting the purchase of these units as second homes rather than as a primary residence, would subvert the purpose of public investment in housing as well as allowing a buyer to use them as investment vehicles.

Analysis: Provision is recommended. Limiting the amount of wealth generation from publicly subsidized housing is important for the long-term viability of a housing program. Restricting ownership as proposed is a standard requirement for most publicly-supported for-sale housing. Most jurisdictions in the United States include such a requirement for below-market for-sale housing offered under inclusionary zoning policies (See Appendix B for examples from other U.S. jurisdictions). Singapore, which has the largest owner-occupied public housing system in the world,

³⁹ 02/15/2019 “Vienna’s Affordable Housing Paradise,” by Adam Forrest, Huffington Post www.huffpost.com

⁴⁰ <http://planning.hawaii.gov/lud/state-tod/>

⁴¹ State Office of Planning and Hawaii Housing Finance and Development Corporation. (2018). State Strategic Plan for Transit-Oriented Development. Available at: https://planning.hawaii.gov/wp-content/uploads/State-TOD-Strategic-Plan_Dec-2017-Rev-Aug-2018.pdf

also has strict prohibitions about owning other property. Notably, Helsinki had a below-market homeownership program called HITAS, which allowed people to own other property. As purchasers increasingly used the program to build wealth by owning multiple homes, HITAS became unpopular and was considered a waste of public resources. It was discontinued in 2020.⁴²

Hawai'i considerations for fractional ownership of homestead and other properties: In Hawai'i, many residents have fractional ownership as a partial interest in a family owned property. These properties have significant cultural and family value but partial owners typically cannot use them as homes for themselves. Moreover, it can be difficult to divest from some partial ownership structures. It is, therefore, important to recognize and accommodate partial ownership of less than 50 percent when establishing restrictions to purchase state-sponsored housing.

Hawai'i Resident Requirement

Purpose: It is appropriate that the benefits of programs supported by state and local tax dollars are restricted to local residents. A failure to include such constraints could incentivize out-of-town residents to move Hawai'i for the benefit of affordable housing in such a desirable location.

Case Study: San Diego, CA

As part of their inclusionary zoning program, San Diego offers below-market for-sale homes to people up to 120 percent of area median income. Initially their program did not have a residency requirement, which prompted a significant number of applications from out-of-state residents. Since this was not the intended purpose of the program, the San Diego Housing Commission updated the rules in 2017 to **require two years of residency** in San Diego County, verified by three years of tax returns.⁴³ The policy has remained in place since then.

Legal Considerations: Durational-Residency Requirements Could Be Challenged

A durational-residency requirement for a public benefit which requires that a person live in a place for a certain length of time has generally been found by the courts to limit the “constitutional right to travel from one State another.” The right to travel has been interpreted to refer to not just entering and exiting another State but to the right to be treated like other citizens of that State.

For example, a California law attempted to limit welfare benefits for newly-arrived residents to the amount paid by their previous state of residence for their first twelve months in California, at which point they were entitled to benefits at the California rate. In *Saenz v. Roe* (526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999)), the U.S. Supreme Court invalidated California's restriction.

However, courts have made an exception to the general rule of disallowing durational-residency requirements for “portable” benefits that a nonresident could obtain and take out of the state. (See, for example, *Martinez v. Bynum*, 461 U.S. 321, 332–33, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983)). In-state tuition requirements are an important example of a “portable” benefit.

⁴² <https://finrepo.fi/en/news-helsinki-is-going-to-close-hitas-system>

⁴³ <https://www.sdhc.org/housing-opportunities/affordable-for-sale-housing/>

“The state can establish such reasonable criteria for in-state [college tuition] status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.”
Vlandis v. Kline, 412 U.S. 441, 453–54, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973)

Applicability to ALOHA Homes: One could argue that homeownership is a portable benefit as compared to renting. An owner builds equity in their home, which translates into a profit that can be taken out of state when the owner sells. However, before the sale of the home the benefit is not portable since it requires the owner to live in the home. Whether ownership is considered a portable benefit similar to college tuition or a non-portable benefit more similar to welfare has not yet been decided by the courts.

Analysis: The most conservative legal approach would be to require no specific length of time for residency but simply that a person be a current Hawai'i resident. Moreover, applicants to the ALOHA homes program would need to be on a pre-approved buyer list before construction begins. They would likely be waiting at least two years before construction is completed and they own a home. This reduces the likelihood that a person would establish residency in Hawai'i just for this program.

Recommendation: A current resident provision is likely to be sufficient to dissuade out-of-state residents from moving to Hawai'i just for this program. However, the requirement could be amended as a durational-residency requirement later if warranted.

Defining “Resident” by Voting Record

Description: The ALOHA homes bill states that a person “voting in the most recent primary or general election shall be an indication of residency in the State; provided further that not voting in any primary or general election creates a rebuttable presumption of non-residency.”

Purpose: This measure would disqualify non-voters from participating in the program and would presumably reward residents who do vote.

Legal Concerns: Voting is not a standard definition of residency and could be considered discriminatory. At the very least, it would discriminate against legal residents who are noncitizens and citizens who choose not to vote for personal or religious reasons.

The Hawai'i Supreme Court has adopted a common definition: “[a]ny person who occupies a dwelling within the State, has a present intent to remain within the State for a period of time, and manifests the genuineness of that intent by establishing an ongoing physical presence within the State together with indicia that his presence within the State is something other than merely transitory in nature.”
(Citizens for Equitable & Responsible Gov't v. Cty. of Hawaii, 108 Haw. 318, 323, 120 P.3d 217, 222 (2005)).

Analysis: A standard definition of “resident” is someone who can demonstrate an intention to stay in Hawai‘i, which can be shown with a driver’s license, completed voter registration, or rental agreements with a Hawai‘i address etc.

Recommendation: Using a standard definition of “resident” will prevent legal challenges and still achieve goals of the program.

Income restrictions

Purpose: Having no income restrictions for buyers could make the program more popular among people who would not otherwise qualify. It would also support the idea that housing is a right which everyone is allowed to access.

Analysis: Not a best practice. A constrained housing supply requires prioritizing access, and higher income earners have options in the private market.

Our survey of affordable housing policies for for-sale homes shows that, to the extent the public is subsidizing the home, income limits and preferences are [typically](#) imposed. Even Singapore has income restrictions for who can qualify for their “new flat” program. As of 2019 the income limit was \$9,000 per month for a couple and \$4,500 for a single person in Singapore. An exception is Finland, where lower-income applicants have preferences but there is no set income limit.

Generally, the lesser the amount of affordable housing available, the stricter the income requirements. Places with large proportions of State-supported public housing, such as Singapore, Vienna and Finland, have relatively high income thresholds because there is enough housing to accommodate need. For example, Vienna’s income limits allow 80 percent of the population to buy state-supported homes. At the same time, they ensure that about 79 percent of the housing stock is affordable, with 50 percent owned directly by the City and 29 percent subject to rent control. However, in places without enough affordable housing to meet the demand, income requirements are stricter to ensure that housing is going to people with the greatest needs.

Factors to Consider when determining income limits:

- 1. Benefits of mixed income neighborhoods**
Good policy encourages mixed-income neighborhoods and discourages income segregation, which has forged many divisions and unequal access to opportunity.
- 2. Income limits high enough to qualify for a mortgage**
Where a publicly-supported project is designed to recoup the cost of units built, income limits for buyers must be high enough so that they can qualify for mortgages. For example, a one-bedroom affordable home at \$290,000 would still cost approximately \$1,800 a month in

housing costs, which would require a yearly salary of about \$65,000 or about 80 percent AMI for Honolulu⁴⁴.

3. **Income limits high enough that public workers can qualify: 140% AMI**

A state supported housing program should be available to teachers, police, firefighters and other public workers. An income limit of 120 percent AMI would disqualify many households with public sector workers. For example, the average teacher salary in Hawai'i for 2019 was \$65,800⁴⁵, so a household with two teachers would earn \$131,600 which is approximately 130 percent of the area median income for Honolulu. A limit of 140 percent AMI would include most public sector households.

4. **Offering opportunity to those with greatest need.**

Honolulu has a scarcity of affordable housing so publicly-supported housing should be allocated at least partly on the basis of need. This could be achieved by having preferences for qualified buyers who are lower-income for a portion of the homes.

Recommendation: Income limit of 140% AMI with some preferences for lower-income residents. Set an upper income limit of 140 percent AMI, with a goal of having some percentage of homes occupied by people earning 100 percent AMI and below. Lower-income residents could be provided a preference in a lottery system.

First-time Homebuyer

Purpose: The purpose of this provision is to allow more residents to access the program, including residents who have previously owned property or currently own property but would consider selling to purchase an affordable home.

Analysis: Many affordable for-sale programs do not require that a person be a first-time homebuyer, but do require that the person not own another home at the time of purchase.

Recommendation: First-time home buyer provision is not necessary. A first-time homebuyer provision could exclude people who previously owned property and are now priced out of private market ownership. The more important provision is that a person not own another home.

Owner Occupancy Enforcement

Owner-occupancy compliance has been a major concern with affordable housing units.

To address the potential of creating a “black market” of illegal rental units, we have examined two options for enforcing owner-compliance:

⁴⁴ <https://www.huduser.gov>

⁴⁵ January 2020, “Hawai'i Teachers Compensation Study and Recommendations” prepared for Hawaii Department of Education, pg. 42

1. **Biometric security systems**
Using iris, facial, or fingerprint scans to verify identities
2. **Stewardship specialist(s)**
Employing full- and part- time staff to monitor compliance

Biometric System

Benefits: Secure and Modern.

By requiring a retinal, facial, or fingerprint scan upon entry, a biometric system provides a highly secure form of owner occupancy enforcement. An automatic record is maintained of all entries to a home, which could have security benefits as well.

Focus Group Concerns: Privacy, Flexibility for Guests, and System Maintenance.

Though biometric systems are reliable, both providers and focus group participants raised concerns about privacy. While receiving quotes for biometric systems, the concern of whether biometrics have received the “sign off” was raised. Providers noted that tenant pushback is common with biometric systems and wondered if there are precedents for using them in owner-occupied housing. This apprehension was echoed by participants in our focus groups. While acknowledging that biometrics would ensure owner-occupancy, some participants expressed discomfort about having their data saved. Focus group participants also raised concerns about the effects of biometric systems on visiting friends or family members and about the overall flexibility of the system. Lastly, informants raised questions about the system’s performance during power outage or internet disruption, and what type of maintenance it would require.

Costs: \$1,500–\$2,800 for installation, on-going supervision and maintenance.

Quotes for biometric systems range between \$400 to \$600 per housing unit, exclusive of the cost to have a contractor install wiring or an internet connection and integrate it into a system.. Installation raises the price to \$1,500 to \$2,800 per unit⁴⁶. The system would also require staff to provide on-going oversight, manage connectivity problems, and enter system updates for guests and new residents.

Stewardship Specialist: Most common enforcement method

Affordable housing departments across the United States most commonly employ staff to manage enforcement. The Champlain Housing Trust in Vermont serves as one of the largest and most successful land trusts in the country. The Trust employs a staff of five to manage their inventory of more than 630 homes and enforce occupancy rules. The service is financed by monthly charges to each home, similar to an HOA fee. The Champlain Trust team handles not just owner-occupancy requirements but also compliance with re-sale restrictions, re-financing requests and disputes that may arise between owners. Enforcement is based on random checks and annual audits. The success of the Champlain Land Trust and many others is due to the stewardship specialist role and to adjusting the size of the team as the housing inventory grows.

Benefits: Flexible, Human Enforcement, Includes other services.

A stewardship approach would more easily accommodate guests or other changes in unit occupancy. It also makes enforcement feel less invasive than a high-tech approach. Lastly, a steward specialist helps with all aspects of the leasehold agreement including resales and conflicts between occupants.

⁴⁶ Based on quote from Fulcrum Biometrics, Iris Id 2020

Concerns: Human error, less predictable: Unlike biometric systems, the stewardship specialist system is human-operated and managed. This can lead to a higher margin for error and a greater variability in the quality of services, depending on the skill and training of the staff.

Costs: \$50–\$75 monthly fee per home. A stewardship specialist program is supported by monthly homeowner fees also referred to as “ground lease fees,” since they are used to ensure compliance with lease terms such as owner-occupancy. Many stewardship programs also use a software program called “HomeKeeper,” which has a one-time set-up fee of \$3,500 and an annual cost of approximately \$3,000.

Recommendation: We recommend a Stewardship approach.

While both owner occupancy enforcement methods have their benefits, a stewardship specialist would provide more services, including managing the resale process and dealing with lease disputes. This allows the position to be much more involved in the overall program and invested in its long-term success. When paired with substantial fines for breaking owner-occupancy rules, the stewardship model has proven to be effective for many below-market for-sale programs.

99-Year Leases and Use of State Lands

Affordable Housing on State Lands and Length of Lease Terms

The issues of affordable housing development and length of lease terms on State lands—crown and government lands of the Hawaiian Kingdom which had been designated as “ceded” to the Republic of Hawai’i and then the United States before being conveyed to the State of Hawai’i—are complex on many grounds: legal, financial, and moral. Additional engagement with key stakeholders is necessary to accurately convey the key perspectives on these issues. The study will be supplemented in a few weeks once the authors have gathered the necessary input.

Five Year Affordability Period

Purpose: The intent of this provision is to give the buyer an incentive to maximize the resale price by maintaining the home, and it prevents any incentive for a “black market” because the new buyer will be purchasing the unit at market price instead of a discounted price.

Example: The current ALOHA Homes bill states:

“If the corporation does not exercise its right to purchase the ALOHA home, the ALOHA home may be sold by the owner to an eligible buyer; provided that the corporation shall retain seventy-five per cent of all profits from the sale net of closing and financing costs, using the price at which the owner purchased the ALOHA home, plus documented capital improvements, as the cost basis.”

2010: Discount Purchase Price: **\$300,000** by qualified buyer. Market Price = **\$400,000**

2020: Market Selling Price: **\$590,000** (4% yr increase) Total Equity Gains: **\$290,000**
 Buyer Equity: **\$72,500** (25%) Agency Equity: **\$217,500**

2020: Selling Price for next buyer: **\$590,000**

Several Concerns:

Home no longer affordable after first buyer.

In the above illustration, the affordable home is only affordable to the first buyer and any future buyers will be paying market price for the home. In this case, the affordability is lost to all subsequent buyers and the benefits of the public program accrue only to the first buyer.

Equity gained by the agency is not sufficient to replace the home.

In this example, the agency has gained \$217,500 from the sale, far less than the cost to replace the home that was lost. Not only will the agency need to pay for new construction, but it will need to undertake a new planning and permitting process and invest in the development of a new site.

Replacing the lost home is lengthy and costly, and unlikely to be in the same location.

The main downside of this model is that the affordable homes lost are **usually not replaced** in a meaningful timeframe. Providing affordable housing in desirable locations requires significant resources and often takes years -even decades - of planning, so it is both costly and difficult to replace units once lost. In addition, the State would have to continually provide new funding, which is not always feasible. Even if the agency gets funds to replace the homes at some point, completion is likely to be years or even decades later... if ever.

Case Study: Kaka'ako. Affordable homes lost have yet to be replaced.

From 2008–2019 Kaka'ako developed to 7,300 for-sale condominiums, of which 1,872 (26 percent) were priced below market rates. Most of those homes were required to remain affordable for only two to five years. As a result, today only 637 homes (9 percent) are still under an affordable price requirement. **By 2025 only 3 percent of for-sale homes will be under an affordability restriction,** and, without any new additions, by 2035 there will be no homes available at below-market prices.

Best Practices: Long term affordability periods.

Over the past few years, the trend in high-cost cities and counties across the U.S. is to extend the affordability period, with many requiring that the home stay affordable for the duration of the lease period. In San Diego, a below market home must stay affordable for 55 years, while in San Francisco, Washington D.C., and New York City, the affordability period is the life of the building.

Recommendation:

Maintain affordability for all subsequent buyers by restricting the resale price.

If the state invests funds to accomplish the public purpose of giving less-affluent people the opportunity to own their own homes, state policy should safeguard the supply of these homes so they'll be available to working families for years to come. We recommend that the sales price of affordable units be restricted so that subsequent buyers can purchase a home at the same area median income level as their predecessors. This way the home stays in the affordable pool, and the neighborhood maintains its affordability.

With this recommendation, the price appreciation is limited and will likely be lower than market price appreciation (unless the market price drops). However, the owners still enjoy significant equity gains that accrue as the owner pays down the mortgage—not to mention the security of owning one's

home. See Appendix C for models of gains made with equity sharing based on CPI. This model does not provide funds back to the agency, but it also does not require the agency to replace the home and it maintains affordable housing in that same neighborhood.

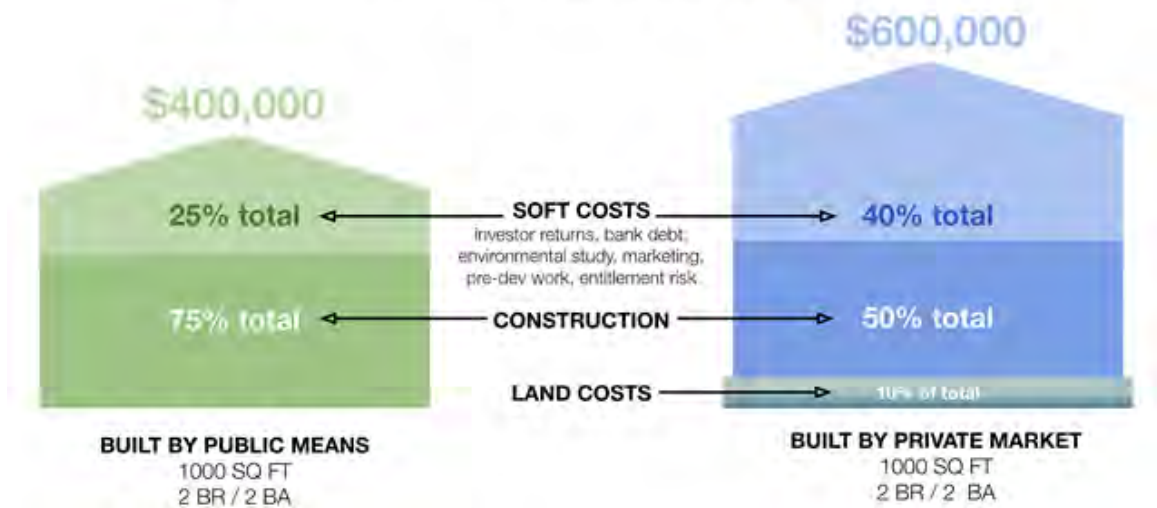
Analysis of Key Cost Savings Approaches

Estimated Cost is Significantly Below Market Prices

HOME TYPE	AVERAGE MARKET PRICE for all condos, Honolulu metro area only, 2019	STATE-SUPPORTED HOUSING COST RANGE for mid- to high-rise buildings	SQUARE FOOTAGE	STATE-SUPPORTED APPROXIMATE COST	SAVINGS
1bd / 1ba	\$395,000	\$280,000–\$325,000	600	\$300,000	24%
2bd / 2ba	\$569,000	\$385,000–\$425,000	830	\$405,000	30%
3bd / 2ba	\$744,000	\$460,000–\$530,000	1,000	\$500,000	33%

These savings arise from two main sources: State land contributions and reductions in all expenses that are not direct costs for vertical construction.

Public vs Private Development



Reducing all soft costs besides vertical construction is a best practice.

State-Supported Financing

The complexity and difficulty in securing financing contributes significantly to project delays and the overall cost of affordable housing.. Providing low-cost financing in a timely and straightforward manner would increase competition for projects and reduce development costs.

All three jurisdictions we researched provide access to low-cost funding to reduce the costs of affordable housing, as noted below:

Helsinki, Finland: Government-backed construction loans at 1 percent interest for 40 years

Vienna, Austria: Construction loans at 1 percent interest for 35 years.

Singapore: The Housing Development Board pays construction companies directly to build housing so no loans are needed.

After researching several financial tools, we recommend the following approach to minimize project financing costs and reduce risk for developers and the State.

1. **DURF for pre-development costs. The Dwelling Unit Revolving Fund (DURF) is** extremely flexible and could be used to cover pre-development costs such as due diligence, master planning, and a programmatic EIS.
2. **Streamline Entitlement: Environmental Impact Statements/Environmental Assessments.** Completing an EIS or an EA can add one to two years to a project timeline. In fact, this work can be done most efficiently if carried out directly by the State.
3. **Buyer Pipeline & Pre-Sales of Homes:** Ensuring a pipeline of qualified buyers and pre-sales is key to minimizing financial risk to the State and to developers. Every developer of lower-income for-sale housing emphasized the importance of programs that ready prospective buyers to take on a mortgage, for which an average of two years is needed. In addition to

buyers needing preparation, there is also likely a pool of *middle-income* buyers already mortgage qualified should a pilot project be developed.

4. **Issue taxable mortgage revenue bonds for construction.** These bonds affect the state budget less than general obligation (GO) bonds. The interest rate is currently 3–4%.

Fewer competing interests: Unlike GO bonds, taxable mortgage revenue bonds are not backed by the full faith and credit of the State of Hawai'i. They are, instead, secured by a pledge of mortgage payments and a deed of trust in the building. In this way, financing with mortgage revenue bonds does not compete with all the other State interests that are paid for with GO bonds, such as roads and schools, and are not a private activity bond.

Easy to sell bonds for affordable housing: Bonds backed by affordable housing projects in high cost areas such as Hawai'i are relatively easy to sell because investors know there is significant demand for below-market housing, and there is little risk that homes will go unsold. Catalyst Housing Group in California has partnered with local jurisdictions and the California Community Housing Authority to sell over \$550 million of limited obligation mortgage revenue bonds since 2017.⁴⁷ Currently, there are many times more buyers than available bonds and as a result the interest rate on these bonds is expected to continue to drop as this becomes a more common way to finance affordable housing for middle-income earners.

Efficient and straightforward: HHFDC could serve as the issuing authority for these bonds, which could be issued on a project-by-project basis. Since these bonds would not likely have to go through a complex budgetary or allocation process, they could be issued quickly, and that agility would reduce the time to secure project financing. The marginally higher interest rate cost compared to tax-exempt bonds is trivial.

Stand-alone financing or combined with other tools in the toolbox: A taxable mortgage revenue bond structured with a 3-year, interest-only, bullet maturity would act like a construction loan. It could fund all of the project costs or be combined with other sources of public or private financing, such as funding from nonprofit lenders or commercial banks offering community-based financing programs.

Bond issue example: Appendix D presents a high-level sample analysis of a 3-year taxable mortgage revenue bond. It would include two years of capitalized interest, which would allow debt service on the bonds to be fully covered for 2-½ of the three years, creating a real cash-flow advantage not available with many other sources of financing. At the end of the 3-year term only a small amount of debt service would remain, and it could be funded by the developer and rolled into the permanent financing, or, more likely, added to each homeowner's individual mortgage. With an average coupon of 3.5 percent, and an underwriter's discount and total issuance costs amounting to 2 percent of the bond issue, this form of financing would appear superior to many forms of private construction loans with higher rates and similar fees.

⁴⁷ Dec. 2020 Interview with Jordan Moss, founder of Catalyst Housing Group

Community Lending Options: Taxable municipal bonds could also be used in combination with commercial construction loans. Many banks have programs that are designed for community investment and would fund affordable housing construction. We spoke with several local banks that would be interested in partnering on this type of project.

Non-Profit Options: Many nonprofit lenders also have products designed to support affordable housing. Hawaiian Community Assets, among others, has funded affordable housing construction loans.

Off-Site Infrastructure part of District Plan

Off-Site Infrastructure Costs:

Individual Projects Paying for Off-Site Infrastructure is Inefficient and Drives Up Costs:

“Off-site” infrastructure costs are those not directly situated on the project site. It is more cost efficient and effective to have these costs paid for not by each project but as a publicly-supported district-wide infrastructure investment. Relieving developers of these requirements would allow them to be selected for what they do best: delivering housing. In fact, this is what all three jurisdictions—Vienna, Helsinki, and Singapore—do. There, the government has created the plan and put in the necessary backbone—roads, sewers, water and electrical services—before developers start building houses. These elements of the planned neighborhood are fairly standard and do not require much creative design. This model allows housing developers to compete on cost and design for the parts that customers will actually experience, such as the layout of the apartments and common area amenities. Also, when the public sector assumes the costs of basic infrastructure, the overall cost of building affordable housing is lower and homes can be sold at a lower price.

Public Infrastructure Investment best supports affordable housing in areas with public land

Market rate housing is affected less by savings in off-site infrastructure cost because its price is largely determined by the market, not by the cost to build. However, there are many places where even market rate housing cannot be built due to lack of infrastructure, and if the public sector provided the infrastructure, more houses would be built. This could lead to a reduction in price, although market rate housing would still not likely be as affordable as a publicly-supported housing project where the price is determined by the cost of building.

Two main ways for the public to pay for district infrastructure: GET or Property Assessment (Community Facilities District)

A July 2020 planning and implementation study prepared for the TOD Council⁴⁸ assessed various options to pay for infrastructure needed in TOD areas, and concluded that using General Excise Tax (GET) funding was preferable to other proposals. The study recommended that the State increase the GET rate by .01 percent on economic activity in the newly-developed area. It would dedicate the

⁴⁸ July 2020, “State Transit-Oriented Development Planning and Implementation Project for the Island of O‘ahu” Prepared for Office of Planning and Prepared by PBR Hawaii.

resulting revenue collected over 10 years to pay for state-supported infrastructure costs. In addition to GET, 30 percent of future property tax revenue from developed areas would be used to cover the costs.

We recommend considering a CFD model: More Equitable and can provide enough revenue

Although we appreciate that the authors of this study felt it was more politically feasible to use an increase in GET to pay for infrastructure, we believe that a Community Facilities District (CFD) model is more appropriate. In fact, such an approach might be more feasible since the COVID-19 pandemic recession has imposed new constraints on the State budget. The 2020 study *assumed a pre-COVID economy* when the State budget was not facing a \$2 billion budget shortfall, tourism was strong, and unemployment low. Additionally, the impacts of COVID have revealed a deeply inequitable economy: single family home prices keep increasing, while low- and middle-income workers are struggling with lost jobs and earnings.

Property assessments are a better tax: Can be adjusted to be progressive.

Property tax assessments tend to be progressive in nature (that is, wealthy households pay the most and low-income households pay the least) because the higher the value of the home, the larger the tax amount. The homeowner's exemption of \$100,000 (or more) makes these taxes more progressive because it disproportionately benefits households in lower priced homes. In many Hawai'i counties, property taxes are becoming more progressive with increased rates for **non-owner occupants** and marginally higher rates for more expensive homes.⁴⁹

Community Facilities District Approach is a Targeted Tax: Only properties in improvement areas are impacted, not the entire island. Also, permanently affordable homes can be exempted.

Another advantage of a CFD approach for infrastructure is that the added tax can be targeted to new developments that benefit from the public improvements. The tax can also be crafted to largely exempt affordable homes, while remaining in place for *market priced homes*.

Based on data from the July 2020 study for the TOD council here is an example of how a CFD can pay for district-wide infrastructure:

Iwilei-Kapalama TOD Plan Projections for Phase I and II:⁵⁰

Number of Homes to be Constructed between 2020- 2039: **16,661**
 Public Housing (HPHA projects): 3,800
 DHHL: 500
 HHFDC (Liliha Civic Center): 200
 Market Priced Homes: **12,161**

⁴⁹ See Maui County Property Tax Rates: <https://www.mauicounty.gov/DocumentCenter/View/122028/2020-Tax-Rate>

⁵⁰ "State Transit Oriented Development Planning and Implementation Project for the Island of Oahu" July 2020

Number of affordable homes, according to Honolulu County guidelines (15%) – 1,824
 Number of private homes sold at market prices: **10,337**

Using the above housing projections, an assessment could be implemented on the market rate property which would generate enough revenue to pay for both market rate and affordable housing.

Infrastructure Investment Needed for IK:⁵¹

Phase I: \$235 million Phase II: \$227 million **Total: \$512 million**

Based on some general assumptions, the following CFD assessments on *market rate homes* would produce funding adequate to support infrastructure investment needs.⁵²

Assessed Value	Current RPT Rate	Honolulu Infrastructure Tax	Total RPT Rate + CFD
0-500k	0.35%	0.5%	0.85%
500k- \$1M	0.35	1%	1.35%

Assumptions:

Annual CFD special tax revenues, in current dollars, would amount to \$33 million, assuming an average private market home value of \$569,000. Depending on future property value increases (we assumed 1–2 percent per year), the number of people claiming a homeowner’s exemption, and the timing of infrastructure requirements, **this additional CFD revenue could generate approximately \$500M in net bond proceeds available to fund infrastructure**. These CFD tax rate assumptions may be considered high, and lower CFD special tax rates would produce less funds, but that may be compensated for if private market home prices are higher than assumed in this simple example.

In this way, a Community Facilities District assessment on private market properties could subsidize the infrastructure costs needed for all homes, including the long-term affordable rental and for-sale.

Construction Methods

Our analysis determined that hard cost management for a state-supported affordable housing program should be **the same** as for market rate housing. We looked at three hard cost approaches and present our findings below:

- **Factory-built / Modular:** Savings begin only at an initial order of 4,000–5,000 homes
 Our interview with Factory OS indicated that, at this time, the only way modular construction of multi-story homes could save costs in Hawai’i would be if shipping costs were eliminated by having a factory built on O’ahu. In order for Factory OS to recover the costs of building a factory in Hawai’i, the state would need to approve and fund orders for 1,000–1,500 homes per year for four to five years.

⁵¹ Pg. 87-88 of “State Transit Oriented Development Planning and Implementation Project for the Island of Oahu” July 2020

⁵²Assumptions: Average price for 2bd condo in Honolulu Metro area in 2019: \$569,000, property value increase of 1.5% per year, no home-owners exemption.

At this time, with the concept of state-supported for-sale homes being a new approach to delivering affordable housing, it would be unwise to “guarantee” such a large order of homes. Funding a pilot project and testing the viability of the model should be the first priority. At a later time, if the price of a modular unit comes down, and the state-supported ownership housing model has proven effective, it could make sense to follow this route.

- **Artificial Intelligence (AI) Design:** Savings of 1–3%

According to two contractors who use Artificial Intelligence and Design, savings related to AI use are about 3–5 percent of hard construction costs or 1.5–2.5% of total project costs. Although it is not a significant amount of the final cost, it is one advancement that the state can take advantage of by providing financing for larger projects. While construction companies use this technology to gain a competitive edge over other companies, the State can directly pass these savings onto the buyer.

- **Limited Do-It-Yourself (DIY) Construction or “Shell Housing”** 5–10% savings

We interviewed several developers that have used sweat equity models in mid-rise dwellings, who report what future residents could have some significant savings by doing some of the finishing work themselves. Work that could be completed in a mid-rise includes installing floors, painting walls, hanging kitchen cabinets, and installing light and plumbing fixtures. Cost savings of even *just 5–10% would be significant* and especially if could be applied towards a down payment, as has sometimes been the case with Self-Help housing.

Streamlined Entitlement: Environmental Assessment

In TOD areas, the development of affordable housing and mixed-use developments could be expedited by the implementation of Programmatic Environmental Impact Statements (EIS) for regional areas. Further, there was a 2019 amendment to the Hawai'i Administrative Rules (HAR) regarding the waiver of an Environmental Assessment (EA) when developing affordable housing. An EA for each parcel adds significant time and costs to any development project. One way to save costs is for the state to complete a Programmatic EIS in TOD areas.

The utilization of the following HAR sections could expedite the development of affordable housing in TOD areas.

EA Waiver for affordable housing.

As stated in Hawai'i Administrative Rules:

“§11-200.1-15 General types of actions eligible for exemption:

(c) The following general types of actions are eligible for exemption:

(10) New construction of affordable housing, where affordable housing is defined by the controlling law applicable for the state or county proposing agency or approving agency, that meets the following:

(A) Has the use of state or county lands or funds or is within Waikiki as the sole triggers for compliance with chapter 343, HRS;

(B) As proposed conforms with the existing state urban land use classification;

- (C) As proposed is consistent with the existing county zoning classification that allows housing; and
- (D) As proposed does not require variances for shoreline setbacks or siting in an environmentally sensitive area, as stated in section 11-200 .1-13 (b) (11)."

The above HAR can be used to expedite the development of affordable housing. The EA completion and process ranges from 8-12 months; hence, the waiver of an EA expedites the development process by approximately one year.

Programmatic EIS can be used in instances requiring a “larger total undertaking.” If the project or a series of projects within an area sited for future development is proposed and the approving agency determines that the “larger total undertaking” requires an Environmental Impact Statement (EIS), the following HAR section can be implemented: Section 11-200.1-10.

Example: Aloha Stadium. A recent mixed-use development in a TOD area implementing the HAR section stated above is the New Aloha Stadium Entertainment District (NASSED) EIS. This multi-phased project is utilizing this HAR provision to complete their EIS requirement and process. The NASSED project is essentially a Programmatic EIS as it’s a large-scale development to be completed in phases.

Recommendation: To achieve cost savings, an ALOHA Homes project should qualify for an EA waiver or be included as part of a larger programmatic EIS.

Developer Fees

Developer Fees and Overhead at 4–6% of Project Costs.

This housing delivery model significantly reduces risks and costs for the developer, which can translate into a lower development fee still being an attractive level of compensation. In a model where the State is providing construction loan financing, in the form of taxable mortgage revenue bonds supported by a mortgage interest in the property (not a private activity bond), and where entitlements and permits have been streamlined, the developer assumes less risk. For the purposes of our sample pro-forma, we have used a middle number of a 5% developer fee. A few relevant comparisons include:

1. In places with a similar housing delivery model, such as Finland, the developer fees are 4 percent.
2. Some non-profit developers in Hawai’i complete projects with a 3–5 percent developer fee.
3. Lastly, average LIHTC projects have developer fees and overhead largely in the 6–8 percent range, so 4–6 percent seems reasonable for a project with less risk and lower upfront costs.

Hard Construction Costs

For affordable housing, costs of \$325–375 per sq ft of leasable area is achievable.

Based on our interviews with local industry experts including both construction companies and developers, the actual costs of vertical concrete construction in TOD areas with land well-suited for housing is \$260–\$300 per gross square foot. For an affordable housing project with limited amenities, the common areas, not including parking, are about 20 percent of the total constructed space. This

translates into a cost of roughly \$325–\$375 per square foot of leasable space for the project. In addition to having fewer amenities, affordable housing can use less expensive construction methods such as tunnel form construction employed by Hawaii Dredging. For affordable housing construction of sound quality but not luxury, we estimate that a hard cost of \$350 per square foot of leasable space is reasonable and accurate.⁵³ These hard costs are lower than what is found in typical LIHTC projects for two reasons:

1. The conditions on construction and compliance with LIHTC requirements adds to the cost.
2. An extended pre-development process often results from complicated financing structures and circumstances.

Parking Separated from Housing Cost

Best Practice: Unbundling parking from the cost of housing. The cost for a parking stall can range from \$25,000 to \$40,000. In Vienna and Helsinki parking is always unbundled and one parking structure is often shared by multiple buildings. High cost jurisdictions such as San Francisco, New York and Seattle are increasingly separating the cost of parking from the cost of housing. Especially in areas near transit this is becoming standard practice. Parking becomes an option that homeowners can pay for with a monthly fee instead of automatically being incorporated into the purchase. To finance parking sometimes a developer will partner with a private parking operator that owns, operates and maintains the structure. In TOD areas where there are other transit options some people would choose to own fewer cars or choose a car sharing option, such as the Hawaii Hui Car Share program where you can reserve cars for personal use.⁵⁴

Focus Group Results: Residents are receptive as long as parking is available. When presented with the option to separate the cost of parking in order to lower the purchase price of a home, our focus group participants agreed it would be good to have a choice. The main concern was ensuring enough parking for those who wanted to pay for it.

Development Model to Increase Competition

We recommend the following for a development model: **Two-step RFQ/RFP process with third-party verification of financial documents**

To encourage competition among developers and to reduce costs for the state, it is recommended that proposals undergo a two-step vetting process and that in the final proposal developers be required to submit their pro-forma for third-party verification.

1. **Create a two-step process in which developers** first submit qualifications. Invite no more than three developers to submit a more detailed RFP. This is the process in use by the New Aloha Stadium Redevelopment Authority to maximize competition and initial interest in a project. However, expect detailed plans from only the top contenders.

⁵³ Based on interviews with several local developers and construction contractors.

⁵⁴ www.drivehui.com

2. **Engage private consultants to provide third-party analysis** of private development proformas as a prerequisite for the contribution of publicly-owned land. This helps to build trust in the process through accountability and transparency. This is a common practice in many jurisdictions and the cost—about \$20,000—is minimal compared to the cost of the overall project. Additionally, the developer can wrap the cost into the overall project budget if a development agreement is executed.

Benefits of Implementation:

Ownership Opportunities for 80%–140% AMI

This model provides a pathway to ownership for people earning average and above-average wages, but who can still not afford to purchase in the private market. Based on the recent Hawai'i Housing Planning Study, there are approximately 5,000 households in the 80%-140% who would like to purchase a home.⁵⁵

Leasehold ownership, even with shared-equity, offers significant benefits over rental housing.

There are long-lasting benefits of a leasehold ownership model when compared to rental housing. Some of these include:

- 1) **Greater stability and control over lease terms:** Leasehold owners, as members of the housing association, can set rules for the building, priorities for common area spaces and determine the schedule for maintenance of the building.
- 2) **Sense of Ownership, Improved well-being:** In the words of one focus group participant, “Owning a home would make me feel like more of a community member, more of a citizen.” Numerous studies have shown that homeowners are more likely to be invested in their local community and that there are significant health and educational improvements for homeowners.^{56, 57}
- 3) **Inheritance: Transfer property to children.** Under a long-term leasehold model, a property can be passed down from parents to their children in the same way as fee simple. The ability to transfer property and equity to future generations is a significant benefit over renting.
- 4) **Financial Gains: Price stability, wealth generation, and tax benefits.** With a fixed 30-year mortgage, a person’s monthly housing costs are more stable over time, and not subject to annual increases that are allowable for most rental agreements. Also, even in a shared-equity model where the resale price is restricted, an owner can build up significant gains just by paying down their mortgage and benefiting from inflationary increases in home value. Lastly, tax benefits through the mortgage-interest deduction program amount to thousands of dollars in savings every year for homeowners. For residents with an income range of

⁵⁵ 2019, “Hawai'i Housing Planning Study”

⁵⁶ 2016, “Beneficial impacts of homeownership: A research summary”, Habitat for Humanity

⁵⁷ May 2012, “Homeownership and Civic Engagement in Low-Income Urban Neighborhoods: A longitudinal analysis.” Maturuk, Lindblad, Quercia Volume: 48 Issue 5

\$60,000 to \$90,000, who would most likely take advantage of this program, the savings would be approximately \$2,500-\$3,000 a year for the first five years of a mortgage.⁵⁸

None of the above advantages are available to renters.

Demand for State Supported Leasehold Housing: Focus Group Insights

After determining what a feasible price would be for this type of housing, we conducted focus groups to see if there would be interest in this housing model and what the concerns would be.

Methodology: To conduct the focus groups, we sent out messages via text and social media to the general public through our website and partner organizations including local unions. Over a period of four weeks over 160 people completed our survey. Ultimately, 18 people participated in either a one-on-one session or a group conversation.

We initially screened for people who had enough household or individual income to potentially qualify for a mortgage with our price assumptions. However, because approximately 66% percent of respondents would not be able to income qualify, we held one focus group with low-income participants to gauge interest in a rent-to-own model supported by low-income tax credits (LIHTC). This rent-to-own model is one of the few pathways to ownership for those below 80 percent of the area median income, and is something the state can facilitate through the existing LIHTC program. Because the ALOHA Homes model does not expressly contemplate a rent-to-own option, we conducted only one focus group with lower-income participants. Fourteen of our 18 focus group participants were income qualified.

Focus Groups' Key Input

- **Leaseholds: hesitation at first, receptive after learning details.**

Generally speaking, participants did not fully understand the limits and benefits of leasehold properties prior to participating in the focus groups. The focus group facilitator explained that leasing was a way to cut down costs, because “you don’t pay for the land, you only pay for the building.” While many participants were initially apprehensive about the idea of engaging in a leasehold agreement, most were open to it after better understanding the financial benefits of leaseholds.

Given the stigma of leasehold properties for many focus group participants, it was important to make a clear distinction between private-market leaseholds, and state-provided leaseholds, which offer a public benefit, and in some cases, operate similar to a public land trust.

- **Importance of pricing: low-monthly costs key to program interest.**

⁵⁸ Assumptions: 30 yr mortgage with 3% interest rate. Federal effective tax rate of 12%, Hawai'i rate of 7%.

Program participants who were initially very skeptical of a leasehold program became interested after being presented with monthly costs, including homeowners association (HOA) fees that are similar to market-rate rental prices. Even participants who strongly preferred fee simple ownership were interested in this option as an intermediate ownership strategy or a stepping stone. “I would do this for the next five years or so,” said one participant who was initially very skeptical. Three participants expressed concern that HOA fees would increase over time and wanted assurance that there were sufficient funds for maintenance.

- **Down payment assistance and mortgage readiness: critical for access.**

For most focus group participants, down payments were the greatest barrier to owning a property. Access to a lower down payment (3 percent or less) and potential down payment assistance was an important benefit to almost everyone. For some, it was the most attractive aspect of the entire program. Moreover, some participants indicated that financial literacy and mortgage readiness programs would be of great benefit to them, as they face credit score and debt barriers to receiving bank loans.

- **Shared equity: initial confusion, strong support after explanation.**

Similar to leaseholds, most participants did not fully understand the concept of shared equity prior to participating in the focus groups. The focus group facilitator used graphics to explain the concept, and the financial trade-offs of keeping housing affordable over the long-term. Once explained, participants almost unanimously supported the concept of shared equity. As one participant stated, “If I receive help buying a place, it only makes sense that I don’t make a lot of money if I sell the place.” Moreover, most participants felt it would be unfair for people to sell affordable units at market-rate value, at any time after the initial purchase.

- **99 yr lease vs 65 yr lease lengths.**

The main benefit people cited for longer leases was being able to pass the home onto their children.

- **Preferences and set-asides: Set asides perceived to be more fair.**

Focus group participants generally supported both preferences and set-asides for special groups in need of housing. However, some participants were hesitant about the idea of preferences because they thought “everyone should be equal.”

Notably, even the participants who were against preferences were in support of housing set-asides. A set-aside felt more fair to participants who were opposed to some applications receiving preference over others.

- **Sweat equity: highly popular option, 94% support.**

Nearly all focus group participants were in support of the sweat equity model and expressed interest in engaging in such a program if it could help reduce the cost of the home and the down payment. They also expressed interest in the fact that sweat equity would help create community among residents and provide homeowners with useful home maintenance skills. As one participant noted, “This [sweat equity] is a great way to solidify tenants’ commitment.”

- **Future resident involvement in planning: strong interest, once a month is feasible.**
Focus group participants believed future residents should be involved in the planning of the ALOHA Homes Program and the eventual design of affordable housing units. Many participants also expressed interest in participating themselves. However, there was some disagreement over the preferred frequency of involvement. Some participants indicated they would be interested in meeting on a monthly basis for about a year, while others said they would only participate a few times a year.
- **Housing amenities: gathering space desired, low HOA fees is priority.**
While focus group participants expressed a desire for amenities, such as recreation rooms and communal spaces with grills, there were few amenities which participants indicated would “make-or-break” their involvement in the ALOHA Homes Program. Instead, participants preferred lower HOA fees and fewer amenities. However, many participants indicated that having laundry machines within their own unit was critical; they would not live in a housing complex with shared laundry machines. Moreover, there was a general interest in having access to gardens or open green spaces.
- **Parking: support separating from cost of housing, concern there will be enough.**
The focus group facilitator began the discussion about parking by sharing information about how parking increases tenants’ mortgages. Many participants were surprised to learn the high costs associated with parking. Although participants generally desired the availability of parking, some participants were open to the idea of having a “one-car-family.” Others were open to not having parking, pending the availability of other transit options. Participants were particularly interested in the option of separating parking from the cost of housing by paying a separate monthly fee of approximately \$160 per stall in exchange for a lower mortgage. Participants appreciated the option to not have parking included in the cost of the mortgage.
- **Owner-occupancy enforcement: concerns with high-tech, management preferred.**
Focus group participants universally agreed that owner-occupancy must be a requirement of the ALOHA Homes Program and that it should be strictly enforced, including with high fines for residents who break the rules. Some participants, particularly single-women, felt this was important for ensuring safety.

Generally, participants were not in favor of technological solutions such as face-scanning and fingerprinting, as they felt it was an invasion of privacy, could be difficult to accommodate guests and was susceptible to technological error. As one participant put it, “I can’t even get my fob to work sometimes.” Participants were more in favor of solutions that involved a property manager enforcing the rules. They felt that the residents themselves should have an active role in monitoring and identifying tenants who are illegally renting their units. Lastly, participants expressed a need for flexibility in some cases where family and friends are visiting for extended periods.

- **Potential Pilot Project: Liliha Civic Center**
In order to make the program more tangible and relatable we suggested the Liliha Civic Center as a potential pilot project site. This site was selected because it is close to downtown

Honolulu, is nearby a future rail station and already has plans for affordable housing. Most participants were very interested in this location, with several commenting that it would save them significant time spent in their cars commuting to work. Some people were so enthusiastic that they asked when the project would start and to be kept informed of any progress.

- **Strong support for state-operated affordable leasehold housing.**

While there was disagreement over some of the potential elements of the ALOHA Homes program, focus group participants were generally supportive of the State pursuing this effort and felt that it was the responsibility of the State to provide affordable housing opportunities to its residents. Several participants expressed frustration that current properties being built were not affordable to local residents and one noted that “even the supposedly ‘affordable’ homes are not really affordable.”

Given the lack of affordable homeownership programs in Hawai‘i, focus group participants felt that many of their family members, friends and colleagues would be interested in this new and innovative opportunity. As one participant from Kaua‘i said, “I would actually move to Honolulu for this program.”

Conclusion:

There is likely high demand among local residents for leasehold affordable housing at the prices that are currently feasible with this model, especially if it is coupled with down payment assistance programs. Concerns that emerged about the model were the potential for HOA prices to increase, possible limits in being able to pass the property onto one’s children, and ensuring that the property be well-maintained and managed in the future.

The interest in affordable homeownership opportunities, even with shared equity and a restricted-resale price, mirrors the experiences in other high cost places shared with our research team. In San Francisco, there are 20 approved applications for every available below-market home, even with a permanent resale price restriction.⁵⁹ Other interviews with land trusts and local governments affirmed that ownership opportunities priced at least 25 percent below market have strong demand even with resale price and buyer restrictions.⁶⁰

Other Affordable Leasehold Program Considerations

State Land Contributions are Key: Mission Alignment of State Agencies

For this housing delivery model to be successful, it is critical that land is contributed at a minimal cost. Otherwise, the housing will require further subsidies in order to be affordable at 80–140 percent of area median income. It is also crucial that the housing projects are part of a larger mixed-use area plan where market rate housing and commercial properties can help subsidize the affordable homes.

⁵⁹Interview with San Francisco Mayor’s Office of Housing and Community Development

⁶⁰ Interviews with Grounded Solutions Network and several Community Land Trusts

Although the state has significant land holdings in TOD areas, the land is often owned by different state agencies whose missions do not include affordable housing. For example, the Department of Education must prioritize education goals and the Department of Accounting and General Services must provide office space for state agencies. However, for affordable housing to be built near rail or other transportation hubs, some of the lands controlled by these departments should be repurposed for housing.

The difficulty is determining which lands should be used for affordable housing, and then facilitating the transfer of development rights to an agency such as HHFDC or HCDA which can deliver the affordable housing. Also, landowning agencies which do not have housing missions, such as the Department of Education, should be compensated for their contribution of land towards affordable housing. Otherwise the goal of affordable housing will always be competing with the primary mission of other agencies. A land contribution can and should be a win-win.

Fortunately, the process of bringing agencies together to create a plan for affordable housing in TOD areas has already been started by the Hawaii Interagency Council for Transit Oriented Development. Created in 2016, the council has encouraged agency collaboration and has initiated important planning efforts for TOD areas. However, it does not have the authority to implement an affordable housing plan or the structure necessary to hold agencies accountable for moving a plan forward. To assist the TOD council and the state in reaching the goals of affordable housing, the following actions are recommended:

1. **Establish a TOD subcabinet under the governor's executive office.** The subcabinet would be responsible for advising the governor and guiding the planning and coordination of state agency TOD implementation. The governor should regularly attend TOD subcabinet meetings to assess progress towards housing goals and offer assistance with obstacles that emerge. To demonstrate that affordable housing is a top priority for the state, the governor must be visibly involved in ensuring that benchmarks are reached.
2. **Create the position of Director of Affordable Housing, who would report directly to the governor and ensure that progress is being made across departments and agencies.** The director would create a set of housing goals and report on progress towards them regularly to the governor. This position would emphasize the importance of affordable housing and require greater accountability from the state in progressing toward its goals.
3. **Support funding for the TOD council and the Director of Affordable Housing to provide seed money for planning efforts and hiring consultants as needed.** Even an annual budget of \$1–2 million for affordable housing planning and implementation efforts would create efficiencies in how hundreds of millions of state and county dollars are spent, and ensure that affordability is prioritized in future development plans.

Expanding the availability of affordable housing will depend on many agencies collaborating and working together towards this common purpose. Unfortunately, collaboration cannot be mandated or simply passed into law. Instead, it needs to be incentivized by providing resources and plans that advance affordable housing goals, compensating non-housing agencies that contribute land, and by continuous assessment of progress. There are no short-cuts to effective collaboration, or to achieving long-range, ambitious goals such as providing quality affordable housing to Hawai'i residents.

Mortgage Assistance: Down Payment Support and Mortgage Readiness

Down payment support is one of the most referenced hurdles for people trying to purchase a home. According to the Hawai'i Housing Planning Study of 2019, when researchers asked people for their top reasons for not buying a home, the overall price of the house was the response for 56 percent of respondents, followed by the down payment for 31 percent.⁶¹

This data aligns with our focus group research, which indicated that **the ability to obtain a 3 percent down payment** and other forms assistance such as grant or matched savings programs, was a significant benefit to interested residents. All of our focus group participants could afford the monthly house payments at our projected sales prices; it was simply the down payment and loan qualification requirements that would prevent homeownership.

Savings & Down Payment Programs in Hawai'i:

Hawaiian Community Assets (HCA) provides a MATCH Savings Program. HCA matches savings for individuals to put towards an identified savings goal. HCA also provides micro loans of up to \$10,000 that a buyer can put toward a down payment.

Local Banks: 3% down payment options. We spoke with three local lenders and all offered mortgage products with a 3% down payment.⁶²

Department of Hawaiian Home Lands: Pilot program.

As of December 2020, the Department of Hawaiian Home Lands (DHHL) approved a pilot program for down payment assistance to help those on the housing waitlist to make payments toward fee-simple residences not situated on Hawaiian Home Lands. By accepting this assistance, the applicant is removed from the list. Should the fee-simple property be sold, DHHL has first right of refusal. It is anticipated that applicants would have to pay for some portion of the down payment, but it is not yet clear how much.

PMI is not required for some below-market mortgages.

Private Mortgage Insurance (PMI) is required in most mortgages where the borrower contributes less than 20% for the down payment. Both Freddie Mac and Fannie Mae have adjustable or cancelable PMI based on the loan-to-market value amount achieved by the borrower. Other municipalities that provide below market housing suggested that this provision can be used to waive PMI if a home is sold for more than 20% below market, because the mortgage loan is already 80% loan to value without a down payment.

Future Resident Engagement in Planning and Design

Best Practice: Vienna, Helsinki and other European cities are adopting the practice. Involving future residents in project planning adds value to a project and creates a sense of community.

⁶¹ 2019 "Hawai'i Housing Planning Study" prepared for HHFDC

⁶² Interviews with Bank of Hawaii, Central Pacific Bank, and American Savings Bank

Over the past few decades, standards have increased for how future residents can be involved in the design and management of affordable housing projects. Below are some case studies:

Local Case Study: Community Involvement in Pu'uhonua O Wai'anae

With a community of nearly 250 people, Pu'uhonua O Wai'anae is one of the oldest and most established houseless encampments on O'ahu.⁶³ Although the residents are technically houseless, Pu'uhonua O Wai'anae is an established village on 19.5 acres of land, where residents grow their own food, share resources with one another, engage in community services, and plan community events.⁶⁴ Pu'uhonua O Wai'anae is organized into sections of 20 to 25 people, forming "communities within the community." Each section is appointed a village "captain" to help enforce rules and settle disputes.

In 2020, Pu'uhonua O Wai'anae succeeded in raising \$1.5 million in private donations to purchase a 20-acre parcel of land in Wai'anae Valley to relocate their village. The initial design concept for the new village included a cluster of tiny homes based on the village sections, and shared spaces at the center of the community, including restrooms, kitchens, cooking areas and gardens.

Village residents were then invited to participate in design charrettes to provide input on the design of proposed community spaces and the homes. Once the relocation site was selected and purchased, organizers and future residents began site visits, clearing rubbish, and building relationships with neighbors of the future village, establishing a sense of responsibility for the land before the building starts. Moreover, the selected design of the homes, A-frame structures, is simple enough to install that residents can actively participate in the process once construction begins. The simple design, communal kitchens and bathrooms, and villagers' demonstrated ability to perform functions like groundskeeping and security, help keep development and operating costs down- savings that will be passed on to residents in the form of rents below \$300 per household.

International Case Studies: Co-Determination in Vienna, Participation model in Helsinki

Vienna has a long history of government-sponsored housing. Today, 62 percent of residents in the city live in public housing.⁶⁵ The developers of public housing actively engage future tenants through a process of "co-determination." Through this process, residents can provide input on housing design, as well as on the use of and decoration of communal areas. The level of collected input varies by development, with some projects allowing residents to choose a floor plan, while others allow input on only common areas.

Helsinki multi-family housing developers are working with buyers during pre-construction to get design input especially for amenities and community spaces. Meeting with future occupants is seen by some developers as a way to add value to a project and have residents help with resource

⁶³ Friedheim, N. (2018, September 30). "This Waianae Homeless Camp Is Going Legit". Honolulu Civil Beat. Available at: <https://www.civilbeat.org/2018/09/this-waianae-homeless-camp-is-going-legit/>

⁶⁴ HCA. (2020). "Affordable Housing Development Training" Webinar. Available at: <https://www.dropbox.com/s/cs0dk5ofixdyvfd/Affordable%20Housing%20Development%20Training%20-%20Nov%202020.mp4?dl=0>

⁶⁵ Dudley (2020)

choices: should we have less parking and more car sharing options? How should communal space be used? Involving future occupants in these conversations can create better design and also save on project costs.⁶⁶

International Case Study: Senakw Development in Vancouver

In January, 2020, Squamish Nation members approved the construction of a new district, called Sedakw, in Vancouver that would house 11 towers with 6,000 total dwelling units for more than 10,000 residents.⁶⁷ The future development sits on 11.7 acres of former railway lands within one of Canada's smallest First Nations reserves.

Since Sedakw is on federal land and not city land, the planners of the future development have the flexibility to work outside of Vancouver's design standards. While the city typically mandates one parking stall per unit, only 10 percent of Sedakw apartments will include parking. Sedakw buildings will also forgo the podium-and-tower design that has become iconic in Vancouver.⁶⁸ Instead, the apartments will be slender high-rises with a density of 500 units per acre, on par with the density in cities such as Hong Kong.

The future Sedakw development challenges the notion that indigenous communities must be low-density, rural, and located on the outskirts of cities. Revery Architecture, the architecture firm responsible for the Sedakw design, worked with members of the Squamish Nation to ensure the design paid tribute to the site's history and relationship to the natural environment. For example, apartments near the Burrard Street Bridge, have been designed to emulate the feeling of entering a forest.⁶⁹

Lessons for the ALOHA Homes Program

- Engage future residents early: Consider ways for future residents to become involved with project design before construction begins. This builds a sense of community and adds value.
- Dense, urban design can still pay tribute to the area's history and natural environment.

Cost Recovery Principle: State Funding is Recycled

One advantage of an ownership model for affordable housing is that state funding for the project can be recovered and recycled for another project when new residents secure mortgages that cover the costs of development. Note that this is for the cost of the building only and not for all the offsite infrastructure, community-wide amenities, and other costs that go into a larger community plan. However, recycling the money for just the vertical construction costs helps create a sustainable path to expanding affordable homeownership in Hawai'i.

⁶⁶ New York Times (2020, October 14th) "Helsinki makes sustainability a guiding principle for development", by Dorn Townsend Available at: <https://www.nytimes.com/2020/10/14/todaysinyt/helsinki-makes-sustainability-a-guiding-principle-for-development.html>

⁶⁷ Halliday, M. (2020, January 3). "The bold new plan for an Indigenous-led development in Vancouver." The Guardian (Cities). Available at: <https://www.theguardian.com/cities/2020/jan/03/the-bold-new-plan-for-an-indigenous-led-development-in-vancouver>

⁶⁸ Halliday (2020)

⁶⁹ Halliday (2020)

Proposed Action Items

Legislative

Most of the tools needed to implement this model for affordable home-ownership already exist within current state laws and administrative rules.

Community Facility Districts for Infrastructure Financing

One area that might require some legislative change is allowing the state to be re-paid for infrastructure investments through Community Facilities Districts implemented by the counties. In this arrangement the state would put in the initial bond funding and the counties would repay the bond financing with increased property assessments in the various improvement districts. Further research is needed to assess whether this arrangement would require any changes in the HRS or if it simply requires a memorandum of understanding between the state and the county.

Affordable Housing Facilitator

Access to affordable housing is such a key issue for Hawai'i residents that it deserves high level attention and direct communication with the Governor's Office. This position would coordinate efforts across multiple agencies and work towards a long-term strategic plan.

Taxable Mortgage Revenue Bonds

This financing tool could be used by HHFDC to provide low-cost and efficient construction financing on a project-by-project basis without impacting the state budget or the private activity bond cap. Further legal research is being conducted to determine if the current HRS 201H provisions for Taxable Mortgage Securities Programs are sufficient for the purposes of financing affordable leasehold housing.

Lease end game issues

We are awaiting further input from important stakeholders and will amend this section.

Leadership

A new leasehold housing program would require high-level state leadership to facilitate negotiation and collaboration between multiple state agencies and departments. Although each department has a separate mission, there are ways for all stakeholders to benefit from providing affordable housing to Hawai'i residents.

Conclusion

In more than 5,000 households in Hawai'i, there are residents earning good wages, who want to purchase a home but find prices to be out of reach. We spoke with some of these residents—teachers, hotel workers, even real estate agents—and they all believe the state should play a role in expanding affordable ownership opportunities. This study provides an initial blueprint for one way to accomplish this without impacting general fund revenue. The model does require a state subsidy in the form of land use and access to expedited entitlements and financing. It also requires negotiation and collaboration across departments.

Adopting a leasehold ownership model faces significant obstacles and will not be easy. If it was, it would have been done already. As a case in point:

In 1970 the Hawai'i legislature passed Act 105 for the purpose of enabling the Hawai'i Housing Authority to develop affordable ownership opportunities. The act stated:

“The legislature has also determined that decent shelter and the responsibility of home ownership contributes to the pride and dignity of man and makes him a greater asset to the community and that lack of decent shelter and the *responsibility of home ownership* contributes to harmful frustration in our community. The home is the basic source of shelter and security in society, and the center of our society which provides the basis for the development of our future citizens. **Frustration in the basic necessity of decent shelter, in the satisfaction of the basic drive in man to provide a decent home for his family, provokes an unrest in our community that is harmful to the overall fiber of our society.**”

For more than fifty years the Hawai'i legislature has struggled to provide home-ownership opportunities to lower- and middle-income residents. The problem is arguably more pressing now than ever before: Hawai'i's population has declined each of the past four years, and one of the main reasons is the cost of housing. While the ALOHA Homes model needs work, the concept of affordable leasehold housing has great potential to fulfill an important housing need for local residents.

Appendix A: Interviewees

Local Developers and Construction Companies

Hawai'i Dredging
Albert C. Kobayashi Inc.
Stanford Carr
Hawai'i Island Community Development Corporation
Alaka'i Development
Mark Development Inc.
Self-Help Housing
Artspace
Hunt Co. Hawai'i
Ahe Group

Local Government

Office of Planning
OHA
DHHL
City and County of Honolulu, Planning Department
City and County of Hawai'i, Planning Department

Local Housing Organization

LURF
BIA

Lenders

Bank of Hawai'i
American Savings Bank
Central Pacific Bank
Hawai'i Community Assets

Financial Consultants

UH Office of Budget and Finance
280CapMarkets

Other Housing Organizations and Agencies

City of Burlington Department of Planning and Zoning
Portland Housing Bureau
San Diego Housing Commission
City and County of San Francisco
DC Department of Housing and Community Development
Champlain Housing Trust
Na Hale O Maui Land Trust
Grounded Solutions
ARA - Housing Finance and Development Centre of Finland
Habitat for Humanity NYC, Habitat for Humanity Maui
Catalyst Housing Group
Factory OS
Center for Budget and Policy Priorities

Interviewed People

Jonathan Huskey - Deputy Director for State Campaign Communications, Center for Budget and Policy Priorities

Bernie Bergmann - State Data and Campaigns Senior Manager, Center for Budget and Policy Priorities

Claudia Shay - Executive Director, Self-Help Housing

Craig Watase - President, Mark Development Inc.

Jarmo Linden - Director, The Housing Finance and Development Centre of Finland

Jeremy McComber - Development Manager, Hawaii Island Community Development Corporation

Keith Kato - Executive Director, Hawaii Island Community Development Corporation

Jon Wallenstrom - Principal, Alaka'i Development

Greg Handberg - Senior Vice President, Artspace

Naomi Chu - Vice President of Asset Management, Artspace

Juliana Bernal - Project Manager, Habitat for Humanity NYC

Kevin Brown - President, Factory OS

Paul Silen - Vice President - Commercial Division, Hawaiian Dredging

Stanford Carr - President, Stanford Carr Development

Paul Kay - Executive Vice President & COO, Hunt Development Group - Hawai'i Division

Thomas Lee - Senior Vice President of Development, Hunt Development Group - Hawai'i Division

Sharon Gi - Vice President of Development, Hunt Development Group - Hawai'i Division

Steve Colón - President, Hunt Development Group - Hawai'i Division

Ruby - Planner, Office of Planning (Honolulu)

Jeff Weiss - Hunt Development Group

Dwight Mitsunaga - President, Building Industry Association

Dean Uchida - President, Building Industry Association

Jessica Leorna - CEO of Building Industry Association

Sherri Dodson - Executive Director, Habitat for Humanity Maui

Jenee Gaynor - Capacity Building Manager, Grounded Solutions

Robert Leuchs - Director of Homeownership Center, Champlain Land Trust

Kalbert Young - Vice President and Chief Financial Officer, UH Office of Budget and Finance

Jordan Moss - Founder, Catalyst Housing Group

Shelly Tanaka - Vice President, John Child & Company

Roberta Hsu - Project Manager, Albert C. Kobayashi Inc.

Michael Young - Vice President, Albert C. Kobayashi Inc.

Tom Lockard - Managing Director, Head of Investment Banking, 280CapMarkets (Originations Head, Co-Founder)

Catherine Lee - 280securities

Jessica Conner - Senior Policy and Planning Coordinator, Portland Housing Bureau

Dory Van Bockel - Program Manager, Development Incentives Team, Portland Housing Bureau

Gene Bulmash - Inclusionary Zoning Manager, DC's Department of Housing and Community Development

Todd Rawlings - Housing Program Manager, City of Burlington Department of Planning and Zoning

David White - Director of Planning and Zoning, City of Burlington Department of Planning and Zoning

Rusty Rasmussen - SVP, Division Manager, Central Pacific Bank

Sujata Raman - Vice President, Single-Family Housing Finance - San Diego Housing Commission

Maria Benjamin - San Francisco housing department

Appendix B: Other Jurisdictions

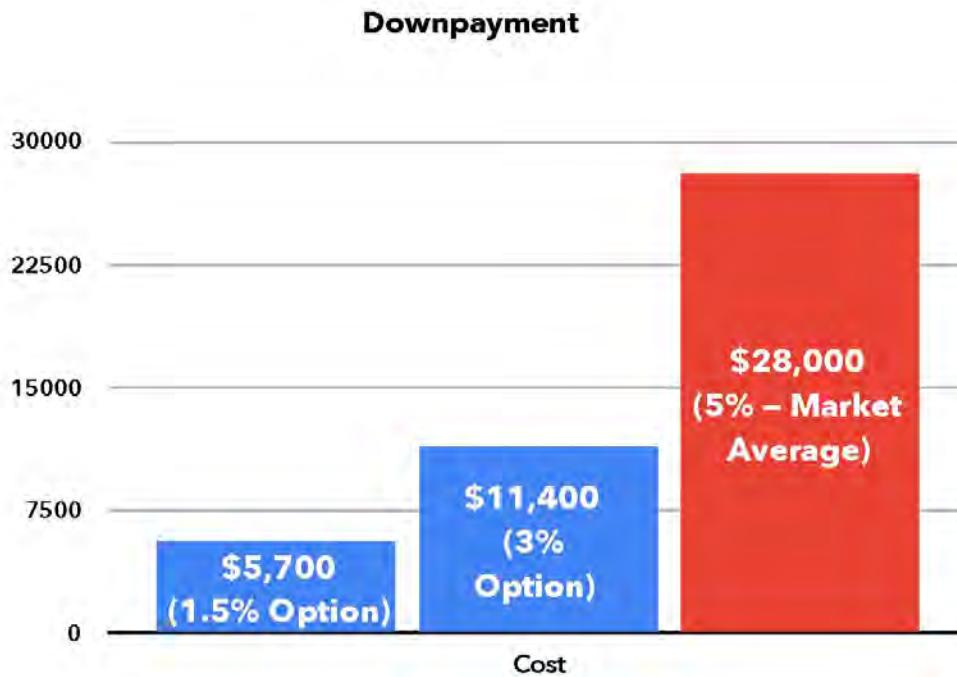
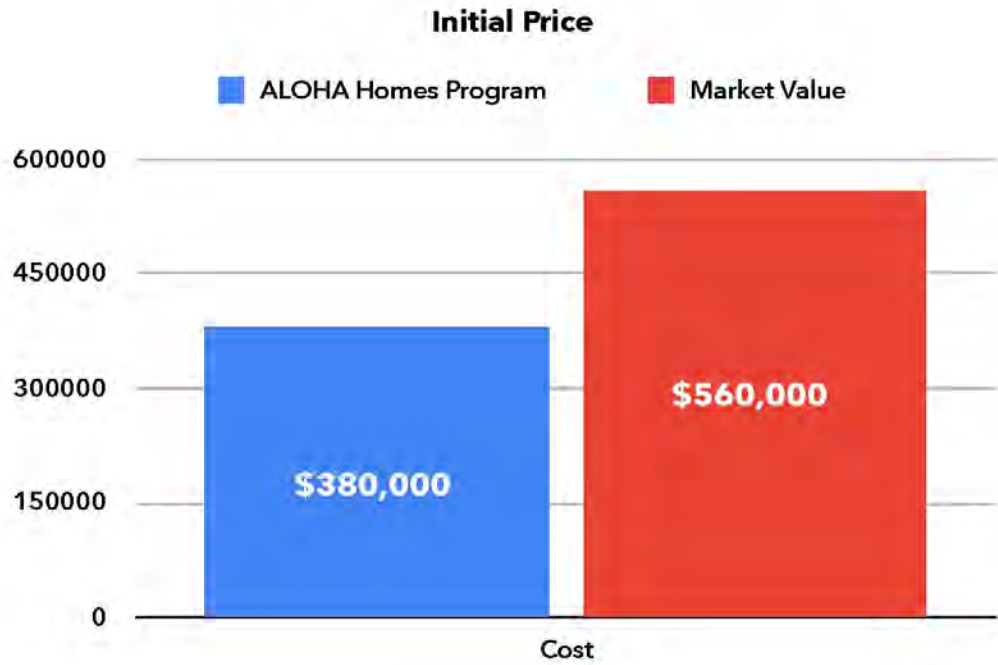
	Washington DC	Portland, OR	San Francisco, CA	San Diego, CA
Managed by	Department of Housing and Community Development	Portland Housing Bureau	Mayor's Office of Housing and Community Development	San Diego Housing Commission
AMI Range	50–80%	60–80%	80–130%	100–120%
% Units Affordable	8–10%	10–20%	12%	20%
Affordability Period	Life of the building	99 years	Life of the building	45–55 years
Owner-occupancy	Yes	Yes		Yes
Residency Requirement	Current Resident	Current resident	Current Resident	Live/work 2 years
Own Other Property	No other residential	No liquid assets > \$20,000	No residential	No other property

	Aspens, CO	Naples, FL (Collier County)	Boston, MA	New York, NY
Managed by	Aspen Pitkin County Housing Authority		City of Boston	New York City Department of Housing Preservation and Development
AMI Range	<205%	80–150%	Varies, <100%	80–130%
Affordability Period	Property Unique	15 years	50 years	Max 40 years
Owner-occupancy	Yes		Yes	Yes
Residency Requirement	Work full-time in Pitkin County or 75% of Income	Yes	Preference	Resident, Local area preference
Own Other Property	No residential			

<p>Other Requirements</p>	<p>Occupy unit at least 9 months out of the year</p>		<p>Preferences (depending on unit) for Veterans, senior citizens, first time homebuyers, approved professional artists, Boston residents</p>	<p>Sell to income-qualifying buyers at 2% appreciation</p>
----------------------------------	--	--	--	--

Appendix C: Equity Share Model

**Cost Difference: Affordable versus Market Rate (FOR SALE)
(Two-Bedroom, Two-Bath Units)**



Mortgage Payments: Affordable Leasehold \$380,000 vs. Market Rate \$570,000

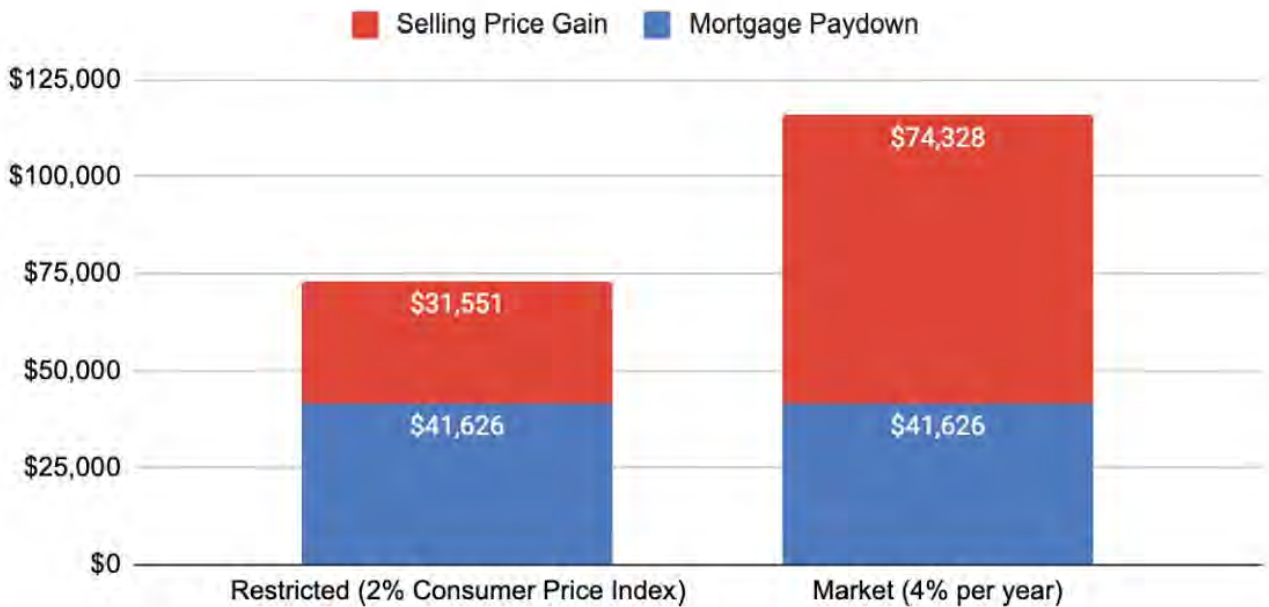


2 Bed/ 2 bath: Affordable Leasehold \$380,000 vs. Market Rate Rental

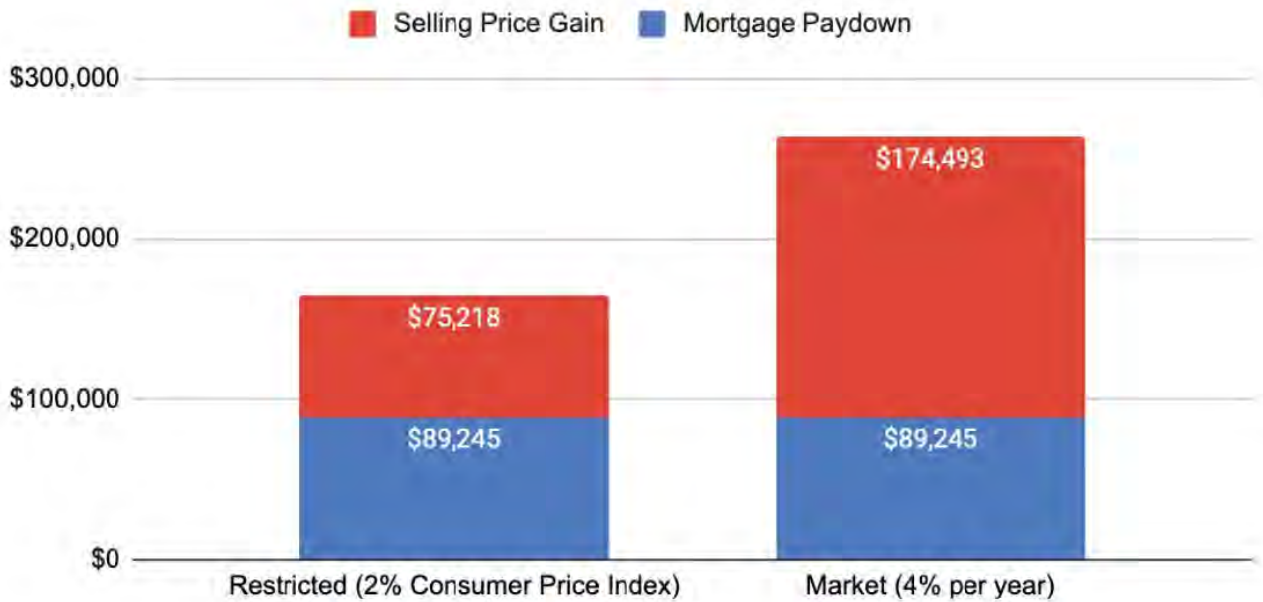


**Equity-Share Difference: Affordable versus Market Rate (FOR SALE)
(Two-Bedroom, Two-Bath Units)**

After 5-Years



After 10-Years



Appendix D: Hawai'i Three-Year Taxable Bonds

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Hawaii Housing Authority
Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

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SOURCES AND USES OF FUNDS

Hawaii Housing Authority
Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

Sources:

Bond Proceeds:	
Par Amount	50,000,000.00
	50,000,000.00

Uses:

Project Fund Deposits:	
Project Fund	44,883,811.81
Other Fund Deposits:	
Capitalized Interest Fund	4,116,188.19
Delivery Date Expenses:	
Cost of Issuance	500,000.00
Underwriter's Discount	500,000.00
	1,000,000.00
	50,000,000.00

Notes:

Cost of Issuance includes market study, appraisal, Financial Advisor, Bond Counsel, Disclosure Counsel, Issuer Fees, HOA Counsel, Trustee, Environmental Assessment, Construction Manager Consultant
30 months of capitalized interest
2023 bullet maturity

BOND SUMMARY STATISTICS

Hawaii Housing Authority
Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

Dated Date	12/16/2020
Delivery Date	12/16/2020
Last Maturity	12/01/2023
Arbitrage Yield	3.470403%
True Interest Cost (TIC)	3.831217%
Net Interest Cost (NIC)	3.808028%
All-In TIC	4.196439%
Average Coupon	3.470000%
Average Life (years)	2.958
Duration of Issue (years)	2.836
Par Amount	50,000,000.00
Bond Proceeds	50,000,000.00
Total Interest	5,132,708.33
Net Interest	5,632,708.33
Total Debt Service	55,132,708.33
Maximum Annual Debt Service	51,735,000.00
Average Annual Debt Service	18,636,408.45
Underwriter's Fees (per \$1000)	
Average Takedown	
Other Fee	10.000000
Total Underwriter's Discount	10.000000
Bid Price	99.000000

<i>Bond Component</i>	<i>Par Value</i>	<i>Price</i>	<i>Average Coupon</i>	<i>Average Life</i>
Bond Component	50,000,000.00	100.000	3.470%	2.958
	50,000,000.00			2.958

	TIC	All-In TIC	Arbitrage Yield
Par Value	50,000,000.00	50,000,000.00	50,000,000.00
+ Accrued Interest			
+ Premium (Discount)			
- Underwriter's Discount	-500,000.00	-500,000.00	
- Cost of Issuance Expense		-500,000.00	
- Other Amounts			
Target Value	49,500,000.00	49,000,000.00	50,000,000.00
Target Date	12/16/2020	12/16/2020	12/16/2020
Yield	3.831217%	4.196439%	3.470403%

BOND PRICING

**Hawaii Housing Authority
Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)**

<i>Bond Component</i>	<i>Maturity Date</i>	<i>Amount</i>	<i>Rate</i>	<i>Yield</i>	<i>Price</i>
Bond Component:	12/01/2023	50,000,000	3.470%	3.470%	100.000
		50,000,000			

Dated Date	12/16/2020		
Delivery Date	12/16/2020		
First Coupon	06/01/2021		
Par Amount	50,000,000.00		
Original Issue Discount			
Production	50,000,000.00	100.000000%	
Underwriter's Discount	-500,000.00	-1.000000%	
Purchase Price	49,500,000.00	99.000000%	
Accrued Interest			
Net Proceeds	49,500,000.00		

BOND DEBT SERVICE

Hawaii Housing Authority
 Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

<i>Period Ending</i>	<i>Principal</i>	<i>Coupon</i>	<i>Interest</i>	<i>Debt Service</i>
12/01/2021			1,662,708.33	1,662,708.33
12/01/2022			1,735,000.00	1,735,000.00
12/01/2023	50,000,000	3.470%	1,735,000.00	51,735,000.00
	50,000,000		5,132,708.33	55,132,708.33

BOND SOLUTION

Hawaii Housing Authority
Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

<i>Period Ending</i>	<i>Proposed Principal</i>	<i>Proposed Debt Service</i>	<i>Total Adj Debt Service</i>
12/01/2021		1,662,708	1,662,708
12/01/2022		1,735,000	1,735,000
12/01/2023	50,000,000	51,735,000	51,735,000
	50,000,000	55,132,708	55,132,708

NET DEBT SERVICE

Hawaii Housing Authority
 Hawaii Housing Finance Authority, Mortgage Revenue Bonds, Series 2021 (3-Year)

<i>Period Ending</i>	<i>Total Debt Service</i>	<i>Capitalized Interest Fund</i>	<i>Net Debt Service</i>
12/01/2021	1,662,708.33	1,662,708.33	
12/01/2022	1,735,000.00	1,735,000.00	
12/01/2023	51,735,000.00	934,972.22	50,800,027.78
	55,132,708.33	4,332,680.55	50,800,027.78

Mid-Rise / High-Rise Building on 1.5 Acres - With Parking	
Type	# Homes
2 Bedroom / 2 Bath Unit	150
Area (gross sq sf per home)	Total Sq Ft
830	124,500
	Parking Stalls
	120
	Site Sq Ft
	65,340

Project Costs

	Basis	Explanation	Cost	Per Home	Per Sq Ft
Due Diligence, Entitlements, Etc.	Estimate	Reduced since State will complete a portion	\$250,000	\$1,667	\$2
Environmental Assessment	Not Applicable	State conducts analysis			
Off-Site Infrastructure	\$3,000	Part of District Wide Plan (\$3000 per home estimate)	\$450,000	\$3,000	
Land and Closing Costs/Commissions	Not Applicable	State/County contributes land			
On-Site Infrastructure, Site Prep, Etc (per site sq	\$10	Recent HI pro formas	\$653,400	\$4,356	\$5
Vertical Construction GMP (per bldg sq ft)	\$350	Input from HI developer contractors	\$43,575,000	\$290,500	\$350
Parking Structure (per stall)	\$35,000	Traditional Parking Structure	\$4,200,000	\$28,000	\$34
Hard Cost Contingency	5%	Average contingency for LIHTC and other projects	\$2,388,750	\$15,925	\$19
Permits and Fees	Estimate	Reduction or exemption for most fees	\$510,000	\$3,400	\$4
Design and Engineering	4% of hard costs	Work with general/subs from start; standardization	\$2,006,550	\$13,377	\$16
Developer Fee (5%) includes overhead	5% of subtotal	Less than typical due to lower risk and State financing	\$2,898,422	\$19,323	\$23
Construction Management and Inspection	2% of hard costs	Fee seen in other pro-formas	\$1,003,275	\$6,689	\$8
Taxes	Exempt	GET, RPT, and other tax exemptions			
Legal	set fee per project	Using State lawyers/consultants where possible	\$200,000	\$1,333	\$2
Insurance	1% of hard costs	Lower premiums if State supports/guarantees	\$501,638	\$3,344	\$4
Homebuyer Preparation and Pre-Sales	Set Fee per unit	High demand; Developer non-profit for pipeline	\$750,000	\$5,000	\$6
Construction Loan Origination Fee	1.5% of funding	Recent HI pro formas	\$677,211	\$4,515	\$5
Construction Interest- 100%	4% of hard costs	Low-Cost Financing through Revenue Bonds	\$802,620	\$5,351	\$6
Subtotal			\$60,866,865	\$405,779	\$489
Additional Contingency	3% of subtotal		\$1,826,006	\$12,173	\$15
TOTAL COST			\$62,692,871	\$417,952	\$504

Appendix E:

ASSEMBLY BILL

No. 387

**Introduced by Assembly Member Lee
(Coauthor: Assembly Member Wicks)**

February 2, 2021

An act relating to housing.

LEGISLATIVE COUNSEL'S DIGEST

AB 387, as introduced, Lee. Social Housing Act of 2021.

Existing law establishes the Department of Housing and Community Development and sets forth its powers and duties. Existing law establishes various programs providing assistance for, among other things, emergency housing, multifamily housing, farmworker housing, homeownership for very low and low-income households, and downpayment assistance for first-time homebuyers.

This bill would declare the intent of the Legislature to subsequently amend this bill to include provisions that would enact the Social Housing Act of 2021 to establish the California Housing Authority for the purpose of developing mixed-income rental and limited equity homeownership housing and mixed-use developments to address the shortage of affordable homes for low and moderate-income households.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. It is the intent of the Legislature to subsequently
- 2 amend this measure to include provisions that would enact the
- 3 Social Housing Act of 2021 to establish the California Housing

AB 387

— 2 —

- 1 Authority for the purpose of developing mixed-income rental and
- 2 limited equity homeownership housing and mixed-use
- 3 developments to address the shortage of affordable homes for low
- 4 and moderate-income households.

O



UN HABITAT

The Right to Adequate Housing



UNITED NATIONS

Human Rights

Fact Sheet No.

21 (Rev. 1)

253



Office of the United Nations
High Commissioner
for Human Rights

UN  HABITAT

The Right to Adequate Housing

Fact Sheet No. **21**/Rev.1

NOTE

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ABBREVIATIONS

IDPs	internally displaced persons
ILO	International Labour Organization
NGOs	non-governmental organizations
NHRI	national human rights institution
OHCHR	Office of the United Nations High Commissioner for Human Rights
UN-Habitat	United Nations Human Settlement Programme
UNHRP	United Nations Housing Rights Programme
UNICEF	United Nations Children’s Fund

Introduction

International human rights law recognizes everyone's right to an adequate standard of living, including adequate housing. Despite the central place of this right within the global legal system, well over a billion people are not adequately housed. Millions around the world live in life- or health-threatening conditions, in overcrowded slums and informal settlements, or in other conditions which do not uphold their human rights and their dignity. Further millions are forcibly evicted, or threatened with forced eviction, from their homes every year.

Adequate housing was recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights. Other international human rights treaties have since recognized or referred to the right to adequate housing or some elements of it, such as the protection of one's home and privacy.

The right to adequate housing is relevant to all States, as they have all ratified at least one international treaty referring to adequate housing and committed themselves to protecting the right to adequate housing through international declarations, plans of action or conference outcome documents. Several constitutions protect the right to adequate housing or outline the State's general responsibility to ensure adequate housing and living conditions for all. Courts from various legal systems have also adjudicated cases related to its enjoyment, covering, for instance, forced evictions, tenant protection, discrimination in the housing sphere or access to basic housing-related services.

Increased international attention has also been paid to the right to adequate housing, including by human rights treaty bodies, regional human rights mechanisms and the Commission on Human Rights (now replaced by the Human Rights Council), which created the mandate of "Special Rapporteur on adequate housing as a component of the right to an adequate standard of living" in 2000. These initiatives have helped to clarify the scope and content of the right to adequate housing.

This Fact Sheet starts by explaining what the right to adequate housing is, illustrates what it means for specific individuals and groups, and then elaborates upon States' related obligations. It concludes with an overview of national, regional and international accountability and monitoring mechanisms.

This joint OHCHR/UN-Habitat Fact Sheet is the second in a series of joint publications by the Office of the United Nations High Commissioner for Human Rights with other United Nations partners to focus on economic, social and cultural rights. The first was the *Fact Sheet on the Right to Health*, issued jointly with the World Health Organization, and a joint fact sheet with the Food and Agriculture Organization of the United Nations on the right to food is forthcoming.

I. WHAT IS THE RIGHT TO ADEQUATE HOUSING?

A. Key aspects of the right to adequate housing

The United Nations Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should not be interpreted narrowly. Rather, it should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified mainly in the Committee's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions.¹

- **The right to adequate housing contains freedoms.** These *freedoms* include:
 - Protection against forced evictions and the arbitrary destruction and demolition of one's home;
 - The right to be free from arbitrary interference with one's home, privacy and family; and
 - The right to choose one's residence, to determine where to live and to freedom of movement.

- **The right to adequate housing contains entitlements.** These *entitlements* include:
 - Security of tenure;
 - Housing, land and property restitution;
 - Equal and non-discriminatory access to adequate housing;
 - Participation in housing-related decision-making at the national and community levels.

- **Adequate housing must provide more than four walls and a roof.** A number of conditions must be met before particular forms of shelter can be considered to constitute "adequate housing." These elements are just as fundamental as the basic supply and availability of housing. For housing to be adequate, it must, *at a minimum*, meet the following criteria:

¹ General comments are adopted by the treaty bodies based on their monitoring experience. They offer expert guidance to States on their obligations arising under a particular treaty.

- *Security of tenure*: housing is not adequate if its occupants do not have a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats.
 - *Availability of services, materials, facilities and infrastructure*: housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal.
 - *Affordability*: housing is not adequate if its cost threatens or compromises the occupants' enjoyment of other human rights.
 - *Habitability*: housing is not adequate if it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards.
 - *Accessibility*: housing is not adequate if the specific needs of disadvantaged and marginalized groups are not taken into account.
 - *Location*: housing is not adequate if it is cut off from employment opportunities, health-care services, schools, childcare centres and other social facilities, or if located in polluted or dangerous areas.
 - *Cultural adequacy*: housing is not adequate if it does not respect and take into account the expression of cultural identity.
- **Protection against forced evictions.** Protection against forced evictions is a key element of the right to adequate housing and is closely linked to security of tenure.

Forced evictions are defined as the “permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”² According to the United Nations Human Settlements Programme (UN-Habitat), at least 2 million people in the world are forcibly evicted every year, while millions are threatened with forced evictions.³

² General comment 7, which goes on to note that “the prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights” (para. 4).

³ UN-Habitat, *Global Report on Human Settlements 2007: Enhancing Urban Safety and Security* (Nairobi, 2007).

Forced evictions are carried out in a variety of circumstances and for a variety of reasons, for instance, to make way for development and infrastructure projects, urban redevelopment or city beautification, or prestigious international events, as a result of conflicts over land rights, armed conflicts or societal patterns of discrimination. Forced evictions tend to be violent and disproportionately affect the poor, who often suffer further human rights violations as a result. In many instances, forced evictions compound the problem they were ostensibly aimed at solving.

Regardless of their cause, forced evictions may be considered a gross violation of human rights and a prima facie violation of the right to adequate housing. Large-scale evictions can in general be justified only in the most exceptional circumstances and only if they take place in accordance with the relevant principles of international law.

Safeguards in the case of evictions

If eviction may be justifiable, because the tenant persistently fails to pay rent or damages the property without reasonable cause, the State must ensure that it is carried out in a lawful, reasonable and proportional manner, and in accordance with international law. Effective legal recourses and remedies should be available to those who are evicted, including adequate compensation for any real or personal property affected by the eviction. Evictions should not result in individuals becoming homeless or vulnerable to further human rights violations.

In general, international human rights law requires Governments to explore all feasible alternatives before carrying out any eviction, so as to avoid, or at least minimize, the need to use force. When evictions are carried out as a last resort, those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

- An opportunity for genuine consultation;
- Adequate and reasonable notice;
- Availability of information on the proposed eviction in reasonable time;
- Presence of Government officials or their representatives during an eviction;

- Proper identification of persons carrying out the eviction;
- Prohibition on carrying out evictions in bad weather or at night;
- Availability of legal remedies;
- Availability of legal aid to those in need to be able to seek judicial redress.

B. Common misconceptions about the right to adequate housing

- **The right to adequate housing does NOT require the State to build housing for the entire population.** One of the most common misconceptions associated with the right to adequate housing is that it requires the State to build housing for the entire population, and that people without housing can automatically demand a house from the Government. While most Governments are involved to some degree in housing construction, the right to adequate housing clearly does not oblige the Government to construct a nation's entire housing stock.

Rather, the right to adequate housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable and marginalized groups, ensure security of tenure to all, and guarantee that everyone's housing is adequate. These measures can require intervention from the Government at various levels: legislative, administrative, policy or spending priorities. It can be implemented through an enabling approach to shelter where the Government, rather than playing the role of housing provider, becomes the facilitator of the actions of all participants in the production and improvement of shelter. Policies, strategies and programmes based on the enabling approach have been promoted by the United Nations since 1988 within the framework of the Global Strategy for Shelter to the Year 2000.

In specific cases, however, the State may have to provide direct assistance, including housing or housing allowances, notably to people affected by disasters (natural or man-made) and to the most vulnerable groups in society. On the other hand, several measures necessary to guarantee the right to adequate housing require the Government only to refrain from certain practices or actions.

- **The right to adequate housing is NOT only a programmatic goal to be attained in the long term.** Another misunderstanding is that the right to adequate housing does not impose immediate obligations on the State. On the contrary, States must make every possible effort, within their available resources, to realize the right to adequate housing and to take steps in that direction without delay. Notwithstanding resource constraints, some obligations have immediate effect, such as the undertaking to guarantee the right to adequate housing in an equal and non-discriminatory manner, to develop specific legislation and plans of action, to prevent forced evictions or to guarantee a certain degree of security of tenure to all.
- **The right to adequate housing does NOT prohibit development projects which could displace people.** It is sometimes believed that the protection against forced evictions prohibits development or modernization projects that entail displacement. There are inevitable needs for the redevelopment of certain areas in growing cities and for public agencies to acquire land for public use and infrastructure. The right to adequate housing does not prevent such development from taking place, but imposes conditions and procedural limits on it. It is the way in which such projects are conceived, developed and implemented that is important. Very often, they are carried out with little or no consultation with those affected, limited consideration of their needs and little attempt to develop solutions which minimize the scale of the eviction and the disruption caused.
- **The right to adequate housing is NOT the same as the right to property.** It is sometimes believed that the right to adequate housing equates to a right to property or property rights. Some also argue that the right to adequate housing threatens the right to property. The right to own property is enshrined in the Universal Declaration of Human Rights and other human rights treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (d)(v)) and the Convention on the Elimination of All Forms of Discrimination against Women (art. 16 (h)), although absent from the two Covenants.⁴

The right to adequate housing is broader than the right to own property as it addresses rights not related to ownership and is

⁴ The right to property is also enshrined in the American Convention on Human Rights (art. 21), the African Charter on Human and Peoples' Rights (art. 14), and the Charter of Fundamental Rights of the European Union (art. 17).

intended to ensure that *everyone* has a safe and secure place to live in peace and dignity, including non-owners of property. Security of tenure, the cornerstone of the right to adequate housing, can take a variety of forms, including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing or informal settlements. As such, it is not limited to the conferral of formal legal titles.⁵ Given the broader protection afforded by the right to adequate housing, a sole focus on property rights might in fact lead to violations of the right to adequate housing, for instance, by forcibly evicting slum-dwellers residing on private property. On the other hand, protection of the right to property might be crucial to ensure that certain groups are able to enjoy their right to adequate housing. The recognition of spouses' equal rights to household property, for instance, is often an important factor in ensuring that women have equal and non-discriminatory access to adequate housing.

- **The right to adequate housing is NOT the same as the right to land.** It is sometimes argued that the right to adequate housing equates to a right to land. Access to land can constitute a fundamental element of the realization of the right to adequate housing, notably in rural areas or for indigenous peoples. Inadequate housing or the practice of forced evictions can be the consequence of being denied access to land and common property resources. As such, the enjoyment of the right to adequate housing might require, in certain cases, securing access to and control over land. Nevertheless, international human rights law does not, currently, recognize a self-standing right to land.⁶
- **The right to adequate housing includes ensuring access to adequate services.** The right to adequate housing does not just mean that the structure of the house itself must be adequate. There must also be sustainable and non-discriminatory access to facilities essential for health, security, comfort and nutrition. For example, there must be access to safe drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, means

⁵ The work of the Global Land Tool Network (GLTN), facilitated by UN-Habitat, aims to take a more holistic approach to land issues by improving global coordination, including through the establishment of a continuum of land rights, rather than just focus on individual land titling. See www.gltn.net.

⁶ "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari" (A/HRC/4/18, paras. 26 and 31). The Special Rapporteur recognized and emphasized the importance of land as a "critical element" of the right to adequate housing, and called on the Human Rights Council to ensure "the recognition in international human rights law of land as a human right."

of storing food, refuse disposal, site drainage and emergency services.

C. The link between the right to adequate housing and other human rights

Human rights are interdependent, indivisible and interrelated. In other words, the violation of the right to adequate housing may affect the enjoyment of a wide range of other human rights and vice versa.

Access to adequate housing can be a precondition for the enjoyment of several human rights, including the rights to work, health, social security, vote, privacy or education. The possibility of earning a living can be seriously impaired when a person has been relocated following a forced eviction to a place removed from employment opportunities. Without proof of residency, homeless persons may not be able to vote, enjoy social services or receive health care. Schools may refuse to register slum children because their settlements have no official status. Inadequate housing can have repercussions on the right to health; for instance, if houses and settlements have limited or no safe drinking water and sanitation, their residents may fall seriously ill.

Forced evictions can have implications for the enjoyment of several human rights, including the right to education and the right to personal security. Forced evictions often result in children's schooling being interrupted or completely stopped. The trauma experienced following a forced eviction can also impair a child's capacity to attend classes. During forced evictions, people are frequently harassed or beaten and occasionally even subjected to inhumane treatment or killed. Women and girls are particularly vulnerable to violence, including sexual violence, before, during and after an eviction.

At the same time, the right to adequate housing can be affected by the extent to which other human rights are guaranteed. Access to housing is most at risk for those denied the right to education, work or social security. Improving housing conditions and protecting against forced evictions are often dependent on claims made by those affected. Where the rights to freedom of expression, assembly or association are not respected, the possibility for individuals and communities to advocate better living conditions is significantly reduced. Human rights defenders working to protect the right of individuals and communities to adequate housing have been subjected to violence, arbitrary arrest, and arbitrary and prolonged detention.

D. How does the principle of non-discrimination apply?

Discrimination means any distinction, exclusion or restriction made on the basis of the specific characteristics of an individual such as race, religion, age or sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms. It is linked to the marginalization of specific population groups and is generally at the root of structural inequalities within societies.

In housing, discrimination can take the form of discriminatory laws, policies or measures; zoning regulations; exclusionary policy development; exclusion from housing benefits; denial of security of tenure; lack of access to credit; limited participation in decision-making; or lack of protection against discriminatory practices carried out by private actors.

Non-discrimination and equality are fundamental human rights principles and critical components of the right to adequate housing. The International Covenant on Economic, Social and Cultural Rights, in its article 2 (2), identifies the following non-exhaustive grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. According to the Committee on Economic, Social and Cultural Rights, “other status” may include disability, health status (e.g., HIV/AIDS) or sexual orientation. The Special Rapporteur on adequate housing has also emphasized that discrimination and segregation in housing can result from poverty and economic marginalization.

The impact of discrimination is compounded when an individual suffers double or multiple discrimination—for instance, on the basis of sex *and* race, national origin or disability. The Committee has stressed the importance of addressing this type of discrimination in its general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights.

States have an obligation to prohibit and eliminate discrimination on all grounds and ensure de jure and de facto equality in access to adequate housing and protection against forced eviction.

E. The right to adequate housing in international human rights law

The right to adequate housing is a human right recognized in international human rights law as part of the right to an adequate standard of living.

One of the first references to it is in article 25 (1) of the Universal Declaration of Human Rights. The International Covenant on Economic, Social and Cultural Rights, widely considered as the central instrument for the protection of the right to adequate housing, refers to *the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions* (art. 11).

As mentioned above, the Committee has adopted general comments on the right to adequate housing and housing-related issues which provide authoritative guidance on the Covenant's provisions, in particular its general comments Nos. 4, 7 and 16.

Other international human rights treaties have addressed the right to adequate housing in different ways. Some are of general application while others cover the human rights of specific groups, such as women, children, indigenous peoples, migrant workers and members of their families, or persons with disabilities.

Other international human rights treaties that recognize the right to adequate housing

- The 1951 Convention Relating to the Status of Refugees (art. 21)
- The International Labour Organization's 1962 Convention No. 117 concerning Basic Aims and Standards of Social Policy (art. 5 (2))
- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e)(iii))
- The 1966 International Covenant on Civil and Political Rights (art. 17)
- The 1979 Convention on the Elimination of All Forms of Discrimination against Women (arts. 14 (2) and 15 (2))
- The 1989 Convention on the Rights of the Child (arts. 16 (1) and 27 (3))
- The International Labour Organization's 1989 Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (arts. 14, 16 and 17)
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43 (1)(d))
- The 2006 Convention on the Rights of Persons with Disabilities (arts. 9 and 28)

At the regional level, the right to adequate housing is recognized in the European Convention on the Legal Status of Migrant Workers (1977), the African Charter on the Rights and Welfare of the Child (1990) and the revised European Social Charter (1996). While the European Convention for the Promotion of Human Rights and Fundamental Freedoms (1950), the European Social Charter (1961), the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981) do not explicitly refer to the right to adequate housing, in the jurisprudence its protection has been derived from the enjoyment of other human rights, such as the right to privacy, the right to property and peaceful enjoyment of possessions, and the right to protection of the family.

The right to adequate housing under the African Charter on Human and Peoples' Rights

In the Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria (communication No. 155/96), the African Commission on Human and Peoples' Rights found that, while the right to adequate housing was not explicitly recognized in the Charter, it could be inferred from other rights:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, ..., the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18 (1) reads into the Charter a right to shelter or housing....

Several international guidelines and principles also set out specific provisions related to the right to adequate housing. While not legally binding, they provide useful guidance regarding the implementation of the right to adequate housing, notably for specific groups such as workers, refugees and internally displaced persons, old persons, and indigenous peoples.⁷ Of particular relevance are the *Basic principles and guidelines*

⁷ United Nations Principles for Older Persons, Principles on Housing and Property Restitution for Refugees and Displaced Persons, Guiding Principles on Internal Displacement; ILO Recommendation No. 115 concerning Workers' Housing, and United Nations Declaration on the Rights of Indigenous Peoples.

on development-based evictions and displacement developed under the mandate of the Special Rapporteur on adequate housing. They outline States' obligations to protect against forced evictions, along with specific obligations before, during and after development-based evictions.

Basic principles and guidelines on development-based evictions and displacement

22. States must adopt legislative and policy measures prohibiting the execution of evictions that are not in conformity with their international human rights obligations. ...

32. ... Comprehensive and holistic impact assessments should be carried out prior to the initiation of any project that could result in development-based evictions and displacement, "Eviction-impact" assessment should also include exploration of alternatives and strategies for minimizing harm.

37. Urban or rural planning and development processes should involve all those likely to be affected....

38. States should explore fully all possible alternatives to evictions. ...

52. ... At a minimum, ..., competent authorities shall ensure that evicted persons or groups, ..., have safe and secure access to: (a) essential food, potable water and sanitation; (b) basic shelter and housing; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; (g) education for children and childcare facilities. ...

55. Identified relocation sites must fulfil the criteria for adequate housing according to international law. ...

Numerous conferences, declarations and plans of action, such as the Vancouver Declaration on Human Settlements (1976), Agenda 21 (1992), the Istanbul Declaration on Human Settlements (1996), the Habitat Agenda (1996) and the Millennium Declaration and Millennium Development Goals (2000) have also helped clarify various aspects of the right to adequate housing and have reaffirmed States' commitments to its realization.

The Habitat Agenda

The outcome of the Habitat II Conference—the Istanbul Declaration and the Habitat Agenda—constitutes a framework for linking human settlements development to the realization of human rights in general and housing rights in particular. The Habitat Agenda states that, *within the overall context of an enabling approach, Governments should take appropriate action in order to promote, protect and ensure the full and progressive realization of the right to adequate housing* (para. 61).

International humanitarian law also entails specific protection of the right to adequate housing during international and non-international armed conflicts.⁸ The Rome Statute of the International Criminal Court recognizes as a war crime the extensive destruction and appropriation of property that is not justified by military necessity and carried out unlawfully and wantonly (art. 8).

Finally, several constitutions explicitly refer to the right to adequate housing, including those of Belgium, Seychelles, South Africa and Uruguay.⁹ Other constitutions suggest a general responsibility of the State for ensuring adequate housing and living conditions for all.¹⁰

⁸ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (art. 53); Protocol I (art. 69); and Protocol II (art. 17).

⁹ See also the constitutions of Ecuador, Guyana, Haiti, Honduras, Iran (Islamic Republic of), Maldives, Mali, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Russian Federation, Sao Tome and Principe, and Spain.

¹⁰ See the constitutions of Argentina, Bangladesh, Brazil, Burkina Faso, Colombia, Costa Rica, Dominican Republic, El Salvador, Finland, Guatemala, Nepal, Netherlands, Nigeria, Pakistan, Philippines, Poland, Republic of Korea, Sri Lanka, Sweden, Switzerland, Turkey, Venezuela (Bolivarian Republic of) and Viet Nam.

The right to adequate housing in selected national constitutions

Constitution of Mexico, 1917 (as amended in 1983)

Article 4

[...] Every family has the right to enjoy decent and proper housing. The law shall establish the instruments and necessary supports to reach the said goal. [...]

Constitution of Portugal, 1976 (fourth revision based on Constitutional Law No. 1/97 of 20 September 1997)

Article 65. Housing and Urban Planning

(1) All have the right, both personally and for their family, to a dwelling of adequate size that meets satisfactory standards of hygiene and comfort and preserves personal and family privacy.

Constitution of the Russian Federation, 1993

Article 40

(1) Everyone has the right to a home. No one may be arbitrarily deprived of a home.

Constitution of South Africa, 1996

Article 26. Housing

(1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Article 28. Children

(1) Every child has the right to... shelter....

See United Nations Housing Rights Programme, "Report No. 1: Human rights legislation: Review of international and national legal instruments" (2002).

II. HOW DOES THE RIGHT TO ADEQUATE HOUSING APPLY TO SPECIFIC GROUPS?

Some groups or individuals have a particularly hard time exercising their right to adequate housing as a result of who they are, discrimination or stigma, or a combination of these factors. To protect the right to housing effectively, it is necessary to pay attention to the specific situation of individuals and groups, in particular those living in vulnerable situations. States should adopt positive measures to ensure that they are not discriminated against in purpose or effect. For instance, they should tailor their housing laws and policies to those most in need rather than merely targeting majority groups.

Discussion on the particular groups outlined below is intended to help illustrate what the standards related to the right to adequate housing mean in practice.

A. Women

Although data are lacking and figures are hard to estimate, it is widely thought that women represent an important proportion of those who

The Convention on the Elimination of All Forms of Discrimination against Women

Article 14 (2)

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: [...]

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 15 (2)

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

are inadequately housed. Women face discrimination in many aspects of housing because they are women, or because of other factors such as poverty, age, class, sexual orientation or ethnicity. In many parts of the world, and especially in rural areas, women's enjoyment of the right to adequate housing often depends on their access to and control over land and property.

Discrimination against women in the housing sphere can be caused, for instance, by: discriminatory statutory laws; gender-neutral laws and policies that fail to take into account women's special circumstances (such as their vulnerability to sexual and gender-based violence); the predominance of customary laws and practices which discriminate against women; bias in the judiciary and public administration; lack of access to remedies, information or decision-making processes; and lack of awareness of rights. This discrimination is underpinned by structural and historical factors.

Women and inheritance

In many parts of the world, women and girls face entrenched discrimination in inheritance, which can seriously affect their enjoyment of the right to adequate housing. Such discrimination can be enshrined in statutory laws as well as in customary laws and practices that fail to recognize women's equal rights to men in inheritance. As a result, women are either entitled to a lesser share than male relatives, or are simply dispossessed from any heritage of their deceased husbands or fathers.

Violence is common within the context of inheritance, as a woman's property can be forcibly seized by relatives, an attempt that often involves physical and psychological violence, and long-lasting trauma. Relatives often abuse widows with impunity, as these matters are seen as a private family affair.

If a woman decides to fight for her inheritance, she may also face violence from her in-laws or even from the community at large. In general, women's claims for inheritance can result in social exclusion, not only from the family but also from the community.

See "Women and adequate housing: Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari" (E/CN.4/2005/43, paras. 59–61).

Women face severe discrimination regarding security of tenure. Regardless of its form, tenure is often understood, recorded or registered in the name of men, leaving women dependent on their male relatives for tenure security. Moreover, while collective forms of tenure can include women, the decision-making processes are often dominated by men.

Without control over housing, land or property, women enjoy little personal or economic autonomy and are more vulnerable to abuse within the family, community and society at large. When women's access to housing, land or property depends on a third person—their husbands, brothers, fathers or other male relatives—they become vulnerable to homelessness, poverty and destitution if this relationship comes to an end.

While forced evictions have an impact on both men and women, women tend to be disproportionately affected. Women are often exposed to violence and intense emotional stress before, during and after an eviction, because of their close ties to the home and their role as caregivers for the entire family.¹¹ During evictions, verbal abuse, beatings and rape may take place. Following an eviction, women are often more vulnerable to abuse, particularly if they have been forced to move to inadequate housing, often in informal settlements. The lack of shelter and privacy in such settlements can lead to increased exposure to sexual and other forms of violence. When housing conditions are inadequate, women are often disproportionately affected. For instance, women are usually responsible for collecting water if water and sanitation services are inadequate, and often spend up to 4 hours a day walking, queuing and carrying water.

Domestic violence has been identified as a major cause of women and children becoming homeless, especially when there is insufficient protection by law enforcement officials or by the legal system itself. Conversely, fear of homelessness might compel women to remain in abusive relationships.

B. Children

Children's health, educational advancement and overall well-being are deeply influenced by the quality of housing in which they live. Lack of adequate housing, forced evictions or homelessness tend to have a profound impact on children due to their specific needs, affecting their growth, development and enjoyment of a whole range of human rights, including the right to education, health and personal security.

¹¹ "Economic and social policy and its impact on violence against women" (E/CN.4/2000/68/Add.5).

The Convention on the Rights of the Child

Article 16 (1)

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. [...]

In its *State of the World's Children 2005* report, the United Nations Children's Fund (UNICEF) revealed that more than one out of every three children in the developing world—over 640 million children—does not live in adequate housing. Given the pervasiveness and the impact of homelessness and inadequate housing on children, the United Nations Committee on the Rights of the Child has emphasized the universal character of the right to adequate housing, stressing that it applies to every child without distinction or restriction of any kind.

While the existence of millions of street children is often the most visible sign of children's lack of shelter, other situations also have specific ramifications for their enjoyment of the right to adequate housing. Cramped, crowded, noisy or run-down housing conditions seriously undermine children's development and health, as well as their capacity to learn or play. Studies have highlighted that the lack of adequate housing increases mortality rates for children under five, while the most significant form of chemical pollutant affecting children's health in

low- and middle-income countries is indoor pollution resulting notably from poor-quality stoves and inadequate ventilation.¹²

Access to basic services attached to the home, such as safe drinking water and adequate sanitation, is fundamental to ensuring children's health. Diarrhoeal diseases claim the lives of nearly two million children every year; 80 to 90 per cent of these cases are the result of contaminated water and inadequate sanitation. Particularly for girls, lack of safe drinking water within or close to the home can mean long journeys to collect water at remote water points, often to the detriment of their education, along with the risk of being subjected to harassment and other threats along the way.

The location of housing is also crucial to ensuring children's access to childcare, schools, health care and other services. If settlements are far away from schools, or if transport is either non-existent or too expensive, it is hard for children to get an education or health care.

Homelessness has particular effects on children, compromising their growth, development and security. Homeless children can be vulnerable to a range of emotional problems, including anxiety, sleeplessness, aggression and withdrawal. Their access to basic services, such as health care and education, can also be seriously impaired if they have no fixed address. Children living and working in the street are particularly vulnerable to threats, harassment and violence by private individuals and the police.

Forced evictions tend to affect the entire family but have a particular impact on children. Following forced evictions, family stability is often jeopardized and livelihoods threatened. The impact of forced evictions on children's development is considered to be similar to that of armed conflict.¹³

C. Slum-dwellers

By the end of 2008, half of the world's population was thought to be living in cities, many without adequate infrastructure and services. UN-Habitat notes that the most insecure urban residents are the world's 1 billion poor people living in slums. More than 930 million slum-dwellers live in developing countries, where they constitute 42 per cent of the

¹² UNICEF, *Poverty and exclusion among urban children*, Innocenti Digest No. 10 (Florence, 2002), p. 10.

¹³ T. Rahmatullah, *The Impact of Evictions on Children: Case Studies from Phnom Penh, Manila and Mumbai* (New York, United Nations Economic and Social Commission for Asia and the Pacific and The Asian Coalition for Housing Rights, 1997).

urban population. This proportion is particularly high in Sub-Saharan Africa, where slum-dwellers make up 72 per cent of the urban population, and in Southern Asia, where they represent 59 per cent.

Slums are blighted by a lack of durable housing, insufficient living space, a lack of clean water, inadequate sanitation, etc. Due to the informal nature of their settlements, slum-dwellers often lack tenure security, which makes them vulnerable to forced evictions, threats and other forms of harassment. UN-Habitat reports that around 2 million people, most of them slum-dwellers, are forcibly evicted every year. The effects of forced evictions on slum-dwellers are often disastrous, leaving them homeless and forcing them deeper into poverty.

Authorities—national or local—are often reluctant to extend basic services to slums precisely because they are informal. As a result, slum-dwellers rarely have access to safe drinking water, adequate sanitation or electricity, and refuse collection is limited or non-existent. As slums are not connected to the piped water systems, slum-dwellers often end up paying 5 to 10 times more for water than higher-income urban residents.¹⁴

Slum upgrading is acknowledged as an effective means of improving the housing conditions of slum-dwellers. It has been defined by the Cities Alliance—a global alliance of cities launched by the World Bank and UN-Habitat in 1999—as consisting of “physical, social, economic, organizational and environmental improvements undertaken cooperatively and locally among citizens, community groups, businesses and local authorities.”¹⁵ Slum upgrading programmes can contribute to the realization of the right to adequate housing for slum-dwellers if they ensure tenure security to all, including tenants; take into account women’s rights and ensure non-discrimination in tenure schemes; and guarantee the full and meaningful participation of affected communities.

D. Homeless persons

The Special Rapporteur on adequate housing has called homelessness “perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing.”

¹⁴ United Nations Development Programme, *Human Development Report 2006, Beyond scarcity: Power, Poverty and the Global Water Crisis* (New York, 2006), pp. 52–53.

¹⁵ World Bank and UNCHS (Habitat), *Cities Alliance for Cities Without Slums: Action Plan for Moving Slum Upgrading to Scale*, Special Summary Edition (1999), p. 2 (available at: www.citiesalliance.org).

There is no internationally agreed definition of homelessness. Definitions range from the narrow—equating homelessness with “rooflessness”—to the broad, based on the adequacy of the dwelling, the risk of becoming homeless, the time exposed to homelessness and responsibilities for taking alleviating action. For statistical purposes, the United Nations has defined homeless households as “households without a shelter that would fall within the scope of living quarters. They carry their few possessions with them, sleeping in the streets, in doorways or on piers, or in any other space, on a more or less random basis.”¹⁶ The Special Rapporteur on adequate housing has noted that narrow definitions are inadequate and that in developing countries the most common definitions recognize that an element of social exclusion is part of the experience of the homeless. UN-Habitat underlines in this respect that homelessness implies belonging nowhere rather than simply having nowhere to sleep. Given the lack of a globally agreed definition of homelessness, limited data are available about the scale of this phenomenon, which in turn impedes the development of coherent strategies and policies to prevent and address it.

The Special Rapporteur on adequate housing has highlighted that poverty is a common denominator in the experience of the homeless. Other causes or factors which make people more vulnerable to homelessness are unemployment, a lack of social security systems, a lack of affordable housing, forced evictions, non-availability of social housing, conflicts and natural disasters, as well as a lack of attention to the needs of the most vulnerable.

The “deinstitutionalization” of mental health care, which first started in many countries during the 1960s and 1970s, led to persons with disabilities swelling the ranks of the homeless unless it was accompanied by a parallel growth in community or other support.

Besides the violation of their right to adequate housing, homeless persons may be deprived of a whole range of other human rights. Laws that criminalize homelessness, vagrancy or sleeping rough, along with street cleaning operations to remove homeless people from the streets, have a direct impact on their physical and psychological integrity. Merely by not having a secure place to live, nor any privacy, homeless persons are much more vulnerable to violence, threats and harassment.

¹⁶ *Principles and Recommendations for Population and Housing Censuses* (United Nations publication, Sales No. 07.XVII.8 P), para 1.328.

States' obligations towards the full realization of the right to adequate housing include taking measures to prevent homelessness. Among the steps to be taken immediately, general comment No. 4 (paras. 10–13) mentions determining the extent of homelessness, as well as adopting a national housing strategy which should reflect extensive genuine consultation with the homeless. General comment No. 7 (para. 17) also emphasizes that forced evictions should not result in individuals being made homeless.

E. Persons with disabilities

There are more than 650 million persons with disabilities in the world, of whom approximately 80 per cent are living in developing countries. They generally experience several barriers to the enjoyment of their right to adequate housing, including lack of physical accessibility; ongoing discrimination and stigmatization; institutional hurdles; lack of access to the labour market; low income; and lack of social housing or community support.

Accessibility remains a key issue. Housing, housing-related facilities and neighbourhoods are traditionally designed for people without disabilities. The frequent exclusion and marginalization of persons with disabilities often mean that they are rarely consulted when new housing structures or neighbourhoods are developed or slums upgraded. They are also vulnerable to associated violations of their rights. For instance, the lack of adequate sanitation facilities in informal settlements can pose severe challenges to them.

Security of tenure is another challenge for persons with disabilities, in particular those with an intellectual or psychosocial disability. The frequent lack of recognition of their legal capacity, often coupled with requirements for applications in person, means that persons with such disabilities are rarely able to enter into any type of formal housing contract (lease, ownership, etc.) and, therefore, have to rely on less formal avenues to secure housing. Those arrangements, in turn, make them more vulnerable to forced evictions.

In general, where stigmatization remains unaddressed and social or community services are unavailable—including social housing—persons with disabilities continue to face discrimination when seeking housing, or more general challenges in securing the resources necessary for obtaining

adequate housing. Such challenges inevitably make them more vulnerable to forced evictions, homelessness and inadequate housing conditions.

The **Convention on the Rights of Persons with Disabilities** requires States to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, including their right to adequate housing.

Article 1 requires States to promote respect for their inherent dignity.

Article 9 further demands that States adopt measures to identify and eliminate obstacles and barriers to accessibility, notably in relation to housing.

Article 12 recognizes that persons with disabilities enjoy legal capacity on an equal basis with others and requires States to take appropriate measures to enable persons with disabilities to exercise legal capacity.

Article 28 recognizes the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate housing, and demands that States take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability, for instance by ensuring that persons with disabilities have access to public housing programmes.

General comment No. 4 provides that persons with disabilities must be accorded full and sustainable access to adequate housing resources, and that housing law and policy should take into account their special needs. In its general comment No. 5 (1994), the Committee on Economic, Social and Cultural Rights reaffirmed that the right to adequate housing includes accessibility for persons with disabilities. The Special Rapporteur on adequate housing has also underlined not only that housing should be physically and economically accessible to persons with disabilities, but that they should be able to effectively participate in the life of the community where they live.

F. Displaced persons and migrants

People on the move, whether they are refugees, asylum-seekers, internally displaced persons (IDPs) or migrants, are particularly vulnerable to a

range of human rights violations, including violations of the right to adequate housing. Displaced persons are also particularly vulnerable to discrimination, racism and xenophobia, which can further interfere with their ability to secure sustainable and adequate living conditions. People who have been forcibly displaced will often have suffered trauma during their flight, and will have lost familiar coping strategies and support mechanisms.

Refugee and IDP camps around the world, particularly when displacement is protracted, are often dilapidated and overcrowded, providing inadequate shelter and services. Sometimes their inhabitants enjoy no basic services at all. Displaced women and girls living in camps can be subject to sexual and gender-based violence, for instance because not enough attention is paid to their specific needs and vulnerabilities in the design and layout of the camp.

In urban areas, urban refugees, asylum-seekers and IDPs can fare little better. Often unable in practice or because of their legal status to rent adequate accommodation, many are forced to live in overcrowded and insecure conditions. Migrants will also often end up living in precarious and unsafe conditions in cities and urban areas. Employers may oblige migrant domestic workers or factory workers to live at their place of work. Many will end up living in overcrowded dormitories, sleeping in shifts and without access to adequate sanitation. Domestic workers can be made to sleep in poorly ventilated rooms, storerooms or common living areas with no regard for their dignity, privacy or personal security.

Irregular or undocumented migrants, including rejected asylum-seekers, are particularly vulnerable to human rights abuses, including violation of their right to adequate housing. Irregular migrants are often homeless, as an inability to pay rent usually results in immediate eviction. Their lack of legal status, and the criminalization of irregular migration in many countries, means that most will be unable or unwilling to challenge discriminatory or otherwise abusive rental practices and seek legal remedies. National housing strategies rarely include migrants, and will practically never include irregular migrants.

In the context of durable solutions, an emerging norm of housing and property restitution guarantees rights for refugees and IDPs who have decided voluntarily to return to their original homes. Voluntary repatriation/return has in recent years been expanded to mean more than the mere return to one's country for refugees or one's city or region for IDPs. It is increasingly taken to mean the return to and reassertion of control over

one's original home, land or property. Refugees and IDPs who choose not to return to their homes must be protected against forced return in all circumstances, and should be enabled to resettle in conditions that respect, inter alia, their right to adequate housing.

Under the **Convention Relating to the Status of Refugees**, State parties are obliged to provide refugees with treatment as favourable as possible, and not less favourable than that accorded to aliens generally in the same circumstances, with regard to housing (art. 21).

Article 43 of the **International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families** guarantees equal treatment in access to housing, including social housing schemes, and protection against exploitation in respect of rents to regular migrants and their families.

ILO Convention No. 97 concerning Migration for Employment (Revised) (1949) addresses the accommodation of migrant workers.

The **Guiding Principles on Internal Displacement**, issued by the Representative of the Secretary-General on internally displaced persons, recall that all IDPs have the right to an adequate standard of living and that, at a minimum, regardless of the circumstances and without discrimination, the competent authorities shall provide IDPs with and ensure safe access to basic shelter and housing (principle 18).

General recommendation No. 30 (2004) of the Committee on the Elimination of Racial Discrimination calls on State parties to "guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices."

This change has been increasingly reflected in international, regional and national laws and other instruments which explicitly recognize housing and property restitution as a human right. In August 2005, the United Nations Sub-Commission on the Protection and Promotion of Human Rights adopted the Principles on housing and property restitution for refugees and displaced persons, also known as the "Pinheiro Principles". These provide specific policy guidance to ensure the right to housing and property restitution in practice, and the implementation

of restitution laws, programmes and policies based on existing international human rights, humanitarian and refugee law, and on national standards.¹⁷

The “Pinheiro Principles”

Principle 2: The right to housing and property restitution

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived [...].

Principle 12: National procedures, institutions and mechanisms

12.1 States should establish and support equitable, timely, independent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims. [...]

Principle 13: Accessibility of restitution claims procedures

13.1 Everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property should be able to submit a claim for restitution and/or compensation to an independent and impartial body [...].

Principle 18: Legislative measures

18.1 States should ensure that the right of refugees and displaced persons to housing, land and property restitution is recognized as an essential component of the rule of law. States should ensure the right to housing, land and property restitution through all necessary legislative means, including through the adoption, amendment, reform or repeal of relevant laws, regulations and/or practices. States should develop a legal framework for protecting the right to housing, land and property restitution which is clear, consistent and, where necessary, consolidated in a single law.

G. Indigenous peoples

Indigenous peoples are more likely than other groups to live in inadequate housing conditions and will often experience systemic discrimination

¹⁷ “Housing and property restitution in the context of the return of refugees and internally displaced persons: Final report of the Special Rapporteur, Paulo Sérgio Pinheiro” (E/CN.4/Sub.2/2005/17). See also Food and Agriculture Organization of the United Nations and others, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the “Pinheiro Principles”* (2007).

in the housing market.¹⁸ Of particular concern is their generally poor housing situation (especially compared to majority populations), including inadequate basic services, their vulnerability as groups affected by displacement, the insecure tenure they often have over their traditional lands, and the culturally inappropriate housing alternatives often proposed by the authorities. Indigenous peoples suffer discrimination in almost all aspects of housing: laws and policies discriminate against them for instance by failing to take account of their specific circumstances; there is discrimination in the allocation of resources for housing, including credits and loans; and private landlords discriminate against them in the rental market.

While the majority of indigenous peoples around the world still live in rural areas, increasing numbers are, voluntarily or involuntarily, migrating to urban areas, leaving behind their traditional lands, territories and resources, and often facing increased poverty. As a result, the housing conditions of many indigenous peoples and individuals in urban areas are inadequate. Indigenous women often bear the brunt of poor housing conditions. Considering that in some countries more than half the indigenous population now lives in cities, their right to adequate housing poses a new challenge to Governments.¹⁹

Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights stipulates that the right to adequate housing extends to everyone. In addition, article 2 (2) provides that all of the rights in the Covenant must be exercised without discrimination. This means that indigenous peoples are entitled to enjoy the right to adequate housing without discrimination and on an equal footing with the majority population.

¹⁸ United Nations Housing Rights Programme, "Report No. 7: Indigenous peoples' right to adequate housing. A global overview" (2005).

¹⁹ UN-Habitat, *Housing Indigenous Peoples in Cities: Policy Guide to Housing for Indigenous Peoples in Cities*, Urban Policy Guides for Indigenous Peoples (Nairobi, 2009).

The **United Nations Declaration on the Rights of Indigenous Peoples** (2007) sets out the minimum international standards for the protection and promotion of the rights of indigenous peoples necessary for their survival, well-being and dignity. The rights of particular relevance to the right to adequate housing contained in this Declaration include the right to self-determination, rights related to lands, resources and territories, social and economic rights, and rights related to non-discrimination. Violations of indigenous peoples' right to self-determination and rights related to lands, resources and territories often lead to violations of their rights to adequate housing. Article 21 (1) recognizes the right to, inter alia, improved housing. Moreover, the Declaration further underscores the importance of indigenous peoples' right to determine their own housing institutions, programmes and policies.

In its general recommendation No. 23 (1997), the **Committee on the Elimination of Racial Discrimination** reflects explicitly on discrimination against indigenous peoples, and calls on States parties to recognize and protect their rights "to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) calls on Governments to ensure that indigenous workers are not discriminated against with respect to housing (art. 20 (2)(c)).

III. WHAT ARE THE OBLIGATIONS ON STATES AND THE RESPONSIBILITIES OF OTHERS?

States have the primary obligation to protect and promote human rights. Human rights obligations are defined and guaranteed by international customary law (evidence of a general practice of States accepted as law and followed out of a sense of legal obligation) and international human rights treaties, creating binding obligations on the States that have ratified them to give effect to these rights.

A. General obligations

Through their ratification of human rights treaties, States are required to give effect to these rights within their jurisdictions. Some obligations are of *immediate effect*, including the fundamental undertaking to guarantee that the right to adequate housing is exercised on the basis of *non-discrimination*.

Under the International Covenant on Economic, Social and Cultural Rights, States have the obligation to achieve progressively the full realization of the right to adequate housing. In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to adequate housing to everyone. Some components of the right to adequate housing are, therefore, deemed *subject to progressive realization*. However, obligations such as non-discrimination are *not* subject to progressive realization.

The International Covenant on Economic, Social and Cultural Rights, article 2 (1)

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

While not all aspects of the right to adequate housing can or may be realized immediately, States must, at a minimum, show that they are making every possible effort, within available resources, to better protect and promote this right. Available resources refer to those existing within a State as well as those available from the international community through international cooperation and assistance, as outlined in articles 2 (1), 11 and 23 of the Covenant.

Article 3 of the Covenant further obliges each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in it.

**The International Covenant on Economic, Social and Cultural Rights,
article 2 (2)**

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

There is also an immediate obligation to *take steps*, which should be concrete, deliberate and targeted, to fulfil the right to adequate housing. Each State should guarantee at least minimum essential levels of this right. For instance, it should ensure that significant numbers are not deprived of basic shelter and housing. If a State cannot do so, it must demonstrate that it has made every effort to use all available resources to satisfy, as a matter of priority, these minimum essential levels. Likewise, if it adopts a retrogressive measure, i.e., one that weakens the protection of the right to adequate housing, it will have to demonstrate that it carefully weighed all the options, considered the overall impact on all human rights of the measure and fully used all its available resources. As the most feasible measures to implement the right to adequate housing will vary from State to State, international treaties do not offer set prescriptions. The Covenant simply states that the full realization of the rights contained in it must be achieved through "all appropriate means, including particularly the adoption of legislative measures."

The Committee has also stated that certain measures must be taken immediately, for instance those aimed at conferring legal security of tenure to those lacking such protection; effectively monitoring the housing situation, notably to ascertain the full extent of homelessness and inadequate housing; protection against forced evictions; and the provision of effective legal or other appropriate remedies for violations of the right to adequate housing.

Progressive realization of the right to adequate housing in practice

With reference to the Dominican Republic, the Committee on Economic, Social and Cultural Rights stressed that: "In order to achieve progressively the right to housing, the Government is requested to undertake, to the maximum of available resources, the provision of basic services (water, electricity, drainage, sanitation, refuse disposal, etc.) to dwellings and ensure that public housing is provided to those groups of society with the greatest need. It should also seek to ensure that such measures are undertaken with full respect for the law. In order to overcome existing problems recognized by the Government in its dialogue with the Committee, the Government is urged to give consideration to initiatives designed to promote the participation of those affected in the design and implementation of housing policies. Such initiatives could include: (a) a formal commitment to facilitating popular participation in the urban development process; (b) legal recognition of community-based organizations; (c) the establishment of a system of community housing finance designed to open more lines of credit for poorer social sectors; (d) enhancing the role of municipal authorities in the housing sector; (e) improving coordination between the various governmental institutions responsible for housing and considering the creation of a single governmental housing agency" (E/C.12/1994/20, paras. 332–333).

The role of international assistance and cooperation is reflected in other instruments as well, such as the Charter of the United Nations, the Universal Declaration of Human Rights and the Convention on the Rights of the Child. It is not a substitute for domestic obligations, but it becomes relevant if a State is unable to give effect to economic, social and cultural rights on its own, and requires assistance from other States to do so. International cooperation is particularly incumbent upon those States that are in a position to assist others in this regard. States should thus have an active programme of international assistance and cooperation, and provide economic and technical assistance to enable other States to meet their obligations in relation to the right to adequate housing. This general obligation to cooperate internationally is reflected in the Committee's general comments No. 3 (1990) on the nature of States parties' obligations and No. 14 (2000) on the right to the highest attainable standard of health.

B. Three types of obligations

State obligations fall into three categories, namely the obligations to *respect*, *protect* and *fulfil*.

The obligation to respect

The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to adequate housing.

For example, States should refrain from carrying out forced evictions and demolishing homes; denying security of tenure to particular groups; imposing discriminatory practices that limit women's access to and control over housing, land and property; infringing on the right to privacy and protection of the home; denying housing, land and property restitution to particular groups; or polluting water resources.

The obligation to protect

The obligation to protect requires States to prevent third parties from interfering with the right to adequate housing.

States should adopt legislation or other measures to ensure that private actors—e.g., landlords, property developers, landowners and corporations—comply with human rights standards related to the right to adequate housing. States should, for instance, regulate the housing and rental markets in a way that promotes and protects the right to adequate housing; guarantee that banks and financial institutions extend housing finance without discrimination; ensure that the private provision of water, sanitation and other basic services attached to the home does not jeopardize their availability, accessibility, acceptability and quality; ensure that third parties do not arbitrarily and illegally withdraw such services; prevent discriminatory inheritance practices affecting women's access to and control over housing, land and property; ensure that landlords do not discriminate against particular groups; ensure that private actors do not carry out forced evictions.

The obligation to fulfil

The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to adequate housing.

States must, for instance, adopt a national housing policy or a national housing plan that: defines the objectives for the development of the

housing sector, with a focus on disadvantaged and marginalized groups; identifies the resources available to meet these goals; specifies the most cost-effective way of using them; outlines the responsibilities and time frame for the implementation of the necessary measures; monitors results and ensures adequate remedies for violations.

Under the obligation to fulfil, States must also, progressively and to the extent allowed by their available resources, prevent and address homelessness; provide the physical infrastructure required for housing to be considered adequate (this would include taking steps towards ensuring universal and non-discriminatory access to electricity, safe drinking water, adequate sanitation, refuse collection and other essential services); or ensure adequate housing to individuals or groups unable, for reasons beyond their control, to enjoy the right to adequate housing, notably through housing subsidies and other measures.

C. The responsibilities of others

The obligation on States to protect human rights includes ensuring that non-State actors do not infringe upon the right to adequate housing. This is the obligation to protect described above. In addition, there is an increasing debate about the extent to which other actors in society—individuals, intergovernmental and non-governmental organizations (NGOs), and business—have responsibilities with regard to the promotion and protection of human rights.

This section explores the role of United Nations agencies and the private sector.

United Nations agencies

According to the Charter of the United Nations, one of the purposes of the United Nations is to promote respect for human rights. International human rights treaties also envisage a particular role for United Nations agencies in their implementation. In general comment No. 2 (1990) on international technical assistance measures, the Committee on Economic, Social and Cultural Rights also underlined that all United Nations organs and agencies involved in any aspect of international development cooperation should ensure that the rights contained in the Covenant are fully taken into account at each phase of a development project.

The United Nations Human Settlements Programme (UN-Habitat)

UN-Habitat is the United Nations agency for human settlements. It is mandated by the General Assembly to promote socially and environmentally sustainable towns and cities with the goal of providing adequate shelter for all. To rise to this challenge, UN-Habitat is implementing its Medium-term Strategic and Institutional Plan for 2008-2013. The Plan aims for sustainable urbanization which can be achieved only if slum upgrading and prevention are addressed through adequate approaches that enable the provision of pro-poor land and housing as well as equitable access to infrastructure and services. The expected key results in the focus area "pro-poor land and housing" are:

- Effective gender- and age-sensitive shelter strategies and improved regulatory frameworks and capacities that provide for progressive realization of housing, land and property rights and for slum upgrading and prevention adopted and implemented by Member States;
- Membership-based community organizations for housing, land acquisition and urban infrastructure development formed/strengthened;
- Improved access to land, housing and property with special focus on the urban poor and populations affected by human settlements in crisis;
- Sustainable gender-sensitive shelter relief and reconstruction models in post-disaster and post-conflict areas developed and implemented;
- Achievement of security of tenure through improved measurement of security of tenure, also for women and youth, in conjunction with the establishment and effective operations of a global monitoring and evaluation mechanism on progress in realization of housing, land and property rights.

The work of UN-Habitat is directly related to the United Nations Millennium Declaration, particularly Millennium Development Goal 7, target 7.D, to improve the lives of at least 100 million slum-dwellers by the year 2020, and target 7.C, which calls for the reduction by half of the number of people without sustainable access to safe drinking water and basic sanitation by 2015.

Source: www.unhabitat.org

In recent years, reforms of the United Nations by the Secretary-General (in 1997, 2002 and 2005) have highlighted the role and responsibilities of United Nations agencies and international financial institutions with respect to human rights. Both the World Bank and the Organisation for Economic Co-operation and Development (OECD) have adopted guidelines on relocation and/or resettlement to limit the scale of human suffering associated with forced evictions. In 2003, United Nations agencies, in a common understanding, affirmed that all development programmes and assistance should realize human rights and be guided by human rights principles and standards.

United Nations agencies have been working increasingly on housing-related issues and human rights. Particularly relevant is the United Nations Housing Rights Programme (UNHRP), launched jointly by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and UN-Habitat in 2002, to support the efforts by Governments, civil society and national human rights institutions (NHRIs) towards the realization of the right to adequate housing.

The private sector

Businesses and the private sector are important players. The private sector—e.g., property developers, construction firms and infrastructure providers—is directly involved in the construction of a significant portion of the housing stock. Companies are also involved in the management and maintenance of buildings and housing. In many countries, rental agreements and sales contracts between private parties cater for a significant proportion of the housing needs.

At the same time, the private sector can have a negative impact on the right to adequate housing. This may be particularly true in the context of the construction of large dams and other development projects, especially those involving resource extraction such as gas and oil, which may force residents to move or cause environmental degradation. Landlords, private owners, housing agencies or estate agencies can also affect the enjoyment of the right to adequate housing, notably if they carry out forced evictions or discriminate against particular groups, for instance by charging prohibitive rents.

The private sector can also have an impact on the enjoyment of the right to adequate housing in cases where housing is provided by the employer. ILO Recommendation No. 115 concerning Workers' Housing (1961) underlines that it is generally not desirable that employers should provide

housing for their workers directly. In exceptional circumstances where accommodation is provided by the employer, the fundamental human rights of workers must be recognized, and rents charged should not cost the worker more than a reasonable proportion of income and should not include a speculative profit. It further underlines that the provision by employers of accommodation and communal services in payment for work should be prohibited or regulated to the extent necessary to protect the interests of the workers.

While States retain the primary responsibility for ensuring that private actors respect human rights, according to the Special Representative of the United Nations Secretary-General on business and human rights, business enterprises have a responsibility to respect all human rights, including the right to adequate housing. This responsibility is the basic expectation society has of business, and it is recognized in a broad range of soft law instruments. It is also invoked by global business organizations and individual companies worldwide.

Various voluntary initiatives on business and human rights have also been launched. For example, the United Nations Global Compact²⁰ defines 10 principles related to human rights, labour standards, environment and anti-corruption that signatory companies pledge to respect. Some companies have developed their own human rights policies, programmes and tools to incorporate human rights into their business operations.

IV. MONITORING THE RIGHT TO ADEQUATE HOUSING AND HOLDING STATES ACCOUNTABLE

Mechanisms of accountability are crucial for ensuring that States respect their obligations in relation to the right to adequate housing. Monitoring takes place at national, regional and international levels, and involves a variety of actors, such as the State itself, civil society, NHRIs and international human rights mechanisms.

A. National accountability and monitoring

Accountability compels a State to explain what it is doing and why and how it is moving towards the realization of the right to adequate housing for all as expeditiously and effectively as possible. International human rights law does not prescribe an exact formula for domestic mechanisms of

²⁰ <http://www.unglobalcompact.org>

accountability and redress. At a minimum, all accountability mechanisms must be accessible, transparent and effective.

Administrative, policy and political mechanisms

Administrative and political mechanisms are complementary or a parallel means to judicial mechanisms of accountability. For instance, the development of a national housing policy or strategy, linked to work plans and participatory budgets, plays an important role in ensuring Government accountability. Human rights-based indicators support the effective monitoring of key housing outcomes and some of the processes to achieve them. Furthermore, assessments of various kinds, such as human rights impact assessments, offer a way for policymakers to anticipate the likely impact of a projected policy and later to review its actual impact on the enjoyment of the right to adequate housing.

Political mechanisms, such as democratic processes, and monitoring and advocacy by independent actors also contribute to accountability. Civil society organizations and others are increasingly using monitoring methods based on indicators, benchmarks, impact assessments and budgetary analysis to hold Governments accountable in relation to the right to adequate housing. Indicators, especially when disaggregated by prohibited grounds of discrimination (e.g., sex), provide useful information on how the right to adequate housing is realized in a particular national context. OHCHR has developed a conceptual and methodological framework for using indicators to promote and monitor the implementation of human rights—both civil and political as well as economic, social and cultural.

A proposed framework for human rights indicators

The framework adopted by OHCHR and more specifically its set of indicators should bring to the fore an assessment of steps taken by a State in addressing its obligations—from its acceptance of international human rights standards (*structural* indicators) to its efforts to meet the obligations that flow from the standards (*process* indicators), and on to the results of those efforts from the perspective of the affected population (*outcome* indicators). Examples of indicators for the right to adequate housing are the date of the inclusion of the right to adequate housing in the constitution (*structural* indicator); the share of public expenditure on social or community housing (*process* indicator); the proportion of the urban population living in slums and/or the reported cases of forced evictions (*outcome* indicator). It is also crucial to produce indicators that are disaggregated by relevant group and possible grounds of discrimination.

This framework has been validated through workshops and consultations organized by OHCHR with national and international human rights stakeholders, including experts from the international human rights treaty bodies, United Nations special rapporteurs, United Nations specialized agencies, NHRIs, statistics agencies and NGOs. See “Report on indicators for promoting and monitoring the implementation of human rights” (HRI/MC/2008/3). For the right to housing, the framework also builds on the results of a previous initiative by the United Nations Housing Rights Programme to establish a global monitoring mechanism for the progressive realization of the right to adequate housing. United Nations Housing Rights Programme, “Working Paper No. 2: Housing rights indicators: Measuring the progressive realization of the right to adequate housing” (forthcoming).

Judicial mechanisms

Judicial mechanisms are a crucial component of domestic enforcement measures, providing adequate remedies to individuals if their right to adequate housing is violated.

The incorporation in domestic laws of international instruments recognizing the right to adequate housing can significantly broaden and improve remedial measures. It enables courts to adjudicate violations by direct reference to the International Covenant on Economic, Social and Cultural Rights, the constitution or specific laws recognizing or

incorporating elements of the right to adequate housing. Domestic courts are increasingly hearing such cases.

A notable example came from the **Constitutional Court of South Africa** in the case *The Government of the Republic of South Africa and others v. Grootboom and others*.

Ms. Grootboom and others, evicted from private property and living on the edge of a sports field in appalling conditions, launched a legal action for immediate relief when winter rains made their temporary shelter unsustainable. The Court determined that, although there was a comprehensive housing legislation and policy in place aimed at the progressive realization of the right to adequate housing, these failed to take into account the situation of people in desperate need. The Court applied a test of reasonableness to the housing policy and concluded that it did not meet this test, as a reasonable part of the national housing budget was not devoted to people in desperate need. While the Court found that the State had no obligation to provide housing immediately upon demand, it did hold that the State must provide relief for those in desperate need. Additionally, the Court held that the obligation to progressively provide housing included the immediate obligation to draft and adopt a plan of action to devote reasonable resources towards the implementation of that plan.

Legal aid and access to remedies

Victims of violations of the right to adequate housing often belong to the most marginalized and discriminated groups, such as the urban and rural poor, racial or ethnic minorities, indigenous peoples, irregular migrants, internally displaced persons or women. Providing legal aid can ensure that victims have access to remedies in cases related to the violation of the right to adequate housing. Otherwise, they might, for instance, have to choose between paying court fees and sending their children to school.

To ensure that judicial remedies are effective, an independent and functioning judiciary is vital. Judges and lawyers must be able to conduct their work impartially, on the basis of facts and in accordance with the law, without any improper influences, threats or interference. Members of

the judiciary, lawyers and other legal professionals must be competent to perform their role and accountable for poor performance.

National human rights institutions

National human rights institutions (NHRIs) advise the Government and recommend policy or legislative changes, handle complaints, undertake investigations, ensure the ratification and implementation of international human rights treaties, and provide training and public education.²¹ NHRIs sometimes have quasi-judicial functions and a mandate allowing them to contribute to the development of legislation. Most institutions are called commissions or ombudsmen.

National human rights commissions and the right to adequate housing: some examples

The *Australian Human Rights and Equal Opportunity Commission* has a well-developed practice of inquiry into systemic violations of human rights, especially economic, social and cultural rights. The first inquiry concerned the rights of homeless children. In its 1989 report *Our Homeless Children: Report of the National Inquiry into Homeless Children*, the Commission made a series of detailed recommendations to the national and State Governments of Australia and to private and community organizations. It recommended, for instance, that “where children and young people leave or ought to leave home because of serious neglect or abuse, the Commonwealth should meet the obligation to support them, regardless of their age, in conditions where they are protected and can develop as required by the Declaration of the Rights of the Child”. The report raised community awareness of child homelessness as a human rights issue and raised public expectations of more effective Government action to address the needs of the children concerned.

The *Kenya National Commission on Human Rights* has a specific programme to monitor the realization of economic, social and cultural rights; promote them; address violations of these rights; and conduct research and produce reports on issues related to their enjoyment. As part of this focus, the Commission has notably been working on forced evictions and informal settlements. It has also been working with ministries and organizations active in housing to develop national guidelines to prevent and remedy evictions.

²¹ See General Assembly resolution 48/134 on national institutions for the protection and promotion of human rights (“Paris Principles”).

In some countries NHRIs are increasingly focusing their work on ensuring protection of economic, social and cultural rights. As such, they can provide another avenue for the protection of the right to adequate housing.

In addition to the work of NHRIs, some States have instituted other innovative ways to protect and promote housing rights in practice.

National rapporteur on the right to adequate housing

Inspired by the United Nations system of special procedures (described below), Brazil established national rapporteurs to monitor the implementation of economic, social and cultural rights throughout the country. One of these national rapporteurs focuses on the right to adequate housing and urban land, and can receive complaints from individuals and communities about alleged violations, conduct missions to investigate violations and make specific recommendations related to the right to adequate housing to the Brazilian Government.

See OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, Professional Training Series No. 12 (United Nations publication, Sales No. E.04.XIV.8).

B. Regional accountability

Some regional human rights conventions and treaties recognize the right to adequate housing.

The treaties' monitoring bodies and courts, in particular the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the European Committee of Social Rights, play an important role in protecting the right to adequate housing and have developed specific jurisprudence related to it.

The Ituango Massacres v. Colombia

The case of *the Massacres of Ituango v. Colombia* dealt with the forced eviction, displacement and housing destruction in the municipality of Ituango (La Granja and El Aro districts) in Colombia by paramilitaries aligned with the Government. It was brought by two NGOs and involved serious human rights violations, including forced evictions accompanied by high levels of violence.

In July 2006, the Inter-American Court found that the forced evictions and destruction of housing violated article 11 (2) (the right to be free from arbitrary or abusive interference with the home) and article 21 (the right to property) of the American Convention on Human Rights. The Court considered that the effect of the housing destruction was the loss not only of material possessions but also of the social frame of reference of the inhabitants. It also stated that it constituted a grave, unjustified and abusive interference in the victims' private life and home.

The Council of Europe's Commissioner for Human Rights, mandated to promote awareness of and respect for human rights in its member States, has also addressed the enjoyment of the right to adequate housing, notably in connection with discrimination against specific groups.

C. International monitoring

United Nations treaty bodies

Implementation of the United Nations core human rights treaties is monitored by committees of independent experts, often referred to as *treaty bodies*, such as the Committee on Economic, Social and Cultural Rights. These committees issue both *concluding observations* on the regular reports of States parties, as well as thematic *general comments*.

Concluding observations that address the right to adequate housing have been issued by several committees in addition to the Committee on Economic, Social and Cultural Rights. The Human Rights Committee has considered the right to adequate housing in relation to the principle of non-discrimination and protection against unlawful interference with one's privacy.²² The Committee on the Elimination of Racial Discrimination

²² See, for example, "Concluding observations of the Human Rights Committee: Portugal"

has highlighted cases of racial discrimination in preventing minority populations from enjoying effective access to adequate housing.²³ The Committee on the Rights of the Child has addressed a number of issues surrounding the right of all children to adequate housing, including the situation of street children and displaced children.²⁴ The Committee against Torture has raised concerns about the way in which forced evictions and relocation of Roma communities have been conducted, and has made recommendations.²⁵

In addition, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee on Migrant Workers, the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances (yet to be established) have *individual complaints mechanisms*. In some cases brought before it, the Committee against Torture, for instance, has expressed the view that forced evictions could be considered cruel, inhuman and degrading treatment or punishment.²⁶ In December 2008, the General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. It allows complaints in relation to *all* aspects of the right to adequate housing, rather than being limited, as was the case hitherto, to housing discrimination or to issues addressed by other treaties. The Optional Protocol will enter into force once it has been ratified by 10 States.

The United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living

“Special procedures” is the generic name given to the mechanisms established and mandated by the Commission on Human Rights and by the Human Rights Council since March 2006 to address issues of concern in all parts of the world. Although their mandates vary, they usually monitor, examine and report publicly on human rights situations in either specific countries or on major thematic human rights issues worldwide.

(CCPR/CO/78/PRT).

²³ See, for instance, “Concluding observations of the Committee on the Elimination of Racial Discrimination: Ukraine” (CERD/C/UKR/CO/18).

²⁴ See, for example, “Concluding observations of the Committee on the Rights of the Child: Colombia” (CRC/C/15/Add.137).

²⁵ See, for instance, “Conclusions and recommendations of the Committee against Torture: Greece” (CAT/C/CR/33/2).

²⁶ See Committee against Torture, decision on communication No. 161/2000, *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, 21 November 2002 (A/58/44).

In its resolution 2000/9, the Commission created the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, which was renewed by Human Rights Council resolution 6/27. Miloon Kothari was appointed as the first Special Rapporteur in 2000. His successor, Raquel Rolnik, was appointed in 2008 by the Human Rights Council.

Mandate of the Special Rapporteur on the right to adequate housing

- Promote the full realization of adequate housing as a component of the right to an adequate standard of living
- Identify best practices as well as challenges and obstacles to the full realization of the right to adequate housing, and identify protection gaps in this regard
- Give particular emphasis to practical solutions with regard to the implementation of the rights relevant to the mandate
- Apply a gender perspective, including through the identification of gender-specific vulnerabilities in relation to the right to adequate housing and land
- Facilitate the provision of technical assistance

The Special Rapporteur's *methods of work* include conducting country missions; investigating issues of concern; reviewing communications from individuals or groups alleging violations of the right to adequate housing and intervening, when appropriate, with Governments in connection with alleged violations; and reporting annually to the General Assembly and the Human Rights Council.

The work of the Special Rapporteur has focused so far on: the legal status and content of the right to adequate housing; homelessness; forced evictions; globalization and the right to adequate housing; discrimination and the enjoyment of the right to adequate housing; the development of indicators; access to water and sanitation as elements of the enjoyment of the right to adequate housing; and women's right to adequate housing.

The Special Rapporteur receives information from individuals and groups, and responds to them as appropriate. She may be contacted at OHCHR:

United Nations Special Rapporteur on adequate housing

OHCHR-UNOG

8–14 avenue de la Paix

CH–1211 Geneva 10

Switzerland

E-mail: urgent-action@ohchr.org

The right to adequate housing is also a concern of many other special procedures and several have taken up the issue in relation to their specific mandates.²⁷

The Advisory Group on Forced Evictions

In 2004, UN-Habitat established the Advisory Group on Forced Evictions to monitor unlawful evictions and identify and promote alternatives such as in situ upgrading and negotiated resettlement. The Advisory Group reports to the Executive Director of UN-Habitat. It includes experts from intergovernmental organizations, local authorities, central Governments, civil society and professionals in developed and developing countries.

Since its creation, the Advisory Group has been conducting fact-finding missions to Accra, Buenos Aires, Curitiba (Brazil), Istanbul (Turkey), New Orleans (United States of America), Port Harcourt (Nigeria), Rome and Santo Domingo. In its first two biennial reports, *Forced Evictions – Towards Solutions?*, published in 2005 and 2007, the Advisory Group documented cases of imminent or ongoing forced evictions in several countries and presented alternative approaches.²⁸

²⁷ For a list of all special procedures, and information on their mandates and contact details, see <http://www.ohchr.org>

²⁸ Both reports are available at: <http://www.unhabitat.org/unhrp>

ANNEX

SELECTED INTERNATIONAL INSTRUMENTS AND OTHER DOCUMENTS RELATED TO THE RIGHT TO ADEQUATE HOUSING (IN CHRONOLOGICAL ORDER)

International treaties

Charter of the United Nations (1945)

Convention Relating to the Status of Refugees (1951)

International Covenant on Economic, Social and Cultural Rights (1966)
and its Optional Protocol (2008)

International Covenant on Civil and Political Rights (1966) and its two
Optional Protocols (1966 and 1989)

International Convention on the Elimination of All Forms of Racial
Discrimination (1965)

Convention against Torture and Other Cruel, Inhumane or Degrading
Treatment or Punishment (1984) and its Optional Protocol (2002)

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in
Independent Countries (1989)

Convention on the Rights of the Child (1989) and its two Optional
Protocols (2000)

International Convention on the Protection of the Rights of All Migrant
Workers and Members of Their Families (1990)

Convention on the Elimination of All Forms of Discrimination against
Women (1979) and its Optional Protocol (1999)

Convention on the Rights of Persons with Disabilities (2006) and its
Optional Protocol (2006)

Regional treaties

African Charter on Human and Peoples' Rights (1981)

African Charter on the Rights and Welfare of the Child (1990)

European Convention for the Protection of Human Rights and Fundamental
Freedoms (1950)

European Social Charter (1961)

European Convention on the Legal Status of Migrant Workers (1977)

Revised European Social Charter (1996)

American Convention on Human Rights (1969)

International declarations and other instruments

Universal Declaration of Human Rights (1948)

United Nations Principles for Old Persons, General Assembly resolution 46/91 (1991)

Guiding Principles on Internal Displacement (1998)

ILO Recommendation No. 115 concerning Workers' Housing (1961)

United Nations Declaration on the Rights of Indigenous Peoples, General Assembly resolution 61/295 (2007)

Guidance by expert human rights mechanisms

Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations (E/1991/23)

Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing (E/1992/23)

Committee on Economic, Social and Cultural Rights, general comment No. 5 (1994) on persons with disabilities (E/1995/22)

Committee on Economic, Social and Cultural Rights, general comment No. 7 (1997) on the right to adequate housing: forced evictions (E/1998/22, annex IV)

Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water (E/C.12/2002/11)

Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women (A/47/38)

Committee on the Elimination of Racial Discrimination, general recommendation No. 23 (1997) on indigenous peoples (A/52/18, annex V)

Principles on Housing and Property Restitution for Refugees and Displaced Persons (E/CN.4/Sub.2/2005/17/Add.1)

Basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I)

Resolutions of the Commission on Human Rights and the Human Rights Council

Commission resolutions 2000/9, 2001/28, 2002/21, 2003/27, 2004/21 on adequate housing as a component of an adequate standard of living

Commission resolution 1993/77 on forced evictions

Commission resolutions 2000/13, 2001/34, 2002/49, 2003/22, 2004/21, 2005/25 on women's equal ownership of, access to and control over land and equal rights to own property and to adequate housing

Council resolution 6/27 on adequate housing as a component of the right to an adequate standard of living

International conference outcome documents

Istanbul Declaration on Human Settlements (1996)

Habitat Agenda (1996)

United Nations Millennium Declaration, adopted by the United Nations General Assembly "Millennium Assembly of the United Nations" (2000)

Vancouver Declaration on Human Settlements (1976)

Rio Declaration on Environment and Development and Agenda 21 of the United Nations Conference on Environment and Development (1992)

Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993)

Selected websites

Intergovernmental organizations

Office of the United Nations High Commissioner for Human Rights: <http://www.ohchr.org>

(This website contains general information and resources on economic, social and cultural rights, and the web pages of the human rights treaty bodies and special procedures, including the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.)

United Nations Human Settlements Programme (UN-Habitat): <http://www.unhabitat.org>

United Nations Housing Rights Programme (UNHRP): <http://www.unhabitat.org/unhrp>

Advisory Group on Forced Evictions to the Executive Director of UN-Habitat (AGFE): <http://www.unhabitat.org/unhrp>

Housing the Urban Poor (a project by the United Nations Economic and Social Commission for Asia and the Pacific): <http://www.housing-the-urban-poor.net>

Council of Europe's Commissioner for Human Rights: <http://www.coe.int/t/commissioner>

International non-governmental organizations

Amnesty International: <http://www.amnesty.org>

Asian Coalition for Housing Rights (ACHR): <http://www.achr.net>

Centre on Housing Rights and Evictions (COHRE): <http://www.cohre.org>

European Federation of National Organisations Working with the Homeless (FEANTSA): <http://www.feantsa.org>

European Roma Rights Centre (ERRC): <http://www.errc.org>

FoodFirst Information and Action Network (FIAN): <http://www.fian.org>

Habitat International Coalition (HIC): <http://www.hic-net.org>

Homeless International: <http://www.homeless-international.org>

Housing and Land Rights Network (HLRN): <http://www.hlrn.org/english/home.asp>

Human Rights Watch (HRW): <http://www.hrw.org>

International Commission of Jurists (ICJ): <http://www.icj.org>

International Federation for Human Rights (FIDH): <http://www.fidh.org>

International Network for Economic, Social and Cultural Rights (ESCRNet): <http://www.escr-net.org>

International Union of Tenants (IUT): <http://www.iut.nu>

Shack/Slum Dwellers International (SDI): www.sdinet.org

Social Watch: <http://www.socialwatch.org>

World Organisation Against Torture (OMCT): <http://www.omct.org>

Human Rights Fact Sheets:*

- No. 2 The International Bill of Human Rights (Rev.1)
- No. 3 Advisory Services and Technical Cooperation in the Field of Human Rights (Rev.1)
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- No. 12 The Committee on the Elimination of Racial Discrimination
- No. 13 International Humanitarian Law and Human Rights
- No. 14 Contemporary Forms of Slavery
- No. 15 Civil and Political Rights: The Human Rights Committee (Rev.1)
- No. 16 The Committee on Economic, Social and Cultural Rights (Rev.1)
- No. 17 The Committee against Torture
- No. 18 Minority Rights (Rev.1)
- No. 19 National Institutions for the Promotion and Protection of Human Rights
- No. 20 Human Rights and Refugees
- No. 21 The Right to Adequate Housing (Rev.1)
- No. 22 Discrimination against Women: The Convention and the Committee
- No. 23 Harmful Traditional Practices Affecting the Health of Women and Children
- No. 24 The International Convention on Migrant Workers and its Committee (Rev.1)
- No. 25 Forced Evictions and Human Rights
- No. 26 The Working Group on Arbitrary Detention
- No. 27 Seventeen Frequently Asked Questions about United Nations Special Rapporteurs
- No. 28 The Impact of Mercenary Activities on the Right of Peoples to Self-determination
- No. 29 Human Rights Defenders: Protecting the Right to Defend Human Rights
- No. 30 The United Nations Human Rights Treaty System - An Introduction to the Core Human Rights Treaties and the Treaty Bodies
- No. 31 The Right to Health
- No. 32 Human Rights, Terrorism and Counter-terrorism
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* Fact sheets Nos. 1, 5 and 8 are no longer issued. All fact sheets are available online at <http://www.ohchr.org>.

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Human Rights





CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council
 From: Councilmember Ben Bartlett
 Subject: Budget Referral: Homeless Outreach Coordinator for South Shattuck Avenue and Adeline Street

RECOMMENDATION

Referral to the November Budget Annual Appropriations Ordinance to fund \$200,000 for a Homeless Outreach Coordinator for South Shattuck Avenue at Dwight Way to Adeline Street at 62nd Street.

BACKGROUND

This recommendation will connect Berkeley's Shattuck Avenue and Adeline Street unhoused population to local and regional services and housing programs. It will provide the data to meet City guidelines and policy goals. Allocating funds for a homeless outreach coordinator will also support the City of Berkeley in responding to South Berkeley community concerns over the myriad of inequitable impacts.

The City of Berkeley seeks to create an environment of compassion and inclusion for all members of the community, including the unhoused population. Tragically, as the unhoused population has increased along the South Shattuck Avenue and Adeline Corridor, so has the number of persons in crisis. Likewise, the neighborhood has also experienced an increase in unsanitary conditions endangering the health and well-being of the unhoused population, residents, and businesses.

To promote health and safety in South Berkeley, the Council should allocate sufficient funding to hire a Homeless Outreach Coordinator to provide focused and dedicated work with the homeless population from Shattuck Avenue and Dwight Way to Adeline Street and 62nd Street.

RATIONALE FOR RECOMMENDATION

To address the concerns of numerous individuals on safety and sanitation, the city should allocate funding for a homeless outreach coordinator. The presence of a homeless outreach coordinator will connect unhoused residents in the South Shattuck and Adeline Corridors to local and regional services and housing programs; provide data to meet City guidelines and policy goals, and help address community concerns. This will lead to more equitable and safe living conditions for the unhoused and housed residents, local businesses, and the community at large.

FISCAL IMPACTS OF RECOMMENDATION

November Budget Annual Appropriations Ordinance Budget
 \$200,000: to employ a homeless outreach coordinator for a pilot year.

CONTACT PERSON

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CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council
 From: Councilmember Ben Bartlett (Author), Councilmember Hahn (Co-Sponsor) and Councilmember Harrison (Co-Sponsor)
 Subject: Letter of Opposition to the Environmental Protection Agency and Oxitec Ltd.'s Proposal to Release Genetically Engineered Mosquitoes in California Counties

RECOMMENDATION

That the Mayor and Members of the Berkeley City Council oppose the United States Environmental Protection Agency (“US EPA”) and Oxitec Ltd.’s proposal to conduct the world’s largest release of genetically engineered (“GE”) Aedes Aegypti mosquitoes. The mosquitos are proposed to be released across 12 California counties, which may include: Shasta, Yolo, Sacramento, Alameda, Stanislaus, Fresno, Tulare, Los Angeles, Orange, San Bernardino, and Riverside. The company intends to release several billion of the mosquitoes on 85,000 acres over a 2-year period. The Council should ask the US EPA Administrator Michael Regan, California Environmental Protection Agency (“CalEPA”) Secretary Jared Blumenfeld, and Governor Gavin Newsom to deny the experimental use permit (“EUP”) application to release genetically engineered mosquitoes across the state. The Council should send letters to State Senator Nancy Skinner, Rep. Barbara Lee, Rep. Mark DeSaulnier, Sen. Dianne Feinstein, Sen. Alex Padilla, Assemblymember Buffy Wicks, and County Supervisor Keith Carson.

CURRENT SITUATION

Oxitec Ltd. has developed a proprietary, genetically engineered, species of Aedes Aegypti mosquitoes. The stated goal is to reduce the number of mosquitoes in the United States carrying dengue, chikungunya, Zika, and yellow fever.

In May 2020, the US EPA approved Oxitec Ltd.’s first release of its GE mosquitoes in Monroe County, Florida. On August 30, 2021, Oxitec Ltd. requested an amendment and extension to their EUP to expand its experimental release of GE mosquitoes to California¹.

Due to the potential regional, and national significance of the EUP, the US EPA sought public comment on Oxitec Ltd.’s application by September 30, 2021.

More than 12,000 comments were submitted on the official government website regulations.gov² including many by Scientists. These Scientists are raising significant concerns, which should give regulators pause. Many questioned the necessity of a mosquito release in California when this state has no reported cases of Dengue fever, Chikungunya, or Yellow Fever. Zika virus is

¹Environmental Protection Agency: “[Application: Pesticide Experimental Use Permit](#),” August, 30, 2021.

²Environmental Protection Agency: “[Application: Pesticide Experimental Use Permit](#),” August, 30, 2021

carried by the Culex mosquito, an entirely different breed than the mosquito being prepped for release in California. Other comments focused on potential threats to the ecological food chain, which is alarming given our status as a bread basket to the country. And still, others noted that endangered species could face the risk of extinction if the food chain was corrupted by the experimental mosquitoes.

Troublingly, Oxitec and the US EPA have failed to release crucial data from previous GE mosquito releases in Florida, Brazil, Malaysia, and the Cayman Islands. This missing data is highly relevant because GE mosquitoes have the potential to create hybrid wild mosquitoes. Were this to happen, the spread of mosquito-borne diseases in the United States could actually increase, and the new mosquitos have an even greater resistance to insecticides than the wild mosquito population.

In 2019, Yale University conducted a field study in Brazil, found that GE mosquitoes' genetic alterations had spread into the wild population³.

It is imperative that California regulators, affected jurisdictions, parties, and the public have the opportunity to review and analyze data from previous GE mosquito releases. Without this information, it is impossible to make an informed decision on whether to allow the release. Accordingly, CalEPA must deny this application to release billions of genetically engineered mosquitoes into our environment.

BACKGROUND

According to Oxitec, the open release experiments are intended to evaluate the efficiency of GE mosquitoes in suppressing the wild Aedes Aegypti mosquito populations in Florida and California. Oxitec's application also states that the biting female offspring of the GE mosquitoes will die before maturing into adults, which leads Oxitec to claim that there is no risk of humans being bit by female GE mosquitoes. However, these claims are not backed by publicly available scientific data. There are also significant levels of tetracycline in California, an antibiotic used in agriculture that can trigger the survival of female GE mosquitoes. The data on this environmental phenomenon has been redacted by Oxitec, so it is not possible for the public to properly assess this risk in California.

Furthermore, Oxitec is arguing that with the introduction of these GE mosquitoes, the reduction in the overall mosquito population will reduce or eradicate diseases, such as dengue and Zika. However, this could result in more negative impacts on public health. With a smaller number of Aedes Aegypti Mosquitoes, granted that the GE mosquitoes are successful, there would be more room for invasive and harmful mosquito species in the environment to increase their population. For example, the Asian Tiger Mosquito is a widespread mosquito species in the United States.

³Science: "[Study on DNA spread by genetically modified mosquitoes prompts backlash](#)," September 17, 2019.

Recent studies have shown that these species are a possible vector for dengue and other diseases, and there is a high risk that this invasive species would take advantage of reduced competition in the ecosystem⁴. Another concern with diseases is the possibility that the dengue virus will evolve, rather than be eradicated when introduced to GE mosquitoes. The *Aedes Aegypti* could become more virulent, and exacerbate the presence of the dengue virus in the United States⁵. The issue of diseases being spread would still be present.

Since first applying for the Pesticide Experimental Use Permit, the Environmental Protection Agency and Oxitec have failed to address public transparency. Critical data and information have been blacked out and withdrawn as Confidential Business Information (CBI). This public health information includes the “allergic potential of the fluorescent protein found in the mosquito’s saliva, and details about what levels of tetracycline would allow female GE mosquitoes to survive to adulthood”⁶. There is a significant amount of missing information in Oxitec’s application that addresses public health and environmental concerns. This data should be made available to the public to allow for proper assessment, and it allows for the community members in affected counties to leave the field trial areas or express their concerns to halt the release altogether.

TIMELINE:

The United States Environmental Protection Agency (“US EPA”) is currently reviewing biotech firm Oxitec Ltd’s Experimental Use Permit (“EUP”) application to release billions of genetically engineered mosquitoes across California, specifically in Alameda County. There is a short window of time to provide public input before the US EPA’s decision is made. It is imperative that Gov. Newsome be given the full scope of information to consider on what is proposed to be the largest release of genetically modified mosquitoes in history.

Although it was not widely publicized, the US EPA held public comment on Oxitec's application. This public comment period ended on **September 30, 2021**. Typically, the EPA takes **2-3 months** to review a EUP application. Federal agencies sometimes release controversial decisions right before major holidays, and typically on Fridays. **This decision can come as early as mid-November.**

Under this potential timeline, the opportunity to educate our communities, elected officials, and regulatory decision-makers are very short, possibly less than one month. If the EPA approves Oxitec’s EUP application to release genetically modified mosquitoes, California’s Department of Pesticide Regulation (“DPR”) under the California EPA (“CalEPA”) will then approve or deny the application. DPR typically approves applications within **1 week to 4 weeks.**

⁴ CDC, https://www.cdc.gov/mosquitoes/mosquito-control/professionals/range.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fzika%2Fvector%2Frange.html

⁵ Medlock, J., Luz, Paula M., Struchiner, Claudio J., and Galvani, Alison P. (2009) The Impact of Transgenic Mosquitoes on Dengue Virulence to Humans and Mosquitoes. *The American Naturalist* 174, 565-577.

⁶ Friends of the Earth Public Comments: https://1bps6437gg8c169i0y1drtgz-wpengine.netdna-ssl.com/wp-content/uploads/2021/09/Friends-of-the-Earth-EPA-public-comments-GE-mosquito-EUP-FL_CA.pdf

Although the US EPA hasn't yet released a decision on this Experimental Use Permit, there is already sufficient information to warrant more careful and transparent consideration of the potential impacts on public and environmental health posed by the scale and nature of this experiment.

There is a deficit of science-based regulations of genetically engineered insects. Experts have raised a series of concerns regarding previous field trial data; questioned the experiment's justification; and urge that critical environmental, and health assessments be performed prior to any release of mosquitoes into California and Alameda County.

It is critical that before the US EPA makes its decision, California regulators, elected officials, and the public at large be made aware of the risks, and be given the opportunity to communicate their concerns and address the lack of regulatory process to Governor Newsome and the California EPA. Absent these sensible considerations, CalEPA must deny this application to release billions of genetically engineered mosquitoes into our environment.

RATIONALE FOR RECOMMENDATION

The experimental release of Genetically Engineered mosquitoes in 12 California counties as proposed by the Environmental Protection Agency and Oxitec could result in unintended consequences on human, animal, public, ecological, and environmental health. The publically available data and information is inadequate and does not completely address safety concerns. To address these important and reasonable safety concerns, the City of Berkeley should stand together in opposing Oxitec Ltd.'s proposal to release Genetically Engineered mosquitoes in Alameda County.

ENVIRONMENTAL SUSTAINABILITY

The GE mosquito could have environmental risks, including negative impacts on endangered species, the introduction of more invasive mosquito species, and the potential creation of wild-hybrid mosquitoes.

The EPA has not done an environmental impact assessment nor study/analysis to determine how effective GE mosquitoes would be in reducing disease.

FISCAL IMPACTS

No fiscal impacts besides staff time.

CONTACT PERSON

Councilmember Ben Bartlett:	510-981-7130
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Harry Xia	510-981-7131
James Chang	jchang@cityofberkeley.info

ATTACHMENTS AND MATERIALS

1. Sample Letter to Elected and Appointed Officials, Opposition to the Environmental Protection Agency and Oxitec Ltd.'s Proposal to Release Genetically Engineered Mosquitoes in California Counties

2. September 30, 2021 Friends of the Earth's public comments to U.S. EPA "Comments for the EPA's consultation on application 93167-EUP-2 from Oxitec"
3. Issue Brief: Genetically Engineered Mosquitoes Proposed for Release in California: Risks and Concerns

Attachment 1: Sample Letter

RE: OPPOSITION TO RELEASE GENETICALLY ENGINEERED MOSQUITOES IN CALIFORNIA COUNTIES

Dear [Name of Official],

On behalf of the City of Berkeley, California, we are writing to voice our opposition to the Environmental Protection Agency and Oxitec Ltd.'s proposal to release genetically engineered mosquitoes in California Counties. This proposal could have huge environmental risks, including negative impacts on endangered species, the introduction of more invasive mosquito species, and the potential creation of wild-hybrid mosquitoes.

Oxitec has applied to the U.S. EPA for an experimental use permit to release hundreds of billions of GE *Aedes Aegypti* across 12 undisclosed counties in California. The [project](#) claims to reduce the *Aedes Aegypti* population. While addressing mosquito borne diseases is important, California does not have any cases of dengue, and there is no publicly available data from previous field trials proving the efficacy of this approach. Recent data from a [Yale study](#) in Brazil highlighted that, instead, Oxitec's GE mosquitoes could pose irreversible risks to the environment, public health and animals.

We are opposed to this proposal for the following reasons:

- **No endangered species assessments have been done.** The EPA has not done an environmental impact nor an endangered species assessment, study, and analysis to determine how effective GE mosquitoes would be in reducing disease.
- **No studies on human health impacts have been done.** GE mosquitoes may inject novel genetically engineered proteins into humans and other animals. Oxitec has yet to show that these novel proteins would not harm humans or other animals
- **The public cannot assess the effects of the trial.** Oxitec's risk assessment provided to the EPA is redacted, so the public has no information on the effects of their test trials.
- **Lack of existing science-based regulations.** There are limited regulations specific to genetically engineered insects, the concerns raised from field trial data, and the critical environmental and health assessments needed ahead of any release.
- **Potential creation of new harmful species.** The GE mosquitoes' novel protein could create hybrid mosquitos that may be more aggressive, more difficult to eradicate, and may increase the spread of mosquito-borne disease

It is critical that before the US EPA makes its decision, California regulators, elected officials, and the public at large be made aware of the risks, and be given the opportunity to communicate their concerns and address the lack of regulatory process to Governor Newsome and the California EPA. Absent these sensible considerations, CalEPA must deny this application to release billions of genetically engineered mosquitoes into our environment.

Sincerely,
[Mayor of Berkeley and Members of the City Council]

September 30, 2021

Docket No. EPA-HQ-OPP-2019-0274

OPP Docket

Environmental Protection Agency Docket Center (EPA/DC), (28221T)

1200 Pennsylvania Ave. NW

Washington, DC 20460-0001

Comments for the EPA's consultation on application 93167-EUP-2 from Oxitec

To Mr. Smith and United States Environmental Protection Agency (EPA):

Friends of the Earth (FOE) respectfully submits the following comments on behalf of its over 4 million members and advocates in response to EPA's proposed Experimental Use Permit amendment and extension allowing the release for investigational use of Oxitec, Ltd. (Oxitec)'s genetically engineered (GE) *Aedes aegypti* mosquitoes (OX5034) in California and Florida.

Friends of the Earth is the U.S. voice of the world's largest network of grassroots environmental organizations, with groups in 74 countries. For more than 50 years, Friends of the Earth has worked at the nexus of environmental protection, economic policy and social justice to fundamentally transform the way our country and the world value people and the environment. It is in this light that Friends of the Earth has been following the development of genetic engineering, raising awareness about the environmental and health risks, and the need for more robust government oversight and assessment related to genetically engineered organisms including genetically engineered mosquitoes.

We request that the EPA reject Oxitec's request for an amendment to release OX5034 mosquitoes across 12 undisclosed counties in California and its request for an extension to its Experimental Use Permit (EUP) for the release of genetically engineered mosquitoes in Monroe County, Florida. There should be a full Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for each of the proposed counties, and this should be reviewed by a committee of independent ecologists and entomologists, public health experts, and other key experts and public stakeholders. There should be long term caged trials in each California county, an endangered species review, and a publicly accessible full CDC review of potential public health impacts. The EPA should release the full data from the current field trials in Monroe County, FL, and Oxitec's full application to the EPA should be publicly available for review. EPA should also convene public meetings in Monroe County, FL and in each of the 12 California counties, advertised in the Federal Register, for the review of the company's proposal and EIS. The EPA should develop new regulations for genetically engineered insects designed to be bio-pesticides -- only after these regulations are in place should EPA consider an application for GE insects.

This docket contains insufficient data and information for a thorough and responsible assessment. While we support the EPA's intentions to limit mosquito populations and the spread of mosquito borne disease, Friends of the Earth believes this experiment with Oxitec's mosquitoes is too risky for Florida and California's ecosystems and public health and is fraught with many unanswered and critical questions.

Background on issue

1100 15th Street, NW · 11th Floor · Washington, DC 20005
202.783.7400 · 202.783.0444 fax · 877.843.8687 toll free · www.foe.org

2150 Allston Way, Suite 240 · Berkeley, CA 94704
510-900-3150 · 510-900-3155 fax · 866.217.8499 toll free

Oxitec has applied for an amendment to its permit to do field releases of genetically engineered *Aedes aegypti* mosquitoes. Oxitec proposes to extend its permit to release GE mosquitoes in Florida for 2 more years, and to expand its experimental releases to 12 counties across California.

Oxitec's application proposes that the open release experiments are to evaluate the efficacy of OX5034 mosquitoes as a tool for suppression of wild *Aedes aegypti* mosquito populations in Florida and California. The application also states that female offspring of the OX5034 mosquitoes in the environment die before they mature into adults, and therefore exposure to biting female mosquitoes is not anticipated. There is incomplete data and testing to substantiate the claim that no females will survive in the environment, particularly given the vast diversity of ecosystems and agricultural systems across California. Both these claims are questioned in the following response.

According to the application amendment, Oxitec proposes to release its GE mosquitoes in Florida for up to 2 more years, across 6,240 acres, and up to 20,000 male GE mosquitoes per acre, per week. It proposes to expand its EUP to release GE mosquitoes across 12 counties in California, across 84,600 acres, and up to 30,000 male GE mosquitoes per acre, per week.

Although Oxitec claims that the GE mosquito could reduce *Aedes aegypti* mosquito populations, it is uncertain that, even if *Aedes aegypti* mosquito populations were reduced, there would be a reduction in rates of disease as other mosquitoes also carry dengue, zika, and related viruses. Oxitec has also not provided data to assess whether population reductions of *Aedes aegypti*, if they did occur, would lead to disease eradication or reduction.

Environmental impacts

Oxitec's application and the publicly accessible information as provided by EPA leaves critical environmental questions to assess. The GE mosquitoes could pose unique risks to the environment in California and Florida, including to endangered species.

It is unclear what the impacts of the GE mosquitoes on wild animals, including endangered or threatened species, and farm animals are. There is no publicly available data about any feeding trials for mammals or birds, which given the prevalence of endangered species in California, is critical. There is also missing information about mosquito predators or prey, which could be impacted by GE mosquito releases and fluctuating mosquito populations. More feeding trials are needed to assess the risk of ingestion to wild species that eat mosquitoes. Ingestion may also be a potential exposure route, as females are expected to die at the larval stage in the water where they breed. There should also be caged trials in each of CA's 12 counties, and in Monroe County, FL, ahead of any open release.

EPA should not assume that all female GE mosquitoes will die, particularly given the prominence of chemicals like tetracycline in the environment in California's vast agricultural areas, which could impact the survival rate of female GE mosquitoes. As noted further below, Oxitec's data about levels of tetracycline in the environment which could trigger survival is redacted, and thus not possible to assess the full risk.

We also need adequate assessment of the potential impacts of increased mosquito populations when the trial GE mosquitoes are initially released in ecosystems, particularly in the 12 California counties and the surrounding areas where the mosquitoes could spread. GeneWatch UK's public comments¹ note

that increases in non-target mosquito species as a result of the proposed releases could pose risks to human and animal health, as could increases in the target species in areas neighboring the releases.

The concerns about introgression of the *Aedes aegypti* into wild type mosquitoes and the potential vectoral capacity have not been addressed, despite evidence from Brazil² highlighting that the genetic material from Oxitec's GE mosquitoes were found in wild mosquitoes. The vectoral capacity of Oxitec's GE mosquitoes should be fully assessed, as well as the potential vectoral capacity of hybrid mosquitoes that could carry the genetic material from Oxitec's GE mosquito. This information should be made publicly available ahead of a public comment period.

Oxitec's application does not consider the complexity of ecosystems carefully enough, nor the vast diversity of California's ecosystems across the state. A complete EIS in each county should not only look at the risks from one release, but the potential impacts of releasing millions of mosquitoes on a continual basis and whether the proposed experimental use will cause unreasonable adverse effects on the environment.

Response to tetracycline

Oxitec's GE mosquitoes are engineered to be dependent on the presence of tetracycline and to die in its absence. In theory, the males will mate and then die off while their tetracycline-dependent gene passes onto their offspring. The offspring should die in the late larvae or pupae stage, and *the Aedes aegypti* population in a given area, such as Monroe County and the 12 undisclosed California counties, will theoretically be suppressed.

However, three key factors point to the limits of this hypothesis. First, 3 to 4 percent of Oxitec's mosquitoes survived into adulthood in the lab in the absence of tetracycline despite carrying the lethal gene.^{3,4}

Even more concerning, tetracycline is a common antibiotic used in agricultural production. Florida citrus growers use significant amounts of tetracyclines (oxytetracycline) on agricultural lands as a pesticide in efforts to control the bacteria responsible for the Citrus Greening disease. California has massive agricultural regions, and it is necessary to look at levels of tetracycline use in each of the counties targeted for release and to compare this with the levels of tetracycline in the environment that could impact the survival of female GE mosquitoes. EPA has redacted information about tetracycline levels from Oxitec's proposal, however, so it is not possible to assess this potential risk. The significant presence of tetracycline in the environment may obviate the lethal trait in the GE mosquitoes, and their offspring could survive and continue to breed.

Third, tetracycline is also a prevalent compound found in sewage due to contamination from agricultural run-off and consumer disposal. *Aedes aegypti* may be found to breed in sewage treatment plants, septic tanks, and cesspits in the Florida Keys and in California.⁵

The possible widespread application and presence of tetracycline in the environment could significantly undermine the efficacy of GE mosquitoes to reduce overall mosquito populations. This further accentuates the EPA's need for a complete EIS and more thorough examination of unintended consequences before allowing Oxitec's application to be considered.

Public health concerns

Oxitec's rationale is based on an assumption that mosquito population reduction will reduce or eradicate diseases such as dengue and Zika. However, Oxitec has not provided the EPA data to support this claim. Even in its trials in Grand Cayman, the company did not demonstrate that reducing overall populations of mosquitoes will reduce or eradicate disease, as dengue is not endemic in the Cayman Islands.⁶ Oxitec should provide a specific mechanism through which its proposed releases might reduce the risk of diseases spread through mosquitoes. Without this information, Oxitec's proposed "pesticide" experiment will not address disease reduction.

Oxitec's GE mosquitoes could also increase other vectors for diseases like dengue fever. If Oxitec's mosquitoes were to successfully reduce the *Aedes aegypti* population and reduce competition for breeding sites, there could be a new ecological niche for other pests to fill, such as the *Aedes albopictus* (Asian Tiger Mosquito). The Asian Tiger Mosquito is one of the most invasive mosquito species, and research has shown it is a possible vector for dengue fever and other tropical diseases, possibly leading to more harm to human health.⁷ The Asian Tiger Mosquito is widespread in the USA, including in Florida.⁸

Oxitec's intention of elimination targets one vector, whereas other vector control methods target breeding grounds for many vectors, either through removing breeding sites in an area or by using repellents for many species.

The experimental release of *Aedes aegypti* raises serious concerns about possible negative impacts on public health. Given the high number of mosquitoes that are proposed for release, and based on experience in Brazil, there is a high likelihood that humans or animals could swallow the GE mosquitoes upon release. As reported in Brazil, because of the high number of GE mosquitoes released, "it's impossible to talk during the liberation sessions without accidentally swallowing a few."⁹ The risks of ingestion, whether intentional or unintentional, of GE mosquitoes by mammals, reptiles, birds, or other organisms, have not been adequately assessed.

There are also concerns about the impacts of biting. Oxitec's initial Draft Environmental Assessment (EA) to the Food and Drug Administration (FDA) acknowledges that it is inevitable that some biting female GE mosquitoes will be released. The sorting is conducted by hand and could result in up to 0.5 percent of the released insects being female.¹⁰ If 100 million mosquitoes were released, 0.5 percent could mean that an additional 500,000 biting mosquitoes could be present in the environment.¹¹ However, checks by the Mosquito Research and Control Unit (MRCU) in the Cayman Islands on one production batch on May 12, 2017 revealed 9 females in one release pot of 500 (1.8%), nine times the agreed level. If the sorting of GE mosquitoes for the field trials were to have similar results as the Cayman Islands, millions of GE female mosquitoes, which can bite and transmit disease, could be released into the environment during the experiments.

Also of concern is that biting female GE mosquitoes may inject a novel engineered protein (*tTAVOX5034* and *DsRed2-OX5034*) into humans; Oxitec has yet to conduct or publish any study showing that this novel protein is not expressed in the mosquito's salivary gland, nor has it determined the protein's allergic or toxic potential. Oxitec claims the exposure will be negligible.

However, Oxitec's claim about the potential toxicity or allergenicity from biting GE mosquitoes and the lack of exposure to biting females depends on the assumption that females do not survive to adulthood.

In reality, survival may occur if resistance develops or because of environmental exposure to tetracycline (see more detail in the section above and our previous submission¹³).

Lastly, there is concern around the possibility of the dengue virus to evolve and become more potent and virulent in response to the introduction of the GE mosquitoes, and this could put human health at greater risk.¹²

Lack of regulations

No federal agency has formal regulations specific to GE insects and animals. The current U.S. regulatory system is outdated and lacks clear oversight of the use of biotechnology to address insect vectors of animal and human diseases. The EPA should issue new regulations that cover GE mosquitoes before it allows any experimental use of this novel technology.

Regulatory action under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) predominantly focuses on the component which would serve as a pesticide, in this case, the tetracycline Trans-Activator Variant (tTAV) protein that Oxitec's GE mosquitoes have been genetically engineered to express. However, it is critical that the EPA examine the whole mosquito, the method of delivery in this case, and its direct and indirect impacts on the environment, human and animal health.

Also, because the *Aedes aegypti* mosquito is considered a disease vector, the EPA should clarify the legal basis for a proposal which would allow Oxitec to be released from the contained use requirements of its import permit, as delineated by the Center for Disease Control, in order to allow its GE mosquitoes to be deliberately released into the environment.

Under the National Environmental Policy Act (NEPA), the EPA should consider all environmental effects of the environmental release of Oxitec's GE mosquitoes, analyze potential risks, and analyze alternatives to these actions. As part of these requirements, the EPA should undertake a full EIS so that it may thoroughly examine the potentially substantial impacts that the proposed action may have.

Although, in some cases, proposed actions under FIFRA have been exempt from NEPA, Oxitec's proposed actions for a deliberate release of disease vectors into the environment raise complex environmental issues which may not be adequately captured under FIFRA, therefore an assessment under NEPA should be required.

In addition to preparing a full EIS for public consideration, the EPA should ensure that it is complying with the Endangered Species Act.

Ethical concerns

The release of GE mosquitoes as an attempt to curb the spread of disease should be considered a medical trial and must follow the laws and guidelines in place to protect human subjects in medical trials. Central to ethics on human subject trials is the idea of free and informed consent. However, Oxitec has a track record of releasing GE mosquitoes without public consent, including in their field releases in the Cayman Islands in 2009¹³ and in Malaysia in 2010.¹⁴ Throughout the 2021 field trials in Florida, residents consistently asked for the trials to stop, for there to be a process of consent and transparency, and for a process of redress.

EPA notes that consent is not necessary and that this is not a human trial because Oxitec's research "does not meet the regulatory definition of research involving human subjects." This is based on Oxitec's claims that female GE mosquitoes won't survive into adulthood. However, there is not publicly available data to support this company claim. There have not been caged trials in the proposed counties in California that show that females wouldn't survive, particularly in the presence of tetracycline. There is a risk that female GE mosquitoes will survive and could bite people living in the release areas. It is also possible that people in surrounding areas will be affected. *Aedes aegypti* mosquitoes could move to nearby areas, there could be a hybrid GE-wild type mosquito as was found in Brazil, or other types of mosquitos, like the *Aedes albopictus*, could move into the open ecological niche and introduce new diseases.

Given these risks, it is critical that all potentially affected communities are given the right to free and prior informed consent to being part of this experiment.

Public transparency

The current information available to the public for review is inadequate and blocks critical information necessary for responsible analysis of environmental and public health risks. In addition, the public engagement process as witnessed in Monroe County, Florida has lacked transparency, been riddled with contradictions, and misled the public.

As with Oxitec's 2018 EUP application for releases in Florida, the lack of transparency and missing information makes any meaningful independent assessment nearly impossible. Information critical for health and environmental analysis is blacked out and withdrawn as Confidential Business Information (CBI). Public health information withdrawn or redacted from the application includes: details about the allergic potential of the fluorescent protein found in the mosquito's saliva, and details about what levels of tetracycline would allow female GE mosquitoes to survive to adulthood. Given the human populations in California and Florida, this public health information should not be allowed to be withdrawn as CBI. The EPA has also not included the CDC's full advice.

There is also missing information critical for environmental assessments. Neither EPA nor Oxitec publicly name the counties proposed for release. There is no information about populations of *Aedes aegypti* in California or competitor mosquito species that could move into its ecological niche, and it remains unclear how any analysis about population reduction will be conducted. Despite Oxitec's previous completed field trials in Brazil and Florida, there is still no publicly available data.

In addition to missing public health and environmental data, EPA has not provided potentially affected communities with critical notice about the application. Community members across all 12 counties must be informed of this proposal and amendment, be informed about the public comment period, and have the full information to do assessments related to their communities. However, the counties proposed for release sites in California haven't been formally named, so people will not know if they could be impacted by the proposed release. There should be communication in multiple languages throughout the process of assessment through a number of mechanisms, including the establishment of local institutional review boards and ethics committees and hosting of community meetings and public forums. Community members must know the parameters of the trial areas, have a right to leave the field trial areas, or demand the halt of the experiment entirely if they so decide.¹⁵

Conclusion

Friends of the Earth believes that there is inadequate information on which to base a public analysis; EPA's docket offers only partial science and analyses. The analyses do not have the necessary data or appropriate risk assessments needed to draw safety conclusions, and the assessments do not adequately address potential unintended consequences. In light of the unanswered questions and the gaps in data analysis, FOE urges EPA to reject Oxitec's amendments and extension requests for genetically engineered mosquitoes to be released in California and Florida. EPA should request further studies from Oxitec and require a full EIS be published for public consultation ahead of an application for an EUP.

Recommendations

Questions remain about the GE mosquitoes' environmental and health impacts as well as their effectiveness in reducing disease. At this point, the EPA should reject Oxitec's application for the release of GE mosquitoes.

The EPA must require Oxitec to obtain the free and informed consent of all potentially affected communities in California and Florida before any trial is allowed to move forward, and mechanisms should be made available to halt the experiment if the community demands. We urge the EPA to conduct a full EIS and to:

- Establish an independent committee of independent ecologists and entomologists, public health experts (including dengue fever and zika virus specialists), and other key experts and public stakeholders to review the proposal and consider the potential environmental, health and social impacts of the release of GE insects;
- Convene public meetings, at various times of the day and evening, across all potentially affected communities for public comment and discussion of the proposal with key independent experts present;
- Develop new regulations for genetically engineered insects that are designed to be bio-pesticides — only after these regulations are in place should EPA, the State of Florida, and the State of California consider an application for the release of genetically engineered insects; and
- Conduct a referendum for Florida and California residents to vote on whether there should be a release of Oxitec's genetically engineered mosquitoes.

Friends of the Earth thanks the EPA for the opportunity to comment on this Pesticide Experimental Use amendment and extension. Until the above requests have been met, the missing information has been provided, and the EPA has formal regulations for the oversight of GE insects, we urge the EPA to not allow any permits for environmental release of genetically engineered mosquitoes to move forward.

Sincerely,



Dana Perls
Food and Technology Program Manager
Friends of the Earth, U.S.

¹ Public comments from GeneWatch UK.

<http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/genewatch-uk-response-to-the-epa.pdf>

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Genetically Engineered Mosquitoes Proposed for Release in California: Risks and Concerns

California is poised to be the second state where genetically engineered (GE) mosquitoes are released, unless the public and California's government officials demand otherwise. Earlier this year, half a billion GE mosquitoes were released in Florida. Now, 12 California counties are targeted for the largest mass releases of GE mosquitoes (potentially including Alameda, Riverside, Fresno, Tulare, Stanislaus, Los Angeles, Orange, Sacramento, Yolo, Shasta and San Bernardino). This open-air genetic experiment poses significant environmental and public health risks.

Summary of Concerns

Oxitec, a UK-based corporation, is proposing a mass release in California even though:

- No endangered species assessments have been done;
- No assessment of potential human health impacts have been done;
- This could result in hybrid mosquitoes that may be more aggressive, more difficult to eradicate, and may increase the spread of mosquito-borne disease;
- The communities where the GE mosquitoes would be released have not been consulted and have not consented to being part of this open-air genetic experiment; and
- Oxitec claims the data and results from earlier trials in other countries and in Florida are confidential business information and will not make them available to the public.



What is the GE Mosquito?

Oxitec has genetically engineered *Aedes aegypti* mosquitoes to depend on the presence of tetracycline, an antibiotic, and to die in its absence. In theory, the GE male mosquitoes would mate and their tetracycline-dependent gene would be passed on to their offspring. The offspring are meant to die in the late larval or pupal stage. The proposed experiment is meant to determine whether the mass release of GE mosquitoes can reduce the population of *Aedes aegypti*, one mosquito species that can carry the viruses that cause yellow fever, dengue, chikungunya and Zika.¹ None of these diseases are endemic in California or in the U.S. outside of Puerto Rico.² While limiting the spread of mosquito-borne disease is important, once GE mosquitos are released into the wild, there is no calling them back, and scientists have raised important concerns about the efficacy and potential risks associated with this open-air experiment.



Scientific Concerns

To date, GE mosquito trials have failed to reduce mosquito populations. Oxitec has conducted GE mosquito field trials in the Cayman Islands, Malaysia, Panama and Brazil. To date, none have effectively reduced the *Aedes aegypti* mosquito population.³ Also to date, there is no publicly available data from the 2021 field trials in Florida, neither from Oxitec nor the Monroe County (Florida Keys) mosquito control district, to support Oxitec's claims that their GE mosquitoes reduced local *Aedes aegypti* populations.

Hybrid GE-wild mosquitoes could be created that may be more resistant to pesticides and more aggressive. Data from a trial in Brazil found genetic material from Oxitec's GE mosquitoes in wild mosquitoes, creating hybrid mosquitoes.⁴ The researchers concluded that hybrid wild-GE mosquitoes could result in increased mosquito populations and could potentially contribute to the spread of viral diseases like Zika, West Nile, and Dengue.⁵ A study highlighted that these hybrid mosquitoes may be more resistant to insecticides and even more aggressive than their wild counterparts. Wild hybrids may also be able to transmit viruses more easily.⁶

Reduction in populations of one type of mosquito could result in an increase in others. *Aedes aegypti* mosquitoes are only one of several species of mosquitoes that can carry diseases. If the experiment succeeded in reducing populations of *Aedes aegypti*, other varieties, such as the *Aedes albopictus* (Asian tiger), which also transmit dengue and other similar viruses, could increase in number to fill the ecological niche.^{7,8}

Female GE mosquitoes could survive and spread disease. Oxitec's trial application states that female offspring — which bite and spread disease — will die before they mature into adults, and therefore exposure to biting female mosquitoes is not anticipated. However, females have been inadvertently released in Oxitec's experiments.^{9,10} Data also show that females may survive in the presence of tetracycline — an antibiotic that is widely used in California agriculture and therefore present in the environment. Because of the very large numbers of GE mosquitoes proposed for release (up to 30,000 mosquitoes per acre, per week), even a small percentage of surviving biting female GE mosquitoes may lead to a significant number of females in the environment. This could lead to an increased mosquito population in the nearly 100,000 acres in California where mosquitoes are proposed for release.

GE mosquitoes may inject novel proteins into humans and other animals. Biting female GE mosquitoes may inject a novel engineered protein into humans and other animals.¹¹ Oxitec has yet to show that these novel proteins would not harm humans or other animals. However, EPA declares that the risk assessment information about allergenic or toxic effects of the genes inserted into the mosquitoes is "confidential."^{12,13}



No studies have been completed to assess risks to endangered species. There are 87 federally listed endangered species in the state of California.¹⁴ Yet, the U.S. Environmental Protection Agency (EPA) has not required any endangered species assessments prior to the release of GE mosquitoes. Feeding trials for key mammals and birds could provide important insights about what impacts the GE mosquitoes may have on endangered or threatened species. However, no feeding trials have been done for mammals or birds, only for “aquatic invertebrates” (crayfish and guppies).¹⁵

Lack of Transparency

Oxitec’s proposal has not undergone independent scientific review, and EPA has not convened a Scientific Review Panel as it has done for other new pesticides. Neither the full proposal nor data from the 2021 releases in Florida are publicly available. In addition, Oxitec’s community engagement has not been transparent. In 2021, Oxitec released GE mosquitoes as part of an experimental trial in Monroe County, Florida. Neither the mosquito control board nor Oxitec informed community residents about the locations of release until three days beforehand. Residents were not given advance warning about the exact date the release was set to occur and there was no free and prior informed consent by affected community members — a fundamental tenet of any research involving human subjects.

Lack of Regulations Specific to GE Insects

Currently, there are no regulations in the U.S. specific to GE insects. EPA regulates GE mosquitoes as biopesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but because of their potential impacts on the environment and human health,¹⁶ critics have named the need for full environmental and health assessment and oversight.¹⁷ Prior to any further consideration of a release in California, CEQA analysis, as well as regulations specific to GE insects, must be in place. In addition, government agencies must not solely rely upon company self-assessment of risks and must require third-party peer-reviewed public health and environmental assessments.

For More Information: Contact Dana Perls, Food and Technology Program Manager, Friends of the Earth, Dperls@foe.org or see <https://foe.org/projects/gmo-animals/>

Endnotes

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- 3 GeneWatch UK comments on docket identification (ID) number EPA-HQ-OPP-2019-0274-0001: New Active ingredient for Oxitec OX5034 *Aedes aegypti* mosquitoes. (2019) GeneWatch UK. http://www.genewatch.org/uploads/f03c-6d66a9b354535738483c1c3d49e4/GeneWatch_EPA_Oxitec_consul19_fin.pdf
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- 17 Kofler, N., Kuzma, J. (2020) Before genetically modified mosquitoes are released, we need a better EPA. <https://www.bostonglobe.com/2020/06/22/opinion/before-genetically-modified-mosquitoes-are-released-we-need-better-epa/>.



Sophie Hahn
Councilmember District 5

CONSENT CALENDAR
November 9, 2021

To: Honorable Members of the City Council

From: Councilmember Sophie Hahn

Subject: Budget Referral: Solano-Peralta Park restoration and improvements

RECOMMENDATION

Refer \$50,000 to the November 2021 AAO process for restoration and improvements for the Solano-Peralta Park, located at 1559 Solano Avenue, also bordered by Peralta and Capistrano Avenues.

BACKGROUND

The Solano-Peralta Park is a small urban park made up mostly of a poured concrete plaza with a few scattered planters and benches and a relatively large fenced sandbox for children. The Park was funded by monies from Measure Y, the bond passed in 1974 for park development, and contributions from a neighborhood organization, the Solano-Peralta Group. The final design was adopted by the Parks and Recreation Commission in November 1981, and the park was completed in 1983. Since that time, the park has not been updated. Situated on a busy corner with numerous nearby restaurants and shops, the park, which has the potential to operate as a lively urban plaza, is extremely worn and tired. An adjacent restaurant has taken on regular sweeping and cleaning of the area but the general poor condition results in an underutilized space.

FINANCIAL IMPLICATIONS

Budget request for \$50,000.

CURRENT SITUATION AND ITS EFFECTS

Access to convenient outdoor dining and socializing space is increasingly in demand due to COVID-19. If updated and revitalized, the Solano-Peralta Park has the potential to bring life to a retail environment that continues to struggle from the economic crisis. Unfortunately, park infrastructure is severely outdated, with benches worn and in some places crumbling, planters filled with dead plants, trees overgrown and/or partially dead, wooden dividers between concrete slabs splintering, and the park in need of maintenance and updates.

The Parks Department is scheduled to “clean up” the park this year, but no funds exist for improvements. Funds allocated will help to replant, refurbish, and update the park to meet current needs. A small Investment can have a significant impact on this heavily used space. New permanent seating, cafe tables/chairs can be purchased to provide much needed outdoor, community seating in the district. Local merchants have offered to “adopt the spot” and take care of securing tables and chairs nightly and putting them out for the public each morning. Permanent benches need to be repainted or replaced. ADA accessible seating for eating should be added.



ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

Minimal. Could contribute to an increased walkability for the shopping district and neighborhood and encourage neighbors to get out of their cars.

CONTACT PERSON

Councilmember Sophie Hahn Council District 5 510-981-7150



To: Honorable Mayor and Members of the City Council
From: Councilmember Sophie Hahn (Author), Councilmember Wengraf (Co-Sponsor)
Subject: Recommendations for Bright Streets Initiative
Date: November 9, 2021

This item was reviewed by the FITES Committee

BACKGROUND

In November 2011, the City Auditor provided an analysis of the conditions of Berkeley's 216 miles of streets that showed widespread disrepair resulting from years of underfunding. The impact of which is compounded by the exponential increase in cost to refurbish streets that have reached "at risk" or "failed" status.

Although funds available for paving and street rehabilitation have increased since 2011, thanks in large part to voter-approved measures, they remain inadequate to maintain the street and road conditions necessary to ensure safety in the City of Berkeley.

On December 10, 2019, recognizing the critical need to move forward on the Berkeley Vision Zero programs strategy to eliminate traffic fatalities and pedestrian injuries, Councilmembers Sophie Hahn and Kate Harrison introduced the Bright Streets Initiative (Attachment 1). At the Agenda Committee it was referred to the FITES Committee.

Over the following several months, Councilmember Hahn met with Department heads and City staff to gather feedback on the proposed program. The results of those conversations were summarized in supplemental materials that were submitted to the FITES Committee on March 5, 2020 (Attachment 2). FITES discussed the supplemental recommendations and on October 7, 2020 voted to refer a slightly amended version of those recommendations to Council with a Positive Recommendation (see below).

However, due to a clerical error in Councilmember Hahn's Office, the FITES Committee's Bright Streets Initiative recommendations were not resubmitted to Council. The FITES Committee recommendation is hereby submitted to the City Council in the exact form in which it was voted out of the Committee on October 7, 2020.



COMMITTEE RECOMMENDATION

On October 7, 2020, the following positive recommendation was made by FITES, M/S/C (Robinson/Harrison), Vote: All Ayes, with the amended language for the 4th recommendation as noted below.

Council should refer to the City Manager to establish and complete a Bright Streets Initiative program:

- 1. Complete the work, if necessary, to paint all crosswalks, midlines, bike lanes, and other street markings, clarify and/or improve traffic signage, and paint curbs in areas around Berkeley public schools;*
- 2. Conduct an inventory to determine the cost of painting and/or improving crosswalks, midlines, bike lanes, and other street markings, traffic signage, and curbs in areas around City of Berkeley public buildings, including libraries, senior centers, recreation centers, and other facilities with public access and substantial public use, and in high-volume pedestrian areas and commercial districts; and*
- 3. Identify additional funding sources for completing such work.*
- 4. ~~Present design standards for crosswalks and other street markings, signs, reflectors, bollards and other safety and street markings to the FITES Committee for input and review, and eventual adoption of official patterns and elements to be specified for all new and refreshed streets in Berkeley.~~*

Present general design standards for crosswalks and other street markings, signs, reflectors, bollards and other safety and street markings to ensure consistency and safety the FITES Committee for input and review, and eventual adoption of official patterns and elements to be specified for all new and refreshed streets in Berkeley.

POLICY COMMITTEE RECOMMENDATION

On October 7, 2020, the Facilities, Infrastructure, Transportation, Environment & Sustainability policy committee took the following action: M/S/C (Robinson/Harrison) to send the item, as revised in the supplemental material submitted by Councilmember Hahn, and further revised by the committee to the City Council with a positive recommendation. The committee revised the fourth recommendation to read: Present general design standards for crosswalks and other street markings, signs, reflectors, bollards and other safety and street markings to ensure consistency and safety the FITES Committee for input and review, and eventual adoption of official patterns and elements to be specified for all new and refreshed streets in Berkeley.

ATTACHMENTS

- Bright Streets Initiative December 10, 2019 Item
- Bright Streets Supplemental submitted by Councilmember Hahn to FITES on March 5, 2020



SOPHIE HAHN
Berkeley City Council, District 5
2180 Milvia Street, 5th Floor
Berkeley, CA 94704
(510) 981-7150
shahn@cityofberkeley.info

ACTION CALENDAR
December 10, 2019

To: Honorable Members of the City Council
From: Councilmembers Sophie Hahn and Kate Harrison
Subject: Bright Streets Initiative

RECOMMENDATION

1. Refer to the City Manager to paint all crosswalks, midlines, bike lanes, and other street markings, clarify and/or improve traffic signage, and paint curbs along collector and arterial streets throughout the City of Berkeley, and within a three-block radius of all Berkeley public schools, to improve safety and support Vision Zero goals. Streets, signage, and curbs that have been redone in the past three years and remain in very good condition need not be repainted and/or replaced.
2. Such work to be completed prior to commencement of the 2020-21 Berkeley Public School Year.

BACKGROUND

In November 2011, the City Auditor provided an analysis of the conditions of Berkeley's 216 miles of streets that showed widespread disrepair resulting from years of underfunding. The impact of the many years of underfunding is compounded by the exponential increase in cost to refurbish streets that have reached "at risk" or "failed" status.

Although funds available for paving and street rehabilitation have increased since 2011, thanks in large part to voter-approved measures, they remain inadequate to maintain the street and road conditions necessary to ensure safety in the City of Berkeley.

In light of the City's limited paving budget, and the urgent need to move forward on the Berkeley Vision Zero Program's strategy to eliminate traffic fatalities and injuries, while increasing safe, healthy, equitable mobility for all, this item provides a rapid and less expensive, relatively easy-to-implement, measure to improve visibility of street markings and signage to guide vehicles, bicyclists, and pedestrians to promote orderliness and safety.

ENVIRONMENTAL SUSTAINABILITY

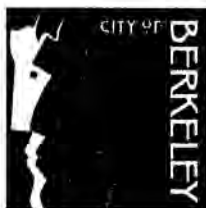
Improved street markings and signage leads to better fuel efficiency, and encourages people to walk or ride a bicycle rather than drive, and therefore will result in less greenhouse gas emissions from vehicles.

FISCAL IMPACTS

Funding for painting of crosswalks and curbs, and posting of signage, has already been allocated.

CONTACT INFORMATION

Councilmember Sophie Hahn, Council District 5, (510) 981-7150

**SOPHIE HAHN**

Berkeley City Council, District 5
 2180 Milvia Street, 5th Floor
 Berkeley, CA 94704
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 shahn@cityofberkeley.info

**RECEIVED AT
 COUNCIL MEETING OF:**

MAR 05 2019

**OFFICE OF THE CITY CLERK
 CITY OF BERKELEY**

To: Honorable Members of the City Council Facilities, Infrastructure,
 Transportation, Environment, & Sustainability (FITES) Policy Committee
 From: Vice Mayor Sophie Hahn
 Subject: Bright Streets Initiative
 Date: March 5, 2020

On February 6, 2020, the Facilities, Infrastructure, Transportation, Environment, & Sustainability (FITES) Policy Committee held a discussion on the Bright Streets Initiative, an item introduced by Vice Mayor Sophie Hahn and Councilmember Kate Harrison to address the many street markings, signs, and curbs throughout the City of Berkeley that have faded and/or fallen into disrepair.

At that time, the Committee discussed four areas for possible action:

1. Paint all crosswalks and all other street markings, clarify and/or improve traffic signage and paint curbs (and other elements such as lightpoles, utility boxes, etc.) on streets within a three-block radius of all Berkeley public schools, prior to August 17, 2020, the first day of the 2020-21 School Year;
2. In the near to medium-term, paint all crosswalks, midlines, bike lanes, and other street markings, clarify and/or improve traffic signage, and paint curbs along collector and arterial streets throughout Berkeley, prioritizing high-volume pedestrian areas and commercial districts;
3. Adopt and apply uniform design standards for painting crosswalks, midlines, bike lanes, and other street markings; and
4. Identify funding source(s) for completing this work.

On March 3, Vice Mayor Hahn met with Director of Public Works Phil Harrington to discuss all four of these areas for possible action. It was clarified that this item seeks a one-time "refreshment" of street markings and signage, using one-time funds. Once refreshed, existing funds for maintenance should be adequate to maintain markings, signage and other elements at a much higher level than is currently possible.

The following is CM Hahn's summary of the discussion; Director Harrington will provide clarifications, if any, at the FITES meeting (time was too short to circulate this memo for his review):

1. Completing the requested work around Public Schools by the end of the summer break should be possible with a combination of City crews and on-call contractors. Some funding for this work may already be available, but completing all of it will likely require a new allocation. We should consider possible funds which could be allocated in the AAO#2 or FY2021 budget processes. Mr. Harrington will work on rough estimates for completion of this work.
2. Completing work on additional streets is also possible, and could be done with one or a series of "one time" infusions of funding. The following prioritization was discussed:
 - a. Areas around public buildings with high foot traffic; Libraries, Senior Centers, Recreation Centers, etc.
 - b. Arterial streets; which also largely coincide with high injury corridors as well as Commercial Districts
 - c. Collector streetsBike boulevards and networks could also be considered for prioritization. Funding would need to be identified and allocated; work could be done over a few years.
3. Staff is already developing, and could and present to this Committee for review, design standards for City crosswalks and other street markings, taking into account both safety and aesthetics. Such standards would recognize that crosswalk design on high-volume corridors and commercial districts may differ from such designs in residential and other areas.
4. Possible funding sources would be similar to those being explored by the FITES Committee, including Gas Tax, Parking Fines and other sources.

CONTACT: Sophie Hahn, District 5: (510) 981-7150



Susan Wengraf
Councilmember District 6

CONSENT CALENDAR
November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Councilmember Wengraf (Author), Councilmember Taplin (Co-Sponsor) and Councilmember Hahn (Co-Sponsor)

Subject: PG&E's Safety Initiative: 10,000 Miles of Undergrounding Power Lines

RECOMMENDATION

Adopt a resolution and send a letter to the PG&E CEO and Board of Directors recommending that Berkeley's evacuation routes and the two established but yet to be completed Underground Utility Districts in Berkeley's Very High Fire Hazard Severity Zone be considered in the 10,000-mile promise to underground utilities.

FINANCIAL IMPLICATIONS

None.

BACKGROUND

On July 21, 2021, Pacific Gas and Electric Company's CEO, Patti Poppe, announced a major new multi-year Electric Infrastructure Safety Initiative to protect communities from wildfire threat by undergrounding 10,000 miles of power lines in the Highest Fire Threat Districts.

A 2019 AP News Analysis identified Berkeley Hills Zip Code 94708 as being within the worst 1% in the state when it comes to population-to-evacuation-route ratios. The Town of Paradise is also in the worst 1% category. Berkeley and Paradise share that terrible distinction with just 31 other Zip Codes in California, out of 1,741 Zip Codes in the state.

Berkeley has a history with wildfire. In 1923, a wildfire swept through north Berkeley, ultimately destroying approximately 600 homes, including churches, schools, libraries, and student living quarters. In 1980, a fire in Berkeley's Wildcat Canyon destroyed 5 homes and then, on October 17, 1991, a fierce and destructive wildfire consumed southeast Berkeley and Oakland, claiming 25 lives and reducing approximately 3,000 structures to ashes.

Berkeley is also at extreme risk for a devastating earthquake on the Hayward Fault, which cuts right through Berkeley's very high fire hazard severity zone; when fire ensues, it will cause even further destruction to life, property and further challenge the City's resiliency.

We are recommending PG&E commit a tiny part of their 10,000 miles of undergrounding to Berkeley's evacuation routes and previously formed Undergrounding Districts 48 and 35A in order to mitigate wildfire risk caused by equipment or earthquakes and improve safety for all residents in Berkeley. This can be done via the following three steps:

1. Underground Berkeley's 15.1 miles of evacuation routes throughout the city as identified in the Study to Underground Utility Wires in Berkeley, Phase 3 Report¹ released in February 2020.
 - a. Evacuation routes include sections of Dwight Way, Marin Ave, Grizzly Peak Blvd, Ashby Ave, Cedar Street, Hopkins Street, Gilman Street, Spruce Street, Rose Street, Oxford Street, Claremont Ave and Alcatraz Ave. (see map in attachments)
2. Undergrounding of Underground Utility District No. 35A [Vistamont (Woodmont)] (UUD 35A) which the City of Berkeley created more than 27 years ago and is still waiting for PG&E to start. This area sits in the Wildland Urban Interface and is in the CALFIRE designated VHFHSZ.
3. Underground Utility District No. 48 [Grizzly Peak/Summit] (UUD 48). PG&E has projected a start date of February 2022.
 - a. The City Council established UUD 48 & UUD 35A in April and May 1993 respectively and is still waiting for PG&E to implement their agreement.

It is the City's intent to have a cooperative and efficient permitting process for undergrounding projects, given our mutual desire and interest in these undergrounding projects.

On December 16, 2014, City Council made a referral to the Public Works Commission, the Disaster and Fire Safety Commission, and the Transportation Commission, to "develop a comprehensive plan for funding of the undergrounding of utility wires on all major arterial and collector streets in Berkeley." Representatives from those Commissions formed an Undergrounding Subcommittee, who, together with Public Works staff, developed a four-phase approach to meet that goal. [Link to the Conceptual Study.](#)

ENVIRONMENTAL SUSTAINABILITY

Undergrounding utility wires will prevent the wildfires caused by equipment and downed utility wires and poles. Undergrounding ensures that fallen utility poles will not impede emergency vehicles from responding in a disaster and will allow for safer evacuation in the event of a fire or earthquake. Last year's California wildfires caused greenhouse

¹ [https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_General/Underground%20Phase%203%20Study%20\(2020\).pdf](https://www.cityofberkeley.info/uploadedFiles/Public_Works/Level_3_-_General/Underground%20Phase%203%20Study%20(2020).pdf)

emissions similar to that of 24 million passenger vehicles driven for one year, according to the EPA's Greenhouse Gas Equivalencies Calculator.

CONTACT PERSON

Councilmember Wengraf

Council District 6

510-981-7160

Attachments:

1: Resolution

2: Letter to PG&E CEO & Board

3: Map of Proposed Undergrounding Along Major Evacuation Routes

4: [PG&E Announcement of Plans to Underground 10K Miles](#)

5: AP News Analysis

RESOLUTION NO. ##,###-N.S.

PG&E'S SAFETY INITIATIVE: 10,000 MILES OF UNDERGROUNDING

WHEREAS, On July 21, 2021 Pacific Gas and Electric Company's CEO, Patti Poppe, announced a new multi-year Electric Infrastructure Safety Initiative to protect communities from wildfire threat by undergrounding 10,000 miles of power lines in the Highest Fire Threat Districts; and

WHEREAS, A 2019 AP News Analysis identified Berkeley Hills Zip Code 94708 as being within the worst 1% in the state when it comes to population-to-evacuation route ratios; and

WHEREAS, The Town of Paradise is also in the worst 1% category. Berkeley and Paradise share that terrible distinction with just 31 other Zip Codes in California, out of 1,741 Zip Codes in the state; and

WHEREAS, Berkeley has a history with wildfire, including the 1923 wildfire that swept through north Berkeley destroying approximately 600 homes and structures, the 1980 fire in Berkeley's Wildcat Canyon that destroyed five homes and the 1991 fire that consumed southeast Berkeley and Oakland, claiming 25 lives and reducing approximately 3,000 structures to ashes; and

WHEREAS, Berkeley is also at extreme risk for a devastating earthquake on the Hayward Fault, which cuts right through Berkeley's very high fire hazard severity zone; when fire ensues, it will cause even further destruction to life, property and further challenge the City's resiliency; and

WHEREAS, The City Council recommends PG&E commit a tiny part of their 10,000 miles of undergrounding to Berkeley's evacuation routes and previously formed Undergrounding Districts 48 and 35A in order to mitigate wildfire risk caused by equipment or earthquakes and improve safety for all residents in Berkeley.

WHEREAS, It is the intent of the City of Berkeley to have a cooperative and efficient permitting process for undergrounding projects, given our mutual desire and interest in these undergrounding projects.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it send a letter to the PG&E CEO and Board of Directors, with a copy to the CPUC, recommending that Berkeley's evacuation routes and the two established but yet to be completed Underground Utility Districts in Berkeley's Very High Fire Hazard Severity Zone be considered in the 10,000-mile promise to underground utilities.

November 9, 2021

Patricia Poppe
CEO, Pacific Gas & Electric
c/o Brian M. Wong
Vice President, Corporate Secretary
77 Beale Street, 24th Floor
Mail Code B24W
San Francisco, CA 94105

RE: PG&E's Safety Initiative: 10,000 Miles of Undergrounding Power Lines

Dear CEO Patti Poppe,

On behalf of the Berkeley City Council, I want to commend PG&E on its Safety Initiative to Underground 10,000 miles of power lines to protect communities from wildfire threat. I also want to recommend that PG&E commit a tiny part of those 10,000 miles of undergrounding to Berkeley's evacuation routes and the two established but yet to be completed Underground Utility Districts in Berkeley's Very High Fire Hazard Severity Zone.

A 2019 AP News Analysis identified Berkeley Hills Zip Code 94708 as being within the worst 1% in the state when it comes to population-to-evacuation-route ratios. The Town of Paradise is also in the worst 1% category. Berkeley and Paradise share that terrible distinction with just 31 other Zip Codes in California, out of 1,741 Zip Codes in the state.

Berkeley has a history with wildfire. In 1923, a wildfire swept through north Berkeley, ultimately destroying approximately 600 homes and structures. In 1980, a fire in Berkeley's Wildcat Canyon destroyed 5 homes and then, on October 17, 1991, a fierce and destructive wildfire consumed southeast Berkeley and Oakland, claiming 25 lives and reducing approximately 3,000 structures to ashes.

Berkeley is also at extreme risk for a devastating earthquake on the Hayward Fault, which cuts right through Berkeley's very high fire hazard severity zone; when fire ensues, it will cause even further destruction to life, property and further challenge the City's resiliency.

Undergrounding Berkeley's 15.1 miles of evacuation routes throughout the city, and UUD 48 and UUD 35A will reduce the threat of wildfire and improve safety for all residents in Berkeley and neighboring jurisdictions as well.

The City of Berkeley is intent on having a cooperative and efficient permitting process for undergrounding projects, given our mutual desire and interest in these undergrounding projects.

I urge you to include Berkeley's evacuation routes and two established UUDs in PG&E's 10,000-mile promise to underground utilities.

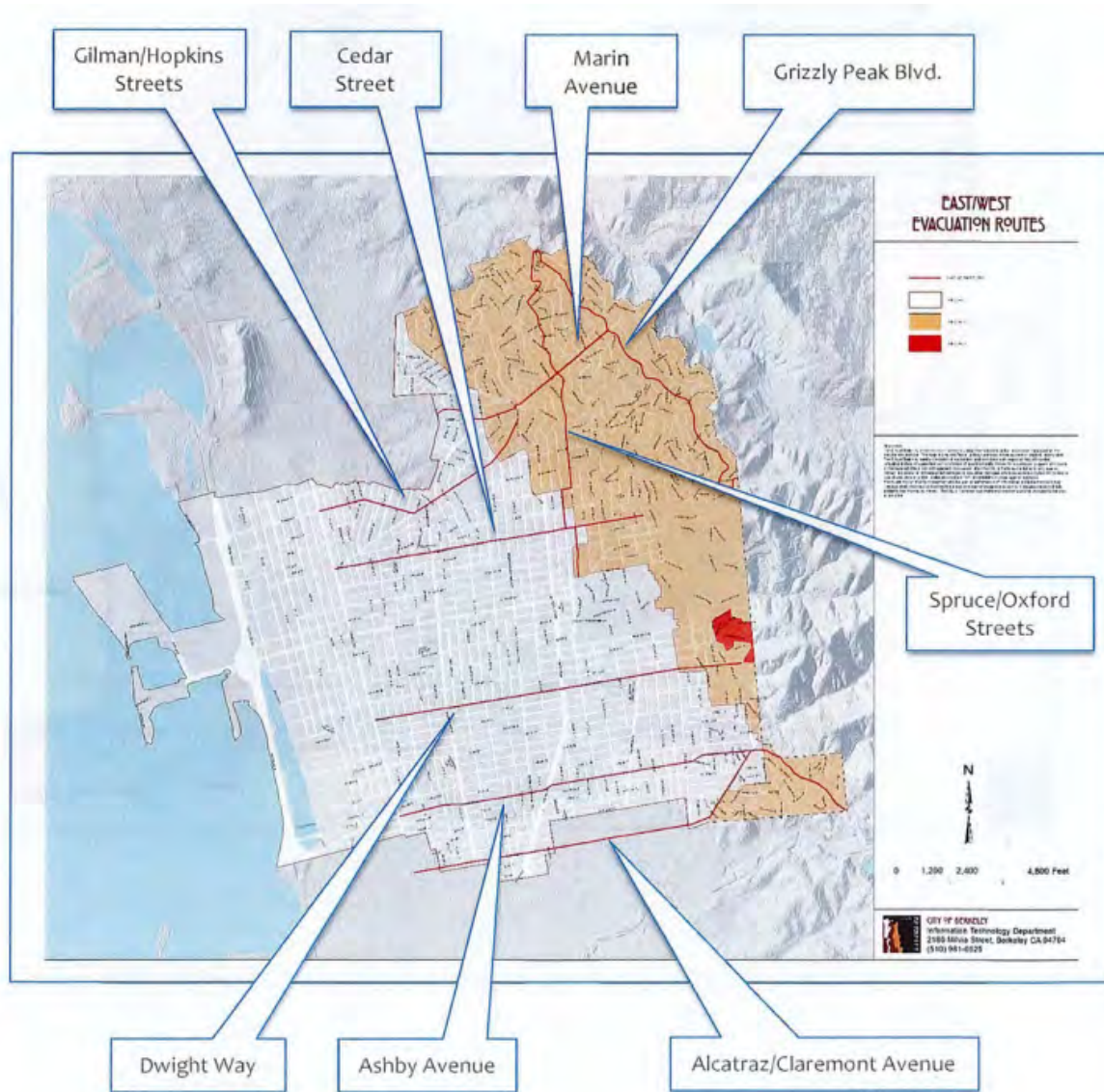
I thank you for your leadership on PG&E's Safety Initiative.

Sincerely,

Susan Wengraf
Councilmember, North East Berkeley Hills
City of Berkeley

CC: CPUC
PG&E Board Members:
Rajat Bahri
Cheryl Campbell
Kerry Cooper
Jessica Denecour
Admiral Mark Ferguson
Robert Flexon
W. Craig Fugate
Arno Harris
Michael Niggli
Dean Seavers
William Smith
Benjamin Wilson

Map of Proposed Undergrounding Along Major Evacuation Routes



PG&E Announces Major New Electric Infrastructure Safety Initiative to Protect Communities from Wildfire Threat; Undergrounding 10,000 Miles of Power Lines in Highest Fire-Threat Areas

Initiative Builds on Recent Successful Projects Using Undergrounding to Harden the Electric System and Mitigate Wildfire Risk

Release Date: July 21, 2021

Contact: PG&E External Communications (415) 973-5930

CHICO, Calif. — Pacific Gas and Electric Company (PG&E) today announced a major new initiative to expand the undergrounding of electric distribution power lines in High Fire Threat Districts (HFTD) to further harden its system and help prevent wildfires. The new infrastructure safety initiative, announced today in Butte County by PG&E Corporation CEO Patti Poppe, is a multi-year effort to underground approximately 10,000 miles of power lines.

PG&E's commitment represents the largest effort in the U.S. to underground power lines as a wildfire risk reduction measure.

"We want what all of our customers want: a safe and resilient energy system. We have taken a stand that catastrophic wildfires shall stop. We will partner with the best and the brightest to bring that stand to life. We will demand excellence of ourselves. We will gladly partner with policymakers and state and local leaders to map a path we can all believe in," Poppe said.

In addition to significantly reducing wildfire risk, undergrounding also benefits customers by lessening the need for Public Safety Power Shutoffs, which are called as a last resort during dry, windy conditions to reduce the risk of vegetation contacting live power lines and sparking a wildfire. Undergrounding also eases the need for vegetation management efforts, leaving more of California's trees untouched.

Today, PG&E maintains more than 25,000 miles of overhead distribution power lines in the highest fire-threat areas (Tier 2, Tier 3 and Zone 1)—which is more than 30% of its total distribution overhead system.

10,000 miles of PG&E lines represents approximately the distance of 11 round trips from Chico to Los Angeles or almost half way around the world. The exact number of projects or miles undergrounded each year through PG&E's new expanded undergrounding program will evolve as PG&E performs further project scoping and inspections, estimating and engineering review.

Public Engagement with Stakeholders to Guide New Undergrounding Plan

PG&E will engage customers and stakeholders as it develops a plan and reviews potential additional undergrounding sites based on a variety of factors, including local municipal planning and

safety considerations. Engineering an underground electric system requires designing the system around existing water, natural gas and drainage systems, as well as planning for future road widening. PG&E intends to work closely with customers and local, state, federal, tribal and regulatory officials throughout this new safety initiative.

Learning from Projects to Inform Expanded Undergrounding Effort

In the past, undergrounding has been done on a select, case-by-case basis, and largely for reasons other than wildfire risk reduction. Thanks to breakthroughs PG&E has achieved on undergrounding projects in recent years, undergrounding can now play a much more prominent role in PG&E's ongoing efforts to harden the electric grid.

Following the devastating October 2017 Northern California wildfires and the 2018 Camp Fire, PG&E began to evaluate placing overhead power lines underground as a wildfire safety measure, and to better understand the construction and cost requirements associated with undergrounding for system hardening purposes. These demonstration projects were part of PG&E's Community Wildfire Safety Program (CWSP) and included the following:

- From 2018-2020, PG&E completed multiple demonstration projects aimed at converting overhead power lines to underground in high fire-threat areas of Alameda, Contra Costa, Nevada, and Sonoma counties.
- As a part of the rebuild efforts following the October 2017 Northern California wildfires, PG&E completed undergrounding eight miles of power lines in the Larkfield Estates and Mark West Estates communities in Sonoma County in 2018.
- In 2019, PG&E announced it would rebuild all its power lines underground in the Town of Paradise as it helps the community recover from the Camp Fire. The company is also rebuilding power lines underground within the 2020 North Complex Fire footprint in Butte County.

Through these demonstration projects and rebuild efforts, PG&E has been able to refine the construction and cost requirements associated with targeted undergrounding, enabling the acceleration and expansion of undergrounding projects. Learnings include:

- Implementing new planning systems and strategies and using new materials and new equipment to make undergrounding more cost effective.
- Building strong partnerships with material suppliers and contractors to accelerate undergrounding efforts.
- Partnering with natural gas projects as well as phone and internet providers to joint trench and share costs, where possible.
- Using new technology and construction methods to increase trench production.
- Bundling work into larger blocks to take advantage of economies of scale.
- Testing new cable and conduit materials to accelerate undergrounding work processes.

Ongoing PG&E Wildfire Mitigation and Resiliency Efforts

In addition to significantly expanding its undergrounding, PG&E's ongoing safety work to enhance grid resilience and address the growing threat of severe weather and wildfires continues on a risk-based and data-driven basis, as outlined in PG&E's [2021 Wildfire Mitigation Plan \(WMP\)](#).

This includes:

- Installing stronger poles and covered power lines
- Deploying [remote grids](#) and [community microgrids](#)
- Targeted sectionalizing and grid reconfiguration
- [Investing in centralized data analytics](#) to reduce risk
- Conducting enhanced vegetation management
- [Scaling the deployment of emerging technologies](#) to proactively mitigate wildfire risk

Learn more about PG&E's wildfire safety efforts by visiting pge.com/wildfiresafety.
To watch a recording of today's announcement, visit [PG&E's YouTube channel](#).

AP NEWS

How we analyzed California's wildfire evacuation routes

By EVAN WYLOGE

April 27, 2019



In this April 17, 2019, photo, a pedestrian crosses Washington St. one of the few roads leading into and out of the Gold Rush community of Sonora, Calif. Residents of Paradise, Calif., who were forced to flee from the Camp Fire, became caught in a nightmare traffic jam on narrow winding roads as they tried to evacuate the area. Sonora faces the same kind of issues of too few escape lanes for too many people in vehicles. The 2018 catastrophe illuminated the grim reality that road systems throughout the state are not designed to handle a sudden evacuation. (AP Photo/Rich Pedroncelli)

REDDING, Calif. (AP) — How many roads are enough to get out?

That's the question we wondered after watching tragedy unfold in Paradise, California, last year during the Camp Fire.

Paradise had five two-lane roads and one four-lane road leading out of town. But the fire forced officials to close three of those routes, further clogging the remaining roads.

Did Paradise have an unusually high ratio of residents to [escape routes](#) ? Or were other California communities in a similar situation?

A USA Today-California Network analysis of California communities and [evacuation routes](#) shows that some areas in the state are far outside the norm when it comes to the number of lanes of roadway available for the size of the population.

This is a shorthand method of evaluating the efficacy of egress routes, according to emergency planning experts.

To evaluate exit routes for Californians living in areas at risk of a fire-related evacuation, [we combined and analyzed data](#) from the U.S. Census Bureau, Cal Fire and OpenStreetMap.

We took 2010 census block-level populations, combined with Cal Fire's "Fire Hazard Severity Zone" maps, and aggregated those to ZIP codes, then applied more current population estimates. Next, we spatially joined those areas with the fire risk map. That provided a current population risk breakdown for each ZIP code, based on area and estimated population.

We added OpenStreetMap data to each ZIP code, so we could see which roads cross into or out of the area. Combining the ZIP code population and fire risk data with the standard number of lanes for every major roadway allowed us to come up with a set of ZIP codes that have the greatest number of people living in the highest-risk areas and hypothetically trying to use the fewest number of lanes to leave in any direction or to areas at less risk for fire.

What does this tell us?

In short, the analysis gives an estimate of how many people there are for every lane of major road leaving an area.

When we looked at all ZIP codes in California that have people living in a very high fire risk zone, we found, on average, 134 residents living in the riskiest areas for each lane of [traffic going either direction](#) .

Only one out of 20 ZIP codes has more than 313 people living in the [riskiest areas](#) for each lane of traffic. Paradise had more than 1,000, putting it in the worst 1%. But some areas, such as Oak Park in Ventura County, South [Lake Tahoe](#) in El Dorado County or the Palos Verdes Peninsula in Los Angeles County, have two, three or even five times the number of people living in the highest-risk zones, per lane of major roadway out, compared to Paradise.

Here are the ZIP codes the analysis identified as being roughly within the worst 1% in the state when it comes to population-to-evacuation-route ratios:

SOUTHERN CALIFORNIA:

90042: Highland Park and Eagle Rock in Los Angeles County

90272: Pacific Palisades in Los Angeles County

90274: Rolling Hills in Los Angeles County

90275: Rancho Palos Verdes in Los Angeles County

91935: Jamul and surrounding areas in San Diego County

92065: Ramona and surrounding areas in San Diego County

92131: Scripps Ranch in San Diego County

91320: From Newbury Park to Dos Vientos Ranch in western Thousand Oaks in Ventura County

91377: Oak Park, an unincorporated community in Ventura County

93021: Moorpark in Ventura County

92548: Homeland and areas northwest of Homeland in Riverside County

92584: Menifee in Riverside County

92314: Big Bear, Minnelusa and Sugarloaf (92386) in San Bernardino County

CENTRAL CALIFORNIA:

93924: Carmel Valley and Jamesburg in Monterey County

NORTHERN CALIFORNIA:

95954: Magalia in Butte County

95969: Paradise in Butte County

96150: South Lake Tahoe and surrounding areas in El Dorado County

95634: Georgetown and surrounding areas in El Dorado County

94508: Angwin in Napa County

94708: Cragmont, Kensington and La Loma Park in northeastern Berkeley in Alameda County

95422: Clearlake in Lake County

95451: Kelseyville in Lake County

95631: Foresthill and surrounding areas in Placer County

95666: Pioneer, Barton and Buckhorn in Amador County



Office of the City Manager

PUBLIC HEARING

November 9, 2021

To: Honorable Mayor and Members of the City Council
 From: Dee Williams-Ridley, City Manager
 Submitted by: Peter Radu, Assistant to the City Manager
 Subject: Public Hearing: Administrative Citations and Property Lien at 2800 Garber Street

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt a Resolution rejecting the property owners' objection to the cost of the administrative fines issued to them for their failure to comply with the City's anti-blight ordinance and building permit requirement, and allowing the special assessment lien on 2800 Garber St. to be recorded as written and approved by the City Manager.

SUMMARY

Since November 21, 2017, when the first administrative citation was issued to the property owner, there have been 12 citations issued. All but one have gone unpaid, resulting in an outstanding citation balance of \$113,500.00. The total proposed lien amount, which includes \$728.00 of administrative costs, is \$114,228.00.

Neither property owner paid or submitted a timely appeal of any of the outstanding citations. Neighborhood Services Code Enforcement Unit (NSCEU) issued a Demand Notice for the outstanding balance on March 25, 2021. On June 17, 2021, NSCEU issued a Notice of Proposed Lien. Ronald Graves, one of the property owners, timely requested a hearing to appeal the proposed lien.

FISCAL IMPACTS OF RECOMMENDATION

Approving this recommendation to initiate a lien at 2800 Garber Street would result in net revenues of \$114,228 to the City from the collection of the outstanding administrative citations and administrative costs.

CURRENT SITUATION AND ITS EFFECTS

Since 2017, Neighborhood Services Code Enforcement Unit (NSCEU) has been engaged to address blight issues, including peeling exterior lead paint, and construction without a valid permit at 2800 Garber Street. The property is located across the street from a school which raises concerns about spreading lead contamination from the chipping and peeling paint. During the last four years, the property owners have been non-compliant in correcting the violations despite voluminous communications and

many attempts from NSCEU. This resulted in the issuance of 12 administrative citations with an outstanding balance of \$113,500.00. Inclusive of administrative costs, the proposed lien amount is \$114,228.00. NSCEU has worked with the property owner to try and get nonenforcement based compliance and has re-inspected the property on multiple occasions in the anticipation that the property would be found to be in compliance. Each re-inspection resulted in non-compliance and the issuance of multiple administrative citations during the course of the enforcement action. A Demand Letter was issued to the property owners for payment of the administrative citations on March 25, 2021 and a Notice of Proposed Lien was subsequently issued on June 17, 2021 to the property owners for the amount of unpaid administrative citations. A detailed history of the City's involvement with the property since 2017 is described below. Based on the intensive nature of the City's involvement with this property, the nature of the violations, and the number of inspections and opportunities to comply that have been provided to the property owners, staff believe that a lien to collect the outstanding citations is the only remaining option to gain compliance.

BACKGROUND

Below is a history of staff's involvement with 2800 Garber Street, Berkeley, CA 94705 (also associated with 2747 Piedmont Avenue, Berkeley, CA 94705) (APN: 053-1701-001-00). The property owners are Ronald E. and Shea M. Graves.

Property background and history with the City of Berkeley:

Background: The property has two separate dwellings. There are two addresses associated with this parcel: the main address is 2800 Garber and the secondary address is 2747 Piedmont Ave.

History:

- 2008 -the City issued a permit to replace the roof
- 2011-the City issued a permit to remodel the property (two extensions were given and the permit was eventually closed in 2015 as, "incomplete.")

Neighborhood Services Code Enforcement Unit (NSCEU) background:

2017 Summary: NSCEU received a complaint about blight at the property and inspected the property. It was determined that there was a need for multiple City Departments to inspect which subsequently took place. There was a referral to Planning / Toxics for exterior chipping paint on the exterior of the dwellings. NSCEU met and emailed with Mr. Graves multiple times to discuss the violations, and established compliance timelines. We also requested access to the property to inspect. Established compliance timelines were not met and the first administrative citation was issued.

- 03/20/2017-NSCEU received a complaint about blight at the property
- 03/21/2017-NSCEU performed the initial inspection
- 07/31/2017-A multi-departmental inspection occurred (Building & Safety, Fire, Planning /Zoning, and NSCEU)
- 08/25/2017-NSCEU issued a Notice of Violation (NOV) for blight

- 10/26/2017-NSCEU made a referral to Planning/Toxics for chipping paint concerns
- 11/16/2017-Re-inspection shows non-compliance to exterior violations that include lead-based, chipping paint.
- 11/21/2017-NSCEU issued an administrative citation (#7806) for \$400 for blight nuisance conditions, in violation of BMC 12.92.030b and e. Mr. Graves did pay this \$400 fine and it is not included in the proposed lien total.

2018 Summary: NSCEU conducted 8 re-inspections and determined on each that non-compliance of blight violations continued. There were 8 administrative citations issued totaling \$70,900. NSCEU issued a final Notice & Order to abate the nuisance conditions at the property.

- 01/30/2018-Re-inspection shows non-compliance to exterior violations
- 02/15/2018- NSCEU issued an administrative citation (#7761) for \$500 for blight non-compliance (BMC 12.92.030b, c, e).
 - The fine for 12.92.030 c was calculated at \$100 per violation per day, for one day, 2/14/2018. The fine for 12.92.030 b and e was calculated at \$200 per violation per day for one day, 2/14/2018.
- 03/19/2018-Re-inspection shows non-compliance to exterior violations
- 03/19/2018- NSCEU issued an administrative citation (#6123) for \$1200 for blight non-compliance (BMC 12.92.030b, c, e).
 - The fine for 12.92.030 c was calculated at \$200 per violation per day, for one day, 3/19/2018. The fine for 12.92.030 b and e was calculated at \$500 per violation per day for one day, 3/19/2018.
- 04/19/2018-Re-inspection shows non-compliance to exterior violations
- 04/19/2018- NSCEU issued an administrative citation (#7768) for \$1500 for blight non-compliance (BMC 12.92.030b, c, e).
 - The fine was calculated at \$500 per violation per day, for three violations on one day, 4/19/2018.
- 05/16/2018-Re-inspection shows non-compliance to exterior violations
- 05/16/2018- NSCEU issued an administrative citation (#6125) for \$7500 for blight non-compliance (BMC 12.92.030b, c, e).
 - The fine was calculated at \$500 per violation per day, for three violations per day for five days, 5/11/2018 – 5/16/2018.
- 06/19/2018-Re-inspection shows non-compliance to exterior violations
- 06/19/2018- NSCEU issued an administrative citation (#7769) for \$10,500 for blight non-compliance (BMC 12.92.030); and \$1,400 for expired permit and unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$500 per violation per day, for three violations per day for seven days, 6/12/18 – 6/19/18.
 - The fine for 19.28.020 was calculated at \$100 per violation per day, for two violations per day for seven days, 6/12/18 – 6/19/18.

- 07/19/2018-Re-inspection shows non-compliance to exterior violations
- 07/19/2018- NSCEU issued an administrative citation (#7770) for \$10,500 for blight non-compliance (BMC 12.92.030); and \$2,800 for expired permit and unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$500 per violation per day, for three violations per day for seven days, 7/12/18 – 7/19/18.
 - The fine for 19.28.020 was calculated at \$200 per violation per day, for two violations per day for seven days, 7/12/18 – 7/19/18.
- 08/16/2018-Re-inspection shows non-compliance to exterior violations
- 08/16/2018- NSCEU issued an administrative citation (#7774) for \$10,500 for blight non-compliance (BMC 12.92.030); and \$7,000 for expired permit and unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$500 per violation per day, for three violations per day for seven days, 8/9/18-8/16/18.
 - The fine for 19.28.020 was calculated at \$500 per violation per day, for two violations per day for seven days, 8/9/18 – 8/16/18.
- 09/04/2018- NSCEU issued a Notice & Order to abate nuisance conditions
- 10/11/2018-Re-inspection shows non-compliance of exterior violations
- 10/11/2018- NSCEU issued an administrative citation (#7882) for \$10,500 for blight non-compliance (BMC 12.92.030); and \$7,000 for expired permit and unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$500 per violation per day, for three violations per day for seven days, 10/12/18 – 10/18/18.
 - The fine for 19.28.020 was calculated at \$500 per violation per day, for two violations per day for seven days, 10/11/18 – 10/18/18.

2019 Summary: A notice of Intent to Lien was sent to the property owners. Mr. Graves reached out to the City to attempt to resolve violations on the property. NSCEU established timelines for Mr. Graves, who completes some of the items listed in the timeline. Remaining steps to compliance are discussed with Mr. Graves.

- 04/15/2019-NSCEU issued a Notice of Intent to Lien to property owners
- 04/30/2019-Owner reaches out to City Attorney's Office to discuss resolving violations
- 09/06/19-NSCEU issued a courtesy notice to reestablish timelines to resolve current violations at the property
- 11/15/2019-NSCEU performed a re-inspection of the property which showed some work to remove chipped paint and some porch repairs. Mr. Graves was at the property during the inspection were NSCEU discussed the next steps with him.

2020 Summary: The discussion of outstanding violations was formalized in a courtesy notice issued to the property owners. Since the timelines were not met, a Citation

Warning Notice was sent. Mr. Graves stated in an email that weather had delayed him in gaining compliance.

- 01/15/2020- NSCEU issued a courtesy notice documenting last discussion of outstanding violation still needed to be addressed
- 05/15/2020- NSCEU issued a Citation Warning Notice for not meeting established timelines
- 06/19/2020-Email communication from Mr. Graves stated that weather had caused delays in gaining compliance

2021 Summary: After two re-inspections, three administrative citations were issued for blight and unpermitted construction totaling \$42,000. NSCEU, with City Attorney's Office, issued a Demand Letter for unpaid administrative citations and also issued a Notice of Proposed Lien to the property owners. The total amount of outstanding administrative citations is \$113,500.00. The total administrative costs assessed, pursuant to BMC 1.24.150, is \$728. The total proposed lien amount is \$114,228.00

- 01/06/2021- NSCEU issued an administrative citation (#5446) for \$100 for blight non-compliance (BMC 12.92.030); and \$100. for unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$100 per violation per day, for one violation on one day, 1/6/21.
 - The fine for 19.28.020 was calculated at \$100 per violation per day, for one violation on one day, 1/6/21.
- 01/28/2021-Reinspection shows blight non-compliance to exterior and continuing to work without active building permits
- 02/04/2021- NSCEU issued an administrative citation (#5449) for \$4,200 for blight non-compliance (BMC 12.92.030); and \$4,200. for unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$200 per violation per day, for one violation for twenty-one days, 1/8/21 – 1/28/21.
 - The fine for 19.28.020 was calculated at \$200 per violation per day, for one violation for twenty-one days, 1/8/21 – 1/28/21.
- 03/04/2021-Re-inspection shows non-compliances of exterior violations
- 03/04/2021- NSCEU issued an administrative citation (#5450) for \$17,000 for blight non-compliance (BMC 12.92.030); and \$17,000. for unpermitted construction (BMC 19.28.020)
 - The fine for 12.92.030 was calculated at \$500 per violation per day, for one violation for thirty-four days, 1/29/21 – 3/4/21.
 - The fine for 19.28.020 was calculated at \$500 per violation per day, for one violation for thirty-four days, 1/29/21 – 3/4/21.
- 03/25/2021- NSCEU issued a Demand Letter to property owners for outstanding unpaid citations totaling \$113,500.00 plus administrative costs of \$728.00.

- 06/17/2021- NSCEU issued a Notice of Proposed Lien to property owners for the amount of unpaid administrative citations plus administrative costs, totaling \$114,228.00

Owners Failed to Pay Outstanding Fines and City Seeks to Recover Fines as a Special Assessment Lien

No timely appeal of the outstanding administrative citations were received by the City nor have the fines been paid to date (with the exception of the \$400 citation dated 11/21/2017, as noted above). The citations issued were subject to a twenty-one (21) day appeal period. In such an appeal, the owners would have had an opportunity to contest the underlying basis for the issuance of the administrative citations. However, they failed to appeal these citations within the required period.

A Demand Letter was issued to the property owners for payment of the administrative citations on March 25, 2021 and a Notice of Proposed Lien was subsequently issued on June 17, 2021 to the property owners for the amount of unpaid administrative citations. Both notices are attached. No payment has been received in response to either notice. The City now seeks to recover the fines through a special assessment lien for the citation balance and administrative costs: \$114,228.00.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no environmental sustainability or climate impacts associated with the recommendation in this report. However, as a separate action, Neighborhood Services Code Enforcement Unit is proceeding with an abatement warrant at the property in question to remove peeling exterior paint that contains lead, the abatement of which will result in a net environmental benefit for the surrounding neighbors of the property.

RATIONALE FOR RECOMMENDATION

Neighborhood Services Code Enforcement Unit, in the course of this enforcement action, has provided the property owners ample opportunity to come into compliance, and to either pay or appeal the citations. Since there have been multiple compliance dates that have passed in the last 4 years and there has been no payment received for the outstanding balance of the unpaid administrative citation fees, the recommendation is to request a lien at 2800 Garber Street to recover the outstanding balance of unpaid administrative citation fees. This is the only means for the City of Berkeley to collect fees for unpaid administrative citations.

ALTERNATIVE ACTIONS CONSIDERED

Neighborhood Services Code Enforcement Unit has provided the property owners with over four years of time to correct violations. This is an extraordinary amount of time to correct. The City of Berkeley has exhausted the extension of time to gain compliance at this property.

CONTACT PERSON

Jeff Conner, Supervisor, Neighborhood Services Code Enforcement Unit, 510 981-2492

Attachments:

1. Resolution
2. Demand Notice
3. Notice of Proposed Special Assessment Lien

RESOLUTION NO. ##,###-N.S.

REJECTING THE PROPERTY OWNERS' OBJECTION TO THE COST OF THE ADMINISTRATIVE FINES ISSUED TO THEM FOR THEIR FAILURE TO ADDRESS BLIGHT CONDITIONS ON THEIR PROPERTY, AND ALLOWING THE SPECIAL ASSESSMENT LIEN AT 2800 GARBER STREET TO BE RECORDED AS WRITTEN AND APPROVED BY THE CITY MANAGER.

WHEREAS, 2800 Garber Street is a property in the City of Berkeley, owned by Ronald E. and Shea M. Graves; and

WHEREAS, the City received a complaint of blight on March 20, 2017 and created a case with the Neighborhood Services Code Enforcement Unit; and

WHEREAS, the City has issued a total of 12 administrative citations between 2017-2021 with an unpaid citation balance of \$113,500.00 for non-compliance of City of Berkeley Municipal Codes; and

WHEREAS, no timely appeal of the administrative citations were received by the City nor have the outstanding fines been paid to date; and

WHEREAS, the City has issued a Demand Letter to the property owners on March 3, 2021 for the amount of unpaid administrative citation issued and associated costs. However, the owners failed to remit the outstanding fines and associated costs within the required 45 day period; and

WHEREAS, the City has issued a Notice of Proposed Lien to the property owners on June 17,2021 to collect the amount of unpaid administrative citations issued plus administrative costs, and such notice was timely objected to by the owner; and

WHEREAS, a public hearing on property owner's objections was conducted on November 9, 2021 by the Council of the City of Berkeley; and

WHEREAS, in evaluating the testimony given during the public hearing, the Council of the City of Berkeley considered and made determinations as to the credibility of the witnesses, the weight of the evidence, and the extent to which the evidence was cumulative and/or probative; and

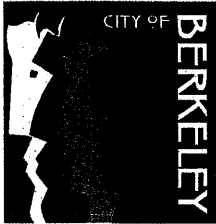
WHEREAS, the City has provided ample time and opportunity for the owners of the property to come into compliance and correct the noted violations, but the owners have failed to adequately abate the violations; and

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley finds that the proposed lien amount of \$114,228.00 is an accurate sum of the administrative costs and administrative citations that were issued, not appealed and final and, thus, is reasonable.

November 9, 2021

BE IT FURTHER RESOLVED, that the Council of the City of Berkeley rejects the property owners' objection to the cost of the administrative fines and associated costs issued to them for their failure to comply with City of Berkeley anti-blight and building permit requirements, and that the special assessment lien is to be recorded as written and approved by the City Manager.

BE IT FURTHER RESOLVED, that the City Manager is authorized to place a special assessment lien in the amount of \$114,228.00 on the property at 2800 Garber St. Berkeley, CA 94705.



Office of the City Manager
Neighborhood Services-Enforcement Division

DEMAND NOTICE

CERTIFIED MAIL

March 25, 2021

Ronald E. & Shea M. Graves
2857 Cicero Way
San Jose CA 95148-2905

RE: Demand For Payment Of Administrative Fines, Costs & Fees Pursuant to BMC Section 1.24.160:

Dear Mr. and Mrs. Graves

As a result of violations of the Berkeley Municipal Code (BMC) listed below, you were issued Administrative Citation(s) in amounts and on dates as follows:

	Date of Citation	B.M.C Code(s)	Nature of Citation(s)	Amount of Citation
1	11/21/2017	12.92.030	Blight nuisance conditions, rodent harborage, hazardous conditions and building violations	\$ (- 400.00)
2	02/14/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 500.00
3	03/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,200.00
4	04/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,500.00
5	05/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 7,500.00

Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

DEMAND NOTICE
March 25, 2021
Page 2 of 3

6	06/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 11,900.00
7	07/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 13,300.00
8	08/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 17,500.00
9	10/18/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 17,500.00
10	01/07/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 200.00
11	02/04/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 8,400.00
12	03/04/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 34,000.00
	Total		Citation Balance	\$113,500.00
13	Administrative costs			\$ 728.00
	Total			\$114,228.00

*See attached cost report for an itemized account of administrative costs.

Please be advised that payment in total of the above fines, fees and costs is due upon receipt of this notice. Remit payment to the Finance Department directly. The Finance-Customer Service Center is located at 1947 Center Street in Berkeley (open Monday - Friday, 9:00am - 4:30pm). Be advised personal checks will not be accepted as payment. Cash, money order, cashier's check, or Visa/MasterCard are acceptable forms of payment. Cash payments must be made in person at the Finance Customer Service Center. You may also pay by phone using Visa or MasterCard by calling the Finance-Customer Service Center at (510) 981-7200 between the hours of 8:30am - 4:30pm.

If payment is not forthcoming within 45 days from the date of this notice, the City of Berkeley will seek to impose the total amount listed above as a special assessment lien against the property at the following address:

2800 Garber Street
Berkeley, CA 94706-2307
APN: 053-1701-001-00

Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

DEMAND NOTICE
March 25, 2021
Page 3 of 3

As of March 16, 2021, County records indicate that you are the recorded owner of the property at this address. [Copies of this notice have been sent to all other owners of record in order to inform them of a matter that may affect their interests in the above property.]

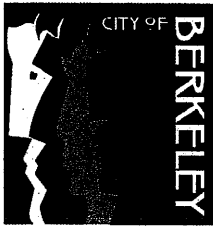
If you have any questions regarding the contents of this notice, please contact Wanda Drouillard, Code Enforcement Officer II or the Finance Customer Service Center.

Sincerely,



Wanda Drouillard
Code Enforcement Officer II
City Manager's Office

Enclosure: Cost Report/Memo



Office of the City Manager
 Neighborhood Services-Enforcement Division

COST REPORT/MEMO

DATE: March 25, 2021

TO: File *(Handwritten signature)*

FROM: *(Handwritten signature)* Wanda Drouillard, Code Enforcement Officer II

RE: Costs Associated with Administrative Citation(s) Pursuant to Section 1.24.150

Name of Violator	Ronald E. & Shea M. Graves.	APN: 053-1701-001-00 Case Number: 336394
Recorded Property Owner(s)	Ronald E. & Shea M. Graves	
Property Location	2800 Garber Street Berkeley, CA 94705-1315	
Nature of Citation(s) & B.M.C Code(s)	Blight Nuisance Conditions... (BMC Section 12.92.020 and 19.28.020).	

	Date	Description	No. of Hours	Hourly Rate	Total \$ Amount
1	11/21/2017 02/14/2018 03/19/2018 04/19/2018 05/16/2018 06/19/2018 07/19/2018 08/16/2018 10/18/2018 01/07/2021 02/04/2021 03/04/2021	Twelve (12) Administrative citation drafted and sent to property owner of record	6 hr	\$104	\$624
2		Title search request, reviewed and processed payment for title company	1 hr	\$104	\$104
3					
<i>Total</i>			7 hrs		\$728

3/25/2021

PROOF OF SERVICE

I, the undersigned, certify that I am employed in the City of Berkeley, County of Alameda, California; that I am over the age of eighteen years and not a party to the within action; that my business address is 2180 Milvia Street, Berkeley, California 94704. On this date, I served by first class mail and certified mail Demand Notice to:

Ronald & Shea Graves

Name

2857 Cicero Way

Street

San Jose CA 95148-2905

City, State, Zip Code

By the following means of service:

By Personal Service - I personally gave the citation to the person whose name appears above.

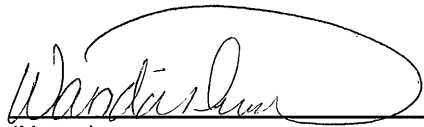
By Posting - I posted the citation in a conspicuous place on the property of the person whose name appears above, specifically:

By First Class Mail - I am readily familiar with the City's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the U.S. Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in Berkeley, California, for mailing to the office of the addressee following ordinary business practices.

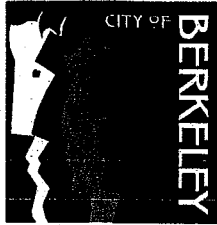
By Certified Mail, Return Receipt Requested - I mailed the citation by certified mail at the U.S. Post office, return receipt requested.

By Facsimile - I caused the citation to be transmitted to the person whose name appears above following ordinary business practices in compliance with applicable rules of civil procedure and rules of court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 25, 2021 at Berkeley, California.



(Name)



Office of the City Manager
Neighborhood Services-Enforcement Division

NOTICE OF PROPOSED LIEN

CERTIFIED MAIL

June 17, 2021

Ronald E. & Shea M. Graves
2857 Cicero Way
San Jose CA 95148-2905

RE: RE: NOTICE OF PROPOSED LIEN AND HEARING RIGHTS

Dear Mr. and Mrs. Graves

As a result of violations of the Berkeley Municipal Code (BMC) listed below, you were issued Administrative Citation(s) in amounts and on dates as follows:

	Date of Citation	B.M.C Code(s)	Nature of Citation(s)	Amount of Citation
1	11/21/2017	12.92.030	Blight nuisance conditions, rodent harborage, hazardous conditions and building violations	\$ 0.00
2	02/14/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 500.00
3	03/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,200.00
4	04/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,500.00

Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

NOTICE OF PROPOSED LIEN

June 17, 2021

Page 2 of 3

5	05/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 7,500.00
6	06/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 11,900.00
7	07/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 13,300.00
8	08/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 17,500.00
9	10/18/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 17,500.00
10	01/07/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 200.00
11	02/04/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 8,400.00
12	03/04/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 34,000.00
	Total		Citation Balance	\$113,500.00
13	Administrative costs			\$ 728.00
	Total			\$114,228.00

*See attached cost report for an itemized account of administrative costs.

On March 25, 2021, this office sent you a Demand Notice to pay the total amount listed above and demanded payment within 45 days from the date of such Notice. You have failed to remit such payment within this time period. Therefore, the City is hereby notifying you as well as the other owners of record of its intent to attach a special assessment lien against the property at the following address:

2800 Garber Street
Berkeley, CA 94706-2307
APN: 053-1701-001-00

2180 Milvia Street, Berkeley, CA 94704 Tel: 510.981.7000 TDD: 510.981.6903 Fax: 510.981-2499
E-mail: codeenforcement@cityofberkeley.info

Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

NOTICE OF PROPOSED LIEN
June 17, 2021
Page 3 of 3

Pursuant to BMC Section 1.24.170.A.3, you are also hereby notified that you have 45 days from the date of this Notice to pay the total amount listed above.

As of June 16, 2021, County Records indicate that you Ronald E. & Shea M. Graves are the recorded owners of the property at the above address.

To pay the amount due, please contact the Finance Department directly and be advised that only cash, money order, cashier's checks, or Visa/MasterCard will be accepted for payment. Personal checks will not be accepted. The Finance Customer Service Center is located at 1947 Center Street in Berkeley (open Monday - Friday, 9:00am - 4:30pm). You may pay by phone with a Visa or MasterCard by calling the Finance-Customer Service Center at (510) 981-7200 between the hours of 8:30 a.m. - 4:30 p.m.


Pursuant to BMC Section 1.24.170.A.4, you have 10 calendar days from the receipt of this Notice to request a hearing before the Berkeley City Council and to file objections to the costs. Failure to request an appeal within 10 days constitutes a waiver of your right to appeal the proposed lien.

If you request a hearing, the City Council will not be deciding whether the basis or the amount of the underlying citations is valid. Rather, the Council will only determine whether the citations were issued and processed in the manner authorized by law and that the proposed lien is an accurate reflection of the citations. To file a hearing request, contact the City Clerk in writing, stating the reason why you believe the amount of the proposed lien is incorrect.

If you fail to either remit the total amount demanded above within 45 days of this Notice or request a hearing within 10 days of receipt of this Notice, the City will notify the County and direct it to place a special assessment lien on your property for the total amount above. The amount of the lien may then be collected at the same time and in the same manner as property taxes are collected.

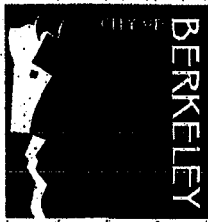
If you have any questions regarding the contents of this Notice, please contact me at 510-981-2482 or wdrouillard@cityofberkeley.info or Finance Customer Service at (510)981-7200.

Sincerely,



Wanda Drouillard
Code Enforcement Officer II
City Manager's Office

Enclosure: March 25, 2021-Demand Notice with Cost Report/Memo attached



Office of the City Manager
Neighborhood Services-Enforcement Division

DEMAND NOTICE

CERTIFIED MAIL

March 25, 2021

Ronald E. & Shea M. Graves
2857 Cicero Way
San Jose CA 95148-2905

RE: Demand For Payment Of Administrative Fines, Costs & Fees Pursuant to BMC Section 1.24.160:

Dear Mr. and Mrs. Graves

As a result of violations of the Berkeley Municipal Code (BMC) listed below, you were issued Administrative Citation(s) in amounts and on dates as follows:

	Date of Citation	B.M.C Code(s)	Nature of Citation(s)	Amount of Citation
1	11/21/2017	12.92.030	Blight nuisance conditions, rodent harborage, hazardous conditions and building violations	\$ (- 400.00)
2	02/14/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 500.00
3	03/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,200.00
4	04/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 1,500.00
5	05/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 7,500.00

Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

DEMAND NOTICE
March 25, 2021
Page 2 of 3

6	06/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 11,900.00
7	07/19/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 13,300.00
8	08/16/2018	12.92.030 (b),(c) & (e)	Blight nuisance conditions- paint worn and peeling, building structure deteriorating and not approved boarded up vacant building.	\$ 17,500.00
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10	01/07/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 200.00
11	02/04/2021	12.92.030, 19.28.020	Blight nuisance conditions and Building permit violations	\$ 8,400.00
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*See attached cost report for an itemized account of administrative costs.

Please be advised that payment in total of the above fines, fees and costs is due upon receipt of this notice. Remit payment to the Finance Department directly. The Finance-Customer Service Center is located at 1947 Center Street in Berkeley (open Monday - Friday, 9:00am - 4:30pm). Be advised personal checks will not be accepted as payment. Cash, money order, cashier's check, or Visa/MasterCard are acceptable forms of payment. Cash payments must be made in person at the Finance Customer Service Center. You may also pay by phone using Visa or MasterCard by calling the Finance-Customer Service Center at (510) 981-7200 between the hours of 8:30am - 4:30pm.

If payment is not forthcoming within 45 days from the date of this notice, the City of Berkeley will seek to impose the total amount listed above as a special assessment lien against the property at the following address:

2800 Garber Street
Berkeley, CA 94706-2307
APN: 053-1701-001-00


Ronald & Shea Graves
2800 Garber Street
Berkeley, CA 94705-2307

DEMAND NOTICE
March 25, 2021
Page 3 of 3

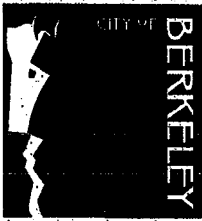
As of March 16, 2021, County records indicate that you are the recorded owner of the property at this address. [Copies of this notice have been sent to all other owners of record in order to inform them of a matter that may affect their interests in the above property.]

If you have any questions regarding the contents of this notice, please contact Wanda Drouillard, Code Enforcement Officer II or the Finance Customer Service Center.

Sincerely,


Wanda Drouillard
Code Enforcement Officer II
City Manager's Office

Enclosure: Cost Report/Memo



Office of the City Manager
Neighborhood Services-Enforcement Division

COST REPORT/MEMO

DATE: March 25, 2021

TO: File

FROM: *Wanda Drouillard*
Wanda Drouillard, Code Enforcement Officer II

RE: Costs Associated with Administrative Citation(s) Pursuant to Section 1.24.150

Name of Violator	Ronald E. & Shea M. Graves.	APN: 053-1701-001-00 Case Number: 336394
Recorded Property Owner(s)	Ronald E. & Shea M. Graves	
Property Location	2800 Garber Street Berkeley, CA 94705-1315	
Nature of Citation(s) & B.M.C Code(s)	Blight Nuisance Conditions... (BMC Section 12.92.020 and 19.28.020).	

	Date	Description	No. of Hours	Hourly Rate	Total \$ Amount
1	11/21/2017 02/14/2018 03/19/2018 04/19/2018 05/16/2018 06/19/2018 07/19/2018 08/16/2018 10/18/2018 01/07/2021 02/04/2021 03/04/2021	Twelve (12) Administrative citation drafted and sent to property owner of record	6 hr	\$104	\$624
2		Title search request, reviewed and processed payment for title company	1 hr	\$104	\$104
3					
<i>Total</i>			7 hrs		\$728

3/25/2021

PROOF OF SERVICE

I, the undersigned, certify that I am employed in the City of Berkeley, County of Alameda, California; that I am over the age of eighteen years and not a party to the within action; that my business address is 2180 Milvia Street, Berkeley, California 94704. On this date, I served by first class mail and certified mail Demand Notice to:

Ronald & Shea Graves
Name

2857 Cicero Way
Street

San Jose CA 95148-2905
City, State, Zip Code

By the following means of service:

By Personal Service - I personally gave the citation to the person whose name appears above.

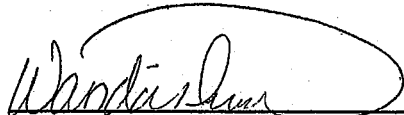
By Posting - I posted the citation in a conspicuous place on the property of the person whose name appears above, specifically:

By First Class Mail - I am readily familiar with the City's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence is deposited with the U.S. Postal Service on the same day as collected, with first-class postage thereon fully prepaid, in Berkeley, California, for mailing to the office of the addressee following ordinary business practices.

By Certified Mail, Return Receipt Requested - I mailed the citation by certified mail at the U.S. Post office, return receipt requested.

By Facsimile - I caused the citation to be transmitted to the person whose name appears above following ordinary business practices in compliance with applicable rules of civil procedure and rules of court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 25, 2021 at Berkeley, California.



(Name)

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By Facsimile - I caused the citation to be transmitted to the person whose name appears above following ordinary business practices in compliance with applicable rules of civil procedure and rules of court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 17, 2021 at Berkeley, California.



(Name)

PROOF OF SERVICE

I, the undersigned, certify that I am employed in the City of Berkeley, County of Alameda, California; that I am over the age of eighteen years and not a party to the within action; that my business address is 2180 Milvia Street, Berkeley, California 94704. On this date, I served by first class mail and certified mail Demand Notice to:

Ronald & Shea Graves

Name

2800 Garber Street

Street

Berkeley CA 94705

City, State, Zip Code

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 17, 2021 at Berkeley, California.


(Name)

**PUBLIC HEARING NOTICE
BERKELEY CITY COUNCIL**

REJECTING THE PROPERTY OWNERS’ OBJECTION TO THE COST OF THE ADMINISTRATIVE FINES ISSUED TO THEM FOR THEIR FAILURE TO ADDRESS BLIGHT CONDITIONS ON THEIR PROPERTY, AND ALLOWING THE SPECIAL ASSESSMENT LIEN AT 2800 GARBER STREET TO BE RECORDED AS WRITTEN AND APPROVED BY THE CITY MANAGER

The Department of City Manager’s Office is proposing a Resolution to initiate a lien on 2800 Garber Street to collect the balance of outstanding administrative citations totaling \$114,228.00.

The hearing will be held on, NOVEMBER 9, 2021 at 6:00 p.m. The hearing will be held via videoconference pursuant to Government Code Section 54953(e) and the state declared emergency.

A copy of the agenda material for this hearing will be available on the City’s website at www.CityofBerkeley.info as of **October 28, 2021**. **Once posted, the agenda for this meeting will include a link for public participation using Zoom video technology.**

For further information, please contact Jeff Conner, Neighborhood Services Code Enforcement Unit Supervisor at (510) 981-2492.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

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

Published: November 3, 2021 – East Bay Express

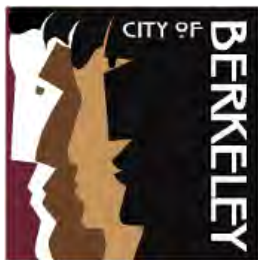
City Clerk shall publish in a newspaper of general circulation published in the county in which the property is located pursuant to BMC 1.24.170.

~~~~~  
I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City’s website, on October 28, 2021.



\_\_\_\_\_  
Mark Numainville, City Clerk





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## **SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 3**

**Meeting Date:** October 26, 2021

**Item Number:** 33

**Item Description:** Objective Standards Recommendations for Density, Design and Shadows

**Submitted by:** Councilmembers Sophie Hahn, Susan Wengraf, Kate Harrison, and Mayor Jesse Arreguin

Several amendments are introduced to the Supplemental 1 submission from the above Councilmembers and Mayor including:

1. The first paragraph of the “Background” section (and associated footnotes) was inadvertently deleted from the Supplemental 1 submission, and is restored here.
2. Emphasis throughout to clarify that all objective standards shall conform with State law and shall not reduce development capacity.

ACTION CALENDAR

October 26, 2021

(Continued from September 28, 2021)

To: Members of the City Council

From: Councilmembers Sophie Hahn, Kate Harrison, Susan Wengraf and Mayor Jesse Arreguin

Subject: Supplemental Recommendations on Objective Standards

**RECOMMENDATION:**

Refer to the City Manager, for review by the Planning Commission and City Attorney ~~and approval by the City Council, recommendations~~ the concepts presented below for regarding codification of objective standards for Commercial Districts and the MU-R for elements of Berkeley's zoning code traditionally addressed through the use permit process. Objective Standards for each District should reflect current patterns and practices of the Zoning Adjustments Board and Zoning Officer, including special consideration for impacts where Commercial and MU-R Districts border each other, or Residential. Objective Standard recommendations should be brought back to the City Council for final action.

Specific recommendations are described more fully below and include:

- Adopting units-per-acre density standards. To conform with State Law, density standards must not reduce the capacity for residential development below what is currently in effect in the General Plan and what can otherwise be built under existing City standards.
- Using a "Daylight Plane" method for shadowing standards. Develop shadowing standards providing an objective, measurable method of calculating shadow impacts, such as a Daylight Plane, that does not reduce a site's residential development capacity. If shadowing standards would reduce building area, other standards should be relaxed to ensure that there is no net loss in residential capacity.
- Developing limited standards regarding building form and elements



The City Manager is requested to prioritize recommendations most urgently needed to address project types subject to state-mandated ministerial review and to support implementation of any rezoning related to the 2023 Housing Element Update. Additional recommendations, if any, should be brought forward as quickly as possible.

All of the recommendations herein and any variations or alternatives which may be proposed by the City Manager, Planning Commission, or City Attorney shall conform and not conflict with State laws.

Funds needed, if any, for additional consulting services to complete objective standards codification should be referred by the City Manager to the budget process.

**BACKGROUND:**

Berkeley's Zoning Ordinance is made up almost entirely of base objective standards, often coupled with an allowance to exceed those standards with a Use Permit (UP) or Administrative Use Permit (AUP).<sup>1</sup> Every element of the code that provides for allowable height, setbacks, number of units, building separation, lot coverage, open space, and similar is an objective standard. For many elements, a base standard is provided with an allowance to exceed the standard if the Zoning Officer/Staff, who issue AUPs, or the Zoning Adjustments Board (ZAB), that issues UPs, determines that the impact of exceeding the standard is not detrimental.<sup>2</sup>

AUPs and UPs to exceed base standards are routinely granted. In some cases, on review by Staff or the ZAB, impacts of diverging from an objective standard are found to be excessive, and the applicant is asked to revise their plans to reduce impacts. The back-and-forth between Staff or ZAB and the applicant in almost all cases results in a project that is approved, with impacts on adjacent properties and/or the neighborhood and community having been taken into account.

There are a few areas of Berkeley's Zoning Ordinance where no (or very limited) standards exist, and the evaluation of impacts to adjacent properties, the neighborhood and the community is undertaken by Staff (officially, the Zoning Officer) or ZAB, who apply their judgement with reference, in general, to (1) the circumstances which exist at the time the permit is being issued, (2) the general purposes of the zone/district in which the project is found, and (3) definitions and standards that appear elsewhere in the

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<sup>1</sup> Applicants may also seek a Variance to diverge from objective standards, but these are only for extreme divergence, and the bar to receive a Variance is very high. For these reasons, variances are rarely sought or granted in Berkeley.

<sup>2</sup> The standards for approval of an AUP and UP are the same; the difference is that AUPs are approved by the Zoning Officer/Staff and UPs are approved by the Zoning Board.

code. Because Staff and ZAB routinely make these evaluations, there is significant consistency across applications; while there may be no “objective” standards or binding precedents there are patterns and practices.

While the overwhelming majority of projects in Berkeley that require AUPs or UPs are approved by Staff or ZAB and are not appealed, a small number are appealed, protracting the permitting process. In most cases, the decisions of Staff or ZAB are not overturned on appeal, resulting in permits being upheld, sometimes with modifications. In just a few cases, decisions of Staff or ZAB are overturned by the appeals decision-making body.<sup>3</sup>

With the advent of State laws that seek to reduce time involved in permitting processes and increase certainty for applicants/developers, mandating “by right” or “ministerial” permitting for projects that conform with base standards, *Berkeley needs to codify standards for elements that have traditionally been left in part or whole to Staff or ZAB’s review.*

Codifying standards for these elements means existing patterns and practices will be quantified and written down (and can be adjusted); *it does not mean new elements are introduced.* Conversely, because State law requires application of written, objective standards, *failure to document standards for these elements - to be “silent” where staff and community standards have long been applied - would represent an affirmative choice to allow unlimited impacts where impacts have long been considered.*

In a by-right/ministerial approvals scenario, base standards, which vary across Districts, are best thought of as *standards that are so unlikely to present unacceptable impacts that automatic approval of applications meeting those standards is warranted across a variety of circumstances.*<sup>4</sup> Base standards *do not operate as a bar to approval of a zoning application*; applications that exceed base standards in Berkeley can be - and already are - routinely considered and approved.

Base objective standards under a by-right or ministerial review process are thus the standards for *automatic* approvals. Projects with elements and impacts that exceed those standards are still approved through the existing AUP/UP process.<sup>5</sup> Staff or ZAB take a second look and determine whether exceeding those base standards would be

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<sup>3</sup> Zoning Officer/Staff decisions are reviewed by ZAB, and ZAB decisions are reviewed by the City Council.

<sup>4</sup> ‘Circumstances’ might include lot size, shape, topography, proximity to other Districts, overlays, etc.

<sup>5</sup> See footnote 1

detrimental to adjacent properties, the neighborhood or the community.<sup>6</sup> The overwhelming outcome of Staff or ZAB review is that projects are approved as originally presented, or as refined via a back-and-forth with the applicant.

The areas of Berkeley's Zoning Ordinance that have limited, if any, base standards in place are density, light/sunlight/shadows, privacy, views, and to some extent, building form and elements. All of these have traditionally been left in part or full to the consideration of Staff or ZAB in the AUP/UP and related Design Review processes.

Berkeley's Zoning Code is unusual in not including specific density limits (units or people per parcel or acre) for all Districts. In Berkeley's C- and MU-R Districts, building height, setbacks, lot coverage, Floor Area Ratio (FAR)<sup>7</sup> and other elements shape building size and placement, but do not prescribe density of units or individuals. This complicates certain circumstances where State and local laws interact. Providing specific density standards for these Districts will facilitate application of State laws.

Berkeley's relative lack of explicit standards in these areas is not unique; many jurisdictions' zoning codes and practices also address some or all elements of building form, sunlight/shadows, privacy, and views through discretionary/community processes. At the same time, some jurisdictions do have more prescriptive, "objective" standards already in place. Differences among jurisdictions are largely a matter of style; some codes were written in a more prescriptive manner, while others, like Berkeley's, were written with more flexibility.

#### **DISCUSSION & RECOMMENDATIONS:**

The recommendations herein provide a structure and some guidelines for Staff and the Consulting team to use in proposing codification of objective standards, for Commercial and MU-R districts, for elements traditionally left to Staff or ZAB review, or where Berkeley's code is currently silent. Where appropriate, standards proposed should include allowances to exceed base standards (with or without caps), as is common throughout Berkeley's Zoning Code.

As with all objective standards, it is likely that standards may differ from District to District, in overlay areas, and where one District, Zone or overlay area borders another. Staff and the consulting team are asked to undertake a segmented review of each

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<sup>6</sup> "Detriment," the crux of the standard by which applications to exceed base objective standards is reviewed, is a much higher standard than a finding of negative impact. Many projects with negative impacts are approved because their impacts, while negative, are found not to rise to the level of detriment.

<sup>7</sup> **Floor area ratio (FAR)** is the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.

meaningfully different circumstance,<sup>8</sup> consider current patterns and practices of Staff and ZAB, review zoning codes of similar sized or situated jurisdictions, and propose standards for Berkeley to codify.

## DENSITY

### **DISCUSSION:**

Berkeley's current zoning code uses a variety of methods to regulate the intensity of development on a single parcel. Not every zone uses all of the methods, but all use one or more.

- Prescribed number of units per parcel or parcel of a certain size (R-zones)
- Height, Setbacks, Building separations and Lot Coverage/Open Space requirements
- Floor Area Ratio (FAR)

Most of these approaches don't directly equate with density of units or residents. A building with allowed FAR, setbacks, and height, for example, could include only a few large units or a much larger number of small units. Because some elements of State law that interact with Berkeley's Zoning Code assume the presence of explicit density requirements, adopting clear density standards for C- and MU-R Districts will facilitate application of State requirements.

Berkeley's General Plan does provide some guidance on density, but the General Plan is not formally incorporated into the City's Zoning Ordinance, as is typical in other jurisdictions. The General Plan provides the following in the Land Use Element under Land Use Classifications:

**Neighborhood & Avenue Commercial:** *Population density will generally range from 44 to 88 persons per acre.*

**Downtown:** *Population density will generally range from 88 to 220 persons per net acre.*

**Mixed Use Residential:** *Population density will generally range from 22 to 44 persons per acre, where housing is allowed.*

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<sup>8</sup> A chart is provided in Attachment A to illustrate one method of organizing these recommendations.

Area plans may also address density in C- and MU-R Districts; staff and the consultants are requested to review applicable plans for potential guidance.

JSISHL<sup>9</sup> considered dwelling units per acre as well as form-based code and floor area ratio (FAR) as approaches to regulate lot buildout and development proportions. There was also interest in a units-per-acre approach that assumed average unit sizes and bedroom counts. No strong agreement could be reached as to the best path forward.

In the end, a recommendation was made using FAR as the primary standard in residential and commercial districts and form-based code, which emphasizes standards with predictable physical outcomes such as build-to lines and frontage and setback requirements, as a secondary approach. *These approaches, however, are already in use - Berkeley's Zoning Code is primarily "form-based,"* and Residential Districts already have unit-per-parcel or parcel-size limits in place.

*The missing density element in Berkeley's code is a unit- or person- per acre (or parcel) number for Commercial and MU-R Districts. This recommendation seeks explicit density standards for the C- and MU-R Districts, where the Zoning Code is currently silent.*

**RECOMMENDATION:**

Refer to the City Manager, Planning Commission, and City Attorney, the codification of units-per-acre standards for C- and MU-R Districts, as originally recommended by the City Council on July 17, 2017. The City's General Plan, Area Plans and the Purposes Section of each District provide guidance. Rezoning to increase density beyond what is already contemplated in existing plans and purposes will be considered in the context of the Housing Element Update.

To ensure density standards conform to State Law, any standards proposed must not reduce the capacity for residential development below what is currently in effect. Density limits articulated in the Zoning Ordinance must not be lower than what is permitted in the General Plan and can otherwise be built under existing City standards. Staff should consider upzoning parcels along with adoption of objective standards.

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<sup>9</sup> Council established JSISHL, the Joint Subcommittee for the Implementation of State Housing Laws, which included representatives of the Planning Commission, Zoning Adjustments Board, and Housing Advisory Commission, to review approaches to and make recommendations about objective standards for density, design, shadows and views.

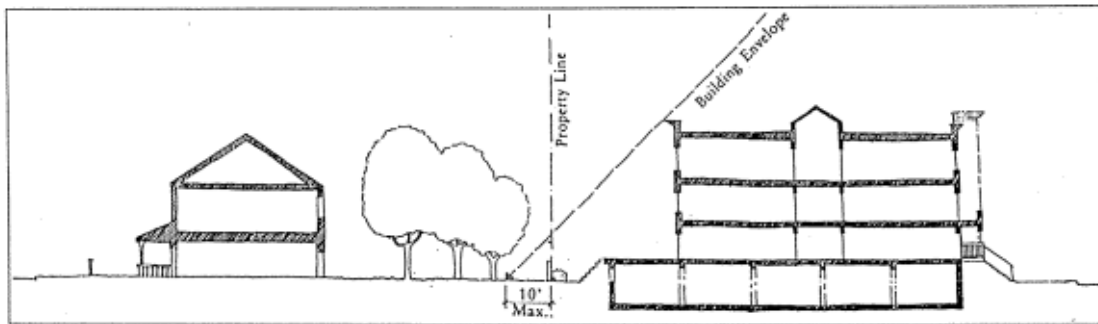
## SUNLIGHT/SHADOWS

### DISCUSSION:

~~One option for creating objective shadowing standards is the It is recommended that a~~ “Daylight Plane” method ~~which be used as a basis to propose maximum shadowing for by right/ministerial approvals, with extra allowances, as appropriate. The Daylight Plane approach~~ is already reflected in the [University Avenue Strategic Plan](#) and was used by El Cerrito for San Pablo Avenue ~~and by Los Angeles, San Francisco, and many other California cities. These cities’ Many other zoning codes use this method and~~ can serve as examples. In addition, other objective shadowing standards should be considered, to best ensure goals are achieved while conforming in full with State housing laws.

Shadowing of residential properties, especially those in neighboring R-Districts, and of parks, schoolyards, and other public outdoor spaces should be considered.

Example from the City of Berkeley’s University Avenue Strategic Plan:



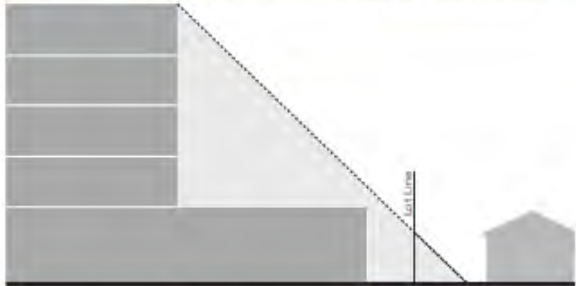
down as it approaches the rear property line, so as not to obstruct direct sunlight to adjacent

*A building may not cast a shadow greater than 10' on an adjacent rear yard when the southern sun is at a 45 degree angle.*

Example from [El Cerrito's Avenue Specific Plan for San Pablo](#):

**2.01.05 FBC SUMMARY: SHADOWS**

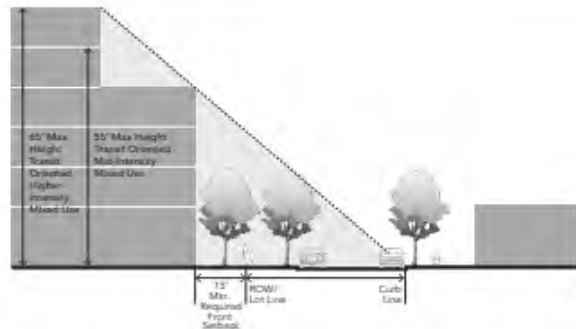
**Rear and Upper Floor Rear Setback Adjacent to Residential Lot**



Buildings shall not cast shadows onto adjacent existing residential uses on Winter Solstice (December 21):

- Adjacent parcels to the east greater than 14'-0" deep at 1:30pm.
- There is no requirement for shadows onto adjacent parcels to the west because shadows are negligible due to solar angle.

**Front and Upper Floor Front Setback Along Street**



Buildings shall not cast shadows beyond the curb line on the opposite side of the street on Winter Solstice (December 21):

- Streets to the east of the parcel at 1:30pm.
- Streets to the north of the parcel at 10:00am or 4:00pm.
- There is no requirement for streets to the south and west of the parcel because shadows are negligible due to solar angle.

02-4 - San Pablo Avenue Specific Plan - August, 2014 - Corrected

Shadows can also impact solar arrays. Berkeley needs to meet its climate action clean energy goals *and* build new housing, placing two important values in tension. This tension is not unique to Berkeley; all progressive communities that value both housing creation and the reduction of GHG emissions must find ways to ensure both can go forward in a robust manner.

It is therefore recommended that solar access regulations in other communities (and countries) be reviewed and solutions proposed that best support the maximization of *both goals*. In addition, Berkeley's Zoning Code has provisions for [private solar access easements](#) that include definitions and impact considerations that can be incorporated into objective standards.

**RECOMMENDATION:**

Develop shadowing standards providing an objective, measurable method of calculating shadow impacts on properties. Staff and consultants should take into consideration alternate proposals considered by JSISHL and any other objective shadowing standards in use in other California cities. Objective standards developed through this process should not reduce a site's residential development capacity. If shadowing standards would reduce building area, other standards should be relaxed to ensure that there is no net loss in residential capacity (for example, reduced setbacks and lot coverage or increased height could offset reductions that the objective shadow standard would otherwise create). Staff should also consider any upzoning necessary to balance impacts of proposed objective standards.

~~Using a Daylight Plane method, standards for shadowing and solar impacts should be proposed for all C- and the MU-R Districts.~~ Proposed standards for all C- and MU-R Districts should include both base and, where appropriate, extra allowances and ~~or programs and~~ consider the following:

- Consideration for public parks, gardens, schools and recreation and gathering areas
- Protections for solar panels and/or compensation for loss of solar panel access
- Standards for transitions where Commercial/MU-R and Residential Districts meet, to limit impacts
- If possible, allowance for adjustments ~~(through the use permit process)~~ as necessary to the location, orientation and massing of structures to minimize shadowing and/or solar access impacts, including allowances to reduce setbacks or lot coverage requirements.

**BUILDING FORM & BASIC DESIGN ELEMENTS**

The term “Design Standards” encompasses a wide variety of concepts, many of which make no sense for the City of Berkeley, where a wide variety of styles, from traditional to eclectic, co-exist (mostly) in harmony. In addition, overly complicated and prescriptive design standards can hamper development and in some cases add costs, none of which the City of Berkeley should endorse. Especially in private townhouse and subdivision-type developments, standards sometimes require an excessive level of uniformity, limiting allowable paint, fence types, trims, roof colors, and even the varieties of grass that can be grown. Berkeley should not enact these types of Design Standards.



Berkeley does, however, have some established standards relating to building form and other key building elements, and also conducts Design Review of buildings in Commercial areas. Some area plans and zoning, for the Downtown and University Avenue, for example, include objective standards such as articulated rather than flat facades, inset entries, step-backs at high elevations or where taller buildings meet lower-rise adjacent areas, and other basic building form requirements that are easy to quantify objectively. Many other jurisdictions that value housing production have similar standards in place.

As with other elements of the Zoning Ordinance that have traditionally been left partially or wholly to discretionary review, Berkeley must now codify a set of key base standards related to building form, step downs and set-backs, facades, and street-level elements (entries, commercial spaces, drop off and bike access zones, etc.) that are *so fundamental to good architecture and a positive pedestrian and community experience that buildings meeting those standards rightly can be approved through a ministerial process*. Again, as with other objective elements, appropriate base standards may vary across Districts, Zones, Overlays and at borders.

In addition to providing base standards, Berkeley can and should allow buildings that diverge from those standards to be reviewed and considered for approval on a case-by-case basis through the use permit process. In addition, in the long run (not through this process), Berkeley may wish to create more detailed Design Guidelines that would be advisory, as is the practice in many cities across the Bay Area and the State.

Thus, a two-tiered system (base standards appropriate for ministerially approved buildings and extra-allowance standards for structures that wish to go beyond base standards) can co-exist with a set of non-binding Guidelines that help architects and designers anticipate elements that would enhance their projects.

As Berkeley is increasingly required by State law to approve projects through a ministerial process, some standards that are already being applied by Staff, ZAB and Design Review, in particular those relating to building form, setbacks, and step-downs/setbacks and to basic elements that improve the street-level and retail experience for pedestrians and bicyclists, should be codified. As with other areas traditionally left to Staff or ZAB review, failure to codify basic elements of building form and articulation would represent *an affirmative decision to leave a void where community standards have long been successfully applied*.

All buildings built over the last 50 years in Berkeley’s commercial districts were subject to design review; the fact that few would fail to meet the kinds of base form and design standards that Staff has proposed is proof that the existing design review process has yielded the desired results. Abandonment of these standards in the ministerial/by-right context, by choosing not to codify them, would likely result in at least some buildings whose form and elements would not be up to current standards.

**RECOMMENDATION:**

Staff on March 23, 2021 filed [a supplemental proposing draft objective standards](#).<sup>10</sup> They cover in very basic terms a few key elements:

1. Building Form and Design  
(including massing, number of materials, rooflines, facades, and windows)
2. Ground Floors  
(including awnings, entries, storefronts, street trees, and signage)
3. Screening  
(for parking lots, garbage areas, lighting, fences and mechanical equipment)

Staff and the consulting team should continue refining these proposed base standards, including consultation with the Design Review Committee and ZAB and review of standards adopted or proposed in other similar California jurisdictions, and consider special standards (step-downs, for example) where C- and MU-R Districts meet each other or meet overlays or Residential areas.

In particular on Berkeley’s commercial “spines” and at the edges of the Downtown, step-downs avoid unnecessarily abrupt transitions and ensure buildings meet adjacent neighborhoods respectfully. They also help mitigate shadowing, view, and privacy impacts, thus serving many neighborly functions. Staff should also clarify that base standards for form and other building elements, applied to buildings seeking ministerial approvals, in no way present a bar to what can be approved. Proposals that do not conform with these standards should still be able to receive permits on a case by case basis.

Recent case law should also be reviewed to ensure compliance with quickly evolving legal standards for objective elements.

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<sup>10</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Supp\\_3\\_Reports\\_Item\\_17\\_Supp\\_Planning\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Supp_3_Reports_Item_17_Supp_Planning_pdf.aspx)

## VIEWS

### **DISCUSSION:**

Views are currently considered in Berkeley's land use decision-making processes, and are defined and addressed in several places in the Zoning Code. Evaluation of view impacts has traditionally been left to discretionary process; thousands - likely tens-of-thousands - of projects with view impacts have been approved over decades of land use decisions by the Zoning Officer, ZAB and the City Council - primarily in Residential Districts. Consideration of views is therefore a deeply embedded concept in Berkeley, and has not been a barrier to project approvals. Moreover, staff has developed administrative standards to guide its evaluation of impacts on protected views. However, this staff level guidance is not codified in the Municipal Code or any formal Administrative Regulation and is not considered an "objective standard".

As with sunlight and shadowing, many jurisdictions already have more objective standards for view impacts in place; Berkeley's lack of codified standards is a result of our Zoning Code and General Plan's more community-centered style and does not reflect a lack of concern for impacts. With a broadening of project types subject to ministerial approvals, including projects with potential view impacts that traditionally have been evaluated through Berkeley's use permit process, some view impact standards will need to be more fully codified. As with other elements typically left to discretionary review, failure to codify basic current practices would mean that an area of longstanding concern and application of standards would now be subject to no standards at all.

### **RECOMMENDATION:**

Because Commercial and MU-R Districts are in flat areas of the City, view impacts are generally less prevalent. Most developments in these Districts present few, if any, significant view impacts to smaller neighboring residences, and developers building larger multi-family buildings know that their buildings' views, if any, are vulnerable to the addition of other tall buildings in the same area.

Step-downs and other features to mitigate shadowing, privacy and other concerns are already recommended. These mechanisms also mitigate view impacts which may exist at the interface/edges of C-/MU-R Districts and Residential areas. For the density that will be required in C- and MU-R Districts to meet our RHNA requirements, some views will inevitably be impacted by developments in these areas, mitigated somewhat by attention to step-downs and set-backs at borders.

## PRIVACY

### **DISCUSSION:**

Like “light,” “air,” and views, “privacy” is a longstanding element of consideration in zoning, but primarily for residential areas. In fact, every R-Zone in the Ordinance mentions consideration of privacy in its Purposes. The concept, however, isn’t defined or addressed with more precision anywhere in the Zoning Ordinance,<sup>11</sup> and is rarely, if ever, addressed in the context of Commercial Districts. One exception is in Section 23E.04, which addresses C-Lots abutting residential zones:

### **23E.04.050 Special Yard Requirements for C- Lots Abutting Residential Zones**

E. The Board may approve a Use Permit authorizing yards smaller than those required above if it finds that such smaller yard would provide *greater privacy* or improved amenity to a lot in the residential District. [emphasis added]

### **RECOMMENDATION:**

Because privacy is a greater concern in residential areas, and because step-downs, setbacks and other similar requirements, especially where C- and MU-R Districts meet, serve the purpose of preserving privacy as well as mitigating shadowing and view impacts, no special recommendations regarding privacy are offered for these Districts.

### **Attachments:**

A - Suggested format for conceptualizing, segmenting and proposing base and extra-allowance standards

B - Excerpts from Berkeley’s Zoning Ordinance

### **Key Links:**

- JSISHL report to Council 3/23/21, Objective Standards Recommendations for Density, Design and Shadows  
[https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Item\\_17\\_Objective\\_Standards.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Item_17_Objective_Standards.aspx)
- Staff Supplemental 3/23/21, Objective Standards  
[https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Supp\\_3\\_Reports\\_Item\\_17\\_Supp\\_Planning\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Supp_3_Reports_Item_17_Supp_Planning_pdf.aspx)
- JSISHL, Working Draft Recommendation Report Excerpt: OBJECTIVE STANDARDS FOR DESIGN, Jul 22, 2020  
[https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Commissions/JSISHL/2020-07-22\\_JSISHL\\_Item%2010.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Commissions/JSISHL/2020-07-22_JSISHL_Item%2010.pdf)

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<sup>11</sup> See Attachment B

**ATTACHMENT A**

This chart is suggestive of how to conceptualize, segment, and present proposed objective standards for codification. Not all Elements listed below will require new standards in every Zone/District/Area. As is already the practice in Berkeley’s Zoning Code, extra-allowance standards may in some cases be appropriate, and, where recommended, may be finite or open-ended.

**ZONE/DISTRICT/AREA**

| <b>Element</b>                                                         | <b>Base Standards</b> | <b>Extra Allowance Standards</b> |
|------------------------------------------------------------------------|-----------------------|----------------------------------|
| <b>Density</b>                                                         | •                     | •                                |
| <b>Sunlight/<br/>Shadowing -<br/>on property<br/>within a District</b> | •                     | •                                |
| <b>Sunlight/Shadowi<br/>ng on neighboring<br/>R-Districts</b>          |                       |                                  |
| <b>Sunlight/<br/>Shadowing -<br/>on solar panels</b>                   | •                     | •                                |
| <b>Form and<br/>Separation -<br/>general</b>                           |                       |                                  |
| <b>Form &amp;<br/>Separation -<br/>Where Districts/<br/>Zones meet</b> |                       |                                  |
| <b>Etc.</b>                                                            |                       |                                  |

**ATTACHMENT B**

**Excerpts from Berkeley's Zoning Ordinance**

The following is cut and paste of Berkeley General Plan and Zoning Ordinance references to elements being further codified through the Object Standards process. These are not comprehensive but provide examples of how our Zoning Code already considers some of these elements.

**Sunlight/Shadows**

**Light, Sunlight, and Shadows are NOT defined in the zoning code**

**23F - Definitions**

**Privately-Owned Public Open Space:** Area on a lot that is designed for active or passive recreational use and that is accessible to the general public without a requirement for payment or purchase of goods. Such areas may include mid-block passageways and other amenities intended to improve pedestrian access. Such areas may be indoor or enclosed, **but shall include natural light in the form of windows, skylights, entryways, or other openings.**

**21.36.040 Solar access easements.**

For any division of land for which a tentative map is required pursuant to Section 66426 of the Subdivision Map Act, the Planning Commission may require, as a condition of approval of the tentative map, the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought **shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system,** provided that such easements meet the following requirements:

- A. The standards for determining the exact dimensions of locations of such easements shall be:
  - 1. The principal axis of the easement shall be true east-west, and the principal directions of the easement shall be in the direction of the principal axis, both east and west from the boundaries of the parcel or unit for which the solar access easement is provided.
  - 2. The width of the easement, at right angles horizontally to the principal axis, shall be equal to one-half of the length of the longest distance that can be measured in a true north-south direction horizontally between the boundaries of the parcel or unit for which the easement is being provided.
  - 3. A vertical plane, running in the direction of and containing the principal axis, shall pass through the centroid of volume of the enclosed living space as shown on the tentative map, or if living space is not shown, through the geometric center of a plane horizontal projection of the boundaries of the parcel or unit for which the easement is being provided, as determined within an accuracy of one foot. The easement shall lie entirely between two vertical planes parallel to the plane containing the principal axis, lying equidistant on either side. Said parallel easement boundary planes shall be separated by a distance equal to the width of the easement.

4. A vertically projected boundary point is defined as any point lying on the horizontal boundary, within the width of the easement, of the parcel or unit for which the easement is being provided, projected vertically eight feet above the ground surface at said boundary point or to a vertically projected point lying in a horizontal plane which is three feet above a parallel horizontal plane containing the minimum point of elevation of the living space (if shown) of the parcel or unit, whichever is higher.

5. The easement shall exist above every line projected in either principal direction outward from any and all vertically projected boundary line points, at a direction of thirty degrees above the horizontal, to a distance of five hundred feet as measured horizontally from said point, or to a lesser distance such that the easement lies wholly within the vertically projected boundaries of the subdivision for which the tentative map is sought.

B. At the request of the subdivider, the Planning Commission may specify an easement of equal width for which:

1. The parallel easement boundary planes defined in subsection A,3. above and the principal directions are both rotated by not more than ten degrees in either direction and remain parallel to each other, about a vertical line through the centroid of volume or geometric center as defined in subsection A,3. above.

2. The parallel easement boundary planes defined in subsection A,3. above are both translated at right angles to the vertical plane of the principal axis by a distance equal to not more than one third of the width of the easement.

C. In requiring the dedication of a solar access easement as a condition of approval of a tentative map, the Planning Commission may specify an easement of lesser volume or dimensions, provided said easement lies wholly within the boundaries specified in subsections A or B, above.

D. No buildings or other objects with a dimension greater than one foot as measured in a projection at right angles to the principal axis of the easement, shall block such easement.

E. No trees or vegetation shall obstruct the passage of more than thirty percent of the incident sunlight which would otherwise reach the parcel through the path specifically blocked by said trees or vegetation.

F. The solar access easement, after being recorded as part of the final map, may not be terminated or revised except by the Planning Commission, on the showing of overriding public purpose, and with the consent of the owner of said unit or parcel and upon payment to said owner of just compensation for termination. Notice of the termination or revision shall be filed for record with the Alameda County Recorder in the same manner that other easements are recorded.

G. In establishing solar access easements, the Planning Commission shall give consideration to feasibility, contour, configuration of the parcel to be divided, and cost. Such easements shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or a structure under other applicable planning and zoning regulations in force at the time the tentative map is filed.

This section is not applicable to condominium projects which consist of the subdivision of airspace in an existing building where no new structures are added.

Solar access easements shall meet the requirements specified in Section 66475.3 of the Subdivision Map Act. (Ord. 5793-NS § 2 (part), 1987)

## **Chapter 12.45 - SOLAR ACCESS AND VIEWS**

### **12.45.010 Purpose and objectives.**

A. The purpose of this chapter is to:

1. Set forth a procedure for the resolution of disputes between private property owners relating to the resolution of sunlight or views lost due to tree growth.

B. The objectives of this chapter are:

3. To encourage the use of solar energy for heat and light;
4. To encourage food production in private gardens;
5. To restore access to light and views from the surrounding locale;

### **12.45.020 Definitions.**

A. For the purposes of this chapter, the meaning and construction of words and phrases hereinafter set forth shall apply:

1. "Solar access" means the availability of sunlight to a property.
4. "Complaining party" means any property owner (or legal occupant without objection of property owner) who wishes to alter or remove a tree(s) on the property of another which creates an obstruction to their access to sunlight or view whether such access is gained from an original dwelling or any addition thereto used as a dwelling.
6. "Obstruction" means any substantial blocking or diminishment of a view from a structure lawfully used as a dwelling or access to sunlight to the real property which is attributable to the growth, maintenance or location of tree(s).

### **12.45.030 Procedures.**

A. The procedures described in this section shall be followed in the resolution of tree disputes between private parties.

1. Initial reconciliation:

A complaining party who believes in good faith that the growth, maintenance or location of tree(s) on the private property of another (hereinafter referred to as tree owner) diminishes the beneficial use of economic value of their property because such tree(s) interfere with the access to sunlight or views which existed prior to such growth, maintenance or location of



the tree(s) on the property during the time the complaining party has occupied the property, shall notify the tree owner in writing of such concerns.

5. Litigation: In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for resolution of the sunlight access or view tree claim under the provisions of this chapter. The litigant must state in the lawsuit that arbitration was offered and not accepted, and that a copy of the lawsuit was filed with the City Clerk.

#### 12.45.040 Standards for resolution of disputes.

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section [12.45.010](#) in determining what restorative actions, if any, are appropriate.

Burdens:

- b. The extent to which the trees diminish the amount of sunlight available to the garden or home of the complaining party.
- c. The extent to which the trees interfere with efficient operations of a complaining party's pre-existing solar energy system.
- e. The extent to which the alleged obstruction interferes with sunlight or view. The degree of obstruction shall be determined by means of a measuring instrument or photography.
- f. The extent to which solar access or the view is diminished by factors other than trees.

3. Restorative actions:

The tree mediator shall recommend or the tree arbitrator or court shall order restorative action or no action according to Section [12.45.040](#) (Standards)

- e. The extent of solar access or view available and documentable as present at any time during the tenure of the present owner or legal occupant is the limit of restorative action which may be required. If the complaining party is seeking a view or sunlight from an addition, the complaining party has no right to a view or solar access greater than that which existed at the time the construction of the addition was completed

### Chapter 23E.68 - C-DMU Downtown Mixed Use District Provisions

#### 23E.68.090 Findings

F. In order to approve a Use Permit for modification of the setback requirements of [23E.68.070.C](#), the Board must find that the modified setbacks will not unreasonably limit solar access or create significant increases in wind experienced on the public sidewalk.

### Chapter 23E.36 - C-1 General Commercial District Provisions

C. No yards for Main Buildings, Accessory Buildings or Accessory Structures shall be required, except that:

- a. **Solar Rear Yard Setback:** Buildings on the north side of University Avenue shall not cast a shadow at noon more than 20 feet onto any lot in a residential zone as calculated when the sun is at a 29 degree angle above the horizon (winter solstice).

**23B.34.070 Development Standards for All Green Pathway Projects**

Green Pathway projects shall comply with the applicable development standards in Section [23E.68.070](#) and the following additional requirements:

- C. **Shadow** Analysis Required for Buildings With Heights Between 60 and 75 Feet: Applications shall include diagrams showing:

- 1. The extent of **shading on public sidewalks and open spaces** within a radius of 75 feet of the closest building wall that would be cast at two (2) hours after sunrise, 12 p.m., and two (2) hours before sunset, on March 21, June 21, December 21, and September 21, by a building 60 feet in height that complies with all applicable setback requirements;
- 2. Features incorporated into the building design, including, but not limited to, additional upper floor setbacks that will **reduce the extent of shadowing** of the proposed building to no more than 75 percent of the shadowing projected in paragraph 1 above.

**VIEWS**

**23F.04 Definitions**

**View Corridor:** A significant view of the Berkeley Hills, San Francisco Bay, Mt. Tamalpais, or a significant landmark such as the Campanile, Golden Gate Bridge, and Alcatraz Island or any other significant vista that substantially enhances the value and enjoyment of real property.

**23D.17.070 - Wireless Telecommunication Facilities**

- C. **No readily visible antenna shall be placed at a location where it would impair a significant or sensitive view corridor** except as provided in subsection 1, below.
  - 1. Roof-mounted antennas shall be located in an area of the roof where the visual impact is minimized. Roof-mounted and ground-mounted antennas **shall not be placed in direct line of sight of significant or sensitive view corridors or where they adversely affect scenic vistas** unless the Zoning Officer or the Zoning Adjustments Board finds that the facility incorporates appropriate, creative stealth techniques to camouflage, disguise, and/or blend into the surrounding environment to the extent possible

**Section 23D.08.010 Accessory Buildings & Structures May Exceed Limit with Use Permit**

- A. An Accessory Building or Accessory Structure that satisfies the requirements of this Ordinance is permitted, except in the ES-R District.
- B. The Zoning Officer may issue an AUP for an accessory structure or accessory building which does not comply with the height limits, minimum setback distances, site location and/or maximum length requirements of this chapter, except for the height limit in Section 23D.08.020.C, **subject to a finding that**

the proposed accessory building or enclosed accessory structure will not be detrimental to the light, air, privacy and view of adjacent properties. (Ord. 7522-NS § 2, 2017; Ord. 6854-NS § 2 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

**Section 23D.16.090 Findings (R-1)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.16.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views. (Ord. 7426-NS § 8, 2015; Ord. 6980-NS § 1 (part), 2007; Ord. 6763-NS § 7 (part), 2003; Ord. 6478-NS § 4 (part), 1999)

**Section 23D.20.090 Findings (R-1A)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.20.070, the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

**Section 23D.24.020 Purposes (ES-R)**

H. Give reasonable protection to views and privacy, yet allow appropriate development of all property as long as public services and access are adequate to ensure protection of the health and safety of residents in this vulnerable area;

**Section 23D.28.090 Findings (R-2)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.28.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

**For all other residential districts - R-2A, R-3, R-4 and R-5, the same findings must be made to deny a use permit for a residential addition**

**CHAPTER 12.45 SOLAR ACCESS AND VIEWS (LOSS OF, DUE TO TREE GROWTH)**

**12.45.010 Purpose and objectives.**

A. The purpose of this chapter is to:

1. Set forth a procedure for the resolution of disputes between private property owners relating to the resolution of sunlight or views lost due to tree growth.
5. To restore access to light and views from the surrounding locale;

**Section 12.45.020 Definitions**

2. "Views" mean a distant vista or panoramic range of sight of Berkeley, neighboring areas or the San Francisco Bay. Views include but are not limited to skylines, bridges, distant cities, geologic features, hillside terrains and wooded canyons or ridges.

4. "Complaining party" means any property owner (or legal occupant without objection of property owner) who wishes to alter or remove a tree(s) on the property of another which creates an obstruction to their access to sunlight or view whether such access is gained from an original dwelling or any addition thereto used as a dwelling.

6. "Obstruction" means any substantial blocking or diminishment of a view from a structure lawfully used as a dwelling or access to sunlight to the real property which is attributable to the growth, maintenance or location of tree(s).

#### **Section 12.45.030 Procedures.**

A. The procedures described in this section shall be followed in the resolution of tree disputes between private parties.

1. Initial reconciliation: A complaining party who believes in good faith that the growth, maintenance or location of tree(s) on the private property of another (hereinafter referred to as tree owner) diminishes the beneficial use of economic value of their property because such tree(s) interfere with the access to sunlight or views which existed prior to such growth, maintenance or location of the tree(s) on the property during the time the complaining party has occupied the property, shall notify the tree owner in writing of such concerns. The notification should, if possible, be accomplished by personal discussions to enable the complaining party and tree owner to attempt to reach a mutually agreeable solution.

5. Litigation: In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for resolution of the sunlight access or view tree claim under the provisions of this chapter

#### **Section 12.45.040 Standards for resolution of disputes**

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section 12.45.010 in determining what restorative actions, if any, are appropriate.

2. Burdens:

d. The existence of landmarks, vistas or other unique features which cannot be seen because of growth of trees since the acquisition of the property.

e. The extent to which the alleged obstruction interferes with sunlight or view. The degree of obstruction shall be determined by means of a measuring instrument or photography.

f. The extent to which solar access or the view is diminished by factors other than trees.

3. Restorative Actions

e. The extent of solar access or view available and documentable as present at any time during the tenure of the present owner or legal occupant is the limit of restorative action which may be required. If the complaining party is seeking a view or sunlight from an addition, the complaining party has no right to a view or solar access greater than that which existed at the time the construction of the addition was completed

**23B.34.070 Development Standards for All Green Pathway Projects**

Green Pathway projects shall comply with the applicable development standards in Section [23E.68.070](#) and the following additional requirements:

A. **Building Setbacks Within View Corridors:** To minimize interference with significant views, buildings that are 75 feet in height or less that are located on a corner lot at any intersection with University Avenue, Center Street, or Shattuck Avenue **must include upper story setbacks as follows:** any portion of a building between 45 feet and 75 feet must be set back from property lines abutting the street by at least one (1) foot for every one (1) foot by which the height exceeds 45 feet.

**“AIR”**

(To be expressed through Privacy and Building Form/Separation Requirements)

**Section 23A.04.030 Purpose of [Zoning] Ordinance and Relationship to Plans**

D. **Provide for adequate light and air** by limiting the height, bulk and size of buildings and requiring building yard setbacks from property lines as well as separations between buildings.

**Section 23D.52.090 Findings**

To deny a Use Permit for a major residential addition or residential addition subject to Section 23D.52.070, the Zoning Officer or Board **must find that the addition would unreasonably obstruct sunlight, air or views.**

**Section 23D.16.020 Purposes (R-1)**

The purposes of the Single Family Residential (R-1) Districts are to:

C. **Protect adjacent properties from unreasonable obstruction of light and air;** and

**Section 23D.16.090 - Findings (R-1)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.16.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, **the addition would unreasonably obstruct sunlight, air or views.**

**Section 23D.20.020 Purposes (R-1A)**

The purposes of the Limited Two-family Residential Districts (R-1A) are to:

B. **Protect adjacent properties from unreasonable obstruction of light and air;**

**Section 23D.20.090 Findings (R-1A)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.20.070, the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, **the addition would unreasonably obstruct sunlight, air or views.**

C. To approve an application for reduction of a required Rear Yard, or a reduction in building separation, the

Zoning Officer or the Board must find that the unit would not cause a detrimental impact on emergency access; or on light, air or privacy for neighboring properties

**Identical or very similar provisions exist for PURPOSES and FINDINGS for R-2, R-2A, R-3, R-4**

**Section 23D.44.020 Purposes (R-5)**

The purposes of the High Density Residential (R-5) Districts are to:

- B. Make available housing for persons who desire both convenience of location, but who require relatively small amounts of Usable Open Space; yet assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;
- C. Protect adjacent properties from unreasonable obstruction of light and air;

**Section 23D.44.090 Findings (R-5)**

- B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.44.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

**Identical or very similar provisions for air exist in R-S and R-SMU**

**PRIVACY**

**Privacy is NOT defined anywhere in the Zoning Code**

**References to Privacy in the Zoning Code:**

**C-1 General Commercial District Provisions**

**Privacy** Rear Yard Setback: Buildings on lots abutting a residentially zoned lot along the south side of University Avenue shall be set back from the rear property line an average of 20 feet, i.e., a rear yard shall be maintained with a minimum area equal to the width of the lot (in feet) multiplied by 20 feet. The minimum depth of any rear yard shall be ten feet, or 10% of the depth of the lot, whichever is greater, as provided in Section [23E.04.050](#).C. The ZAB may approve a Use Permit to reduce the 20 foot average and ten foot minimum setback provisions to a minimum of six feet on the first floor provided that the square footage added on the first floor by this reduction in setback is utilized to increase the average 20 foot setback on higher floors to facilitate the privacy of abutting residentially zoned lots.

- d. Front Yard Setback for Residential-Only Projects: For all floors, buildings shall provide an average two-foot setback. A maximum setback of ten feet is permitted provided that this space is used to accommodate landscaping that enhances the streetscape and provides a sense of privacy for residential units on the first floor.

**23D.48.020 Purposes (R-S Residential Southside District)**

**23D.48.020 Purposes**

B. Make housing available for persons who desire a convenient location with relatively small amounts of Usable Open Space, yet assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;

**23D.52.020 Purposes (R-SMU Southside Mixed Use Residential )**

The purposes of the Southside Mixed Use Residential (R-SMU) Districts are to:

A. Implement General Plan and Southside Plan policy by encouraging high density, multi-story residential development close to major shopping, transportation and employment centers;

B. Make housing available for persons who desire a convenient location, but who require relatively small amounts of Usable Open Space; yet assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;

**23D.20.090 Findings (R-1A)**

A. In order to approve any Permit under this chapter, the Zoning Officer or Board must make the finding required by Section [23B.32.040](#). The Zoning Officer or Board must also make the findings required by the following paragraphs of this section to the extent applicable:

C. To approve an application for reduction of a required Rear Yard, or a reduction in building separation, the Zoning Officer or the Board must find that the unit would not cause a detrimental impact on emergency access; or on light, air or privacy for neighboring properties.

**23D.44.020 Purposes (R-5)**

The purposes of the High Density Residential (R-5) Districts are to:

B. Make available housing for persons who desire both convenience of location, but who require relatively small amounts of Usable Open Space; yet assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;

**12.45.040 Standards for resolution of disputes.**

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section [12.45.010](#) in determining what restorative actions, if any, are appropriate.

d. Visual, auditory and wind screening provided by the tree(s) to the tree owner and to neighbors. Existing privacy provided by the tree(s) to the tree owner's home shall be given particular weight.

**Chapter 23D.04 - Lot and Development Standards**

**23D.04.010 Lot Requirements**

E. The Zoning Officer shall designate the front, side and rear yards for main buildings for flag lots and irregular lots, **in a manner to best protect light, air and privacy.** The yard dimensions shall be as set forth in each District's provisions.

**23D.08.010 Accessory Buildings & Structures May Exceed Limit with Use Permit**

B. The Zoning Officer may issue an AUP for an accessory structure or accessory building which does not comply with the height limits, minimum setback distances, site location and/or maximum length requirements of this chapter, except for the height limit in Section **23D.08.020.C, subject to a finding that the proposed accessory building or enclosed accessory structure will not be detrimental to the light, air, privacy and view of adjacent properties.** (Ord. 7522-NS § 2, 2017; Ord. 6854-NS § 2 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

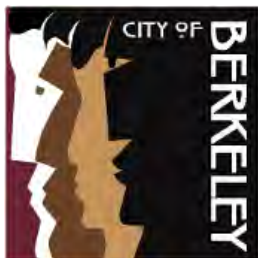
**23D.24.020 - ES-R - Purposes**

H. Give reasonable protection to views and **privacy**, yet allow appropriate development of all property as long as public services and access are adequate to ensure protection of the health and safety of residents in this vulnerable area;

**23E.04.050 Special Yard Requirements for C- Lots Abutting Residential Zones**

E. The Board may approve a Use Permit authorizing yards smaller than those required above if it finds that such smaller yard would provide greater **privacy** or improved amenity to a lot in the residential District.





## **SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 1**

**Meeting Date:** October 28, 2021

**Item Number:** 33

**Item Description:** Objective Standards Recommendation for Density,  
Design and Shadows

**Submitted by:** Mayor Jesse Arreguín, Councilmembers Sophie Hahn, Susan  
Wengraf, Kate Harrison

Additional materials for consideration and referral to City Manager and the Planning Commission in their review and update of objective standards.

ACTION CALENDAR

October 26, 2021

*(Continued from September 28, 2021)*

To: Members of the City Council

From: Councilmembers Sophie Hahn, Kate Harrison, Susan Wengraf and Mayor Jesse Arreguin

Subject: Supplemental Recommendations on Objective Standards

**RECOMMENDATION:**

Refer to the City Manager, for review by the Planning Commission and City Attorney and approval by the City Council, recommendations regarding codification of standards for Commercial Districts and the MU-R for elements of Berkeley’s zoning code traditionally addressed through the use permit process. Objective Standards for each District should reflect current patterns and practices of the Zoning Adjustments Board and Zoning Officer, including special consideration for impacts where Commercial and MU-R Districts border each other, or Residential.

Specific recommendations are described more fully below and include:

- Adopting units-per-acre density standards
- Using a “Daylight Plane” method for shadowing standards
- Developing limited standards regarding building form and elements

The City Manager is requested to prioritize recommendations most urgently needed to address project types subject to state-mandated ministerial review and to support implementation of any rezoning related to the 2023 Housing Element Update. Additional recommendations, if any, should be brought forward as quickly as possible.

Funds needed, if any, for additional consulting services to complete objective standards codification should be referred by the City Manager to the budget process.

**BACKGROUND:**

AUPs and UPs to exceed base standards are routinely granted. In some cases, on review by Staff or the ZAB, impacts of diverging from an objective standard are found to be excessive, and the applicant is asked to revise their plans to reduce impacts. The back-and-forth between Staff or ZAB and the applicant in almost all cases results in a

project that is approved, with impacts on adjacent properties and/or the neighborhood and community having been taken into account.

There are a few areas of Berkeley's Zoning Ordinance where no (or very limited) standards exist, and the evaluation of impacts to adjacent properties, the neighborhood and the community is undertaken by Staff (officially, the Zoning Officer) or ZAB, who apply their judgement with reference, in general, to (1) the circumstances which exist at the time the permit is being issued, (2) the general purposes of the zone/district in which the project is found, and (3) definitions and standards that appear elsewhere in the code. Because Staff and ZAB routinely make these evaluations, there is significant consistency across applications; while there may be no "objective" standards or binding precedents there are patterns and practices.

While the overwhelming majority of projects in Berkeley that require AUPs or UPs are approved by Staff or ZAB and are not appealed, a small number are appealed, protracting the permitting process. In most cases, the decisions of Staff or ZAB are not overturned on appeal, resulting in permits being upheld, sometimes with modifications. In just a few cases, decisions of Staff or ZAB are overturned by the appeals decision-making body.<sup>1</sup>

With the advent of State laws that seek to reduce time involved in permitting processes and increase certainty for applicants/developers, mandating "by right" or "ministerial" permitting for projects that conform with base standards, *Berkeley needs to codify standards for elements that have traditionally been left in part or whole to Staff or ZAB's review.*

Codifying standards for these elements means existing patterns and practices will be quantified and written down (and can be adjusted); *it does not mean new elements are introduced.* Conversely, because State law requires application of written, objective standards, *failure to document standards for these elements - to be "silent" where staff and community standards have long been applied - would represent an affirmative choice to allow unlimited impacts where impacts have long been considered.*

In a by-right/ministerial approvals scenario, base standards, which vary across Districts, are best thought of as *standards that are so unlikely to present unacceptable impacts that automatic approval of applications meeting those standards is warranted across a variety of circumstances.*<sup>2</sup> Base standards *do not operate as a bar to approval of a*

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<sup>1</sup> Zoning Officer/Staff decisions are reviewed by ZAB, and ZAB decisions are reviewed by the City Council.

<sup>2</sup> "Circumstances" might include lot size, shape, topography, proximity to other Districts, overlays, etc.

*zoning application*; applications that exceed base standards in Berkeley can be - and already are - routinely considered and approved.

Base objective standards under a by-right or ministerial review process are thus the standards for *automatic* approvals. Projects with elements and impacts that exceed those standards are still approved through the existing AUP/UP process.<sup>3</sup> Staff or ZAB take a second look and determine whether exceeding those base standards would be detrimental to adjacent properties, the neighborhood or the community.<sup>4</sup> The overwhelming outcome of Staff or ZAB review is that projects are approved as originally presented, or as refined via a back-and-forth with the applicant.

The areas of Berkeley's Zoning Ordinance that have limited, if any, base standards in place are density, light/sunlight/shadows, privacy, views, and to some extent, building form and elements. All of these have traditionally been left in part or full to the consideration of Staff or ZAB in the AUP/UP and related Design Review processes.

Berkeley's Zoning Code is unusual in not including specific density limits (units or people per parcel or acre) for all Districts. In Berkeley's C- and MU-R Districts, building height, setbacks, lot coverage, Floor Area Ratio (FAR)<sup>5</sup> and other elements shape building size and placement, but do not prescribe density of units or individuals. This complicates certain circumstances where State and local laws interact. Providing specific density standards for these Districts will facilitate application of State laws.

Berkeley's relative lack of explicit standards in these areas is not unique; many jurisdictions' zoning codes and practices also address some or all elements of building form, sunlight/shadows, privacy, and views through discretionary/community processes. At the same time, some jurisdictions do have more prescriptive, "objective" standards already in place. Differences among jurisdictions are largely a matter of style; some codes were written in a more prescriptive manner, while others, like Berkeley's, were written with more flexibility.

## **DISCUSSION & RECOMMENDATIONS:**

The recommendations herein provide a structure and some guidelines for Staff and the Consulting team to use in proposing codification of objective standards, for Commercial

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<sup>3</sup> See footnote 1

<sup>4</sup> "Detriment," the crux of the standard by which applications to exceed base objective standards is reviewed, is a much higher standard than a finding of negative impact. Many projects with negative impacts are approved because their impacts, while negative, are found not to rise to the level of detriment.

<sup>5</sup> **Floor area ratio (FAR)** is the ratio of a building's total floor area (gross floor area) to the size of the piece of land upon which it is built.

and MU-R districts, for elements traditionally left to Staff or ZAB review, or where Berkeley's code is currently silent. Where appropriate, standards proposed should include allowances to exceed base standards (with or without caps), as is common throughout Berkeley's Zoning Code.

As with all objective standards, it is likely that standards may differ from District to District, in overlay areas, and where one District, Zone or overlay area borders another. Staff and the consulting team are asked to undertake a segmented review of each meaningfully different circumstance,<sup>6</sup> consider current patterns and practices of Staff and ZAB, review zoning codes of similar sized or situated jurisdictions, and propose standards for Berkeley to codify.

## **DENSITY**

### **DISCUSSION:**

Berkeley's current zoning code uses a variety of methods to regulate the intensity of development on a single parcel. Not every zone uses all of the methods, but all use one or more.

- Prescribed number of units per parcel or parcel of a certain size (R-zones)
- Height, Setbacks, Building separations and Lot Coverage/Open Space requirements
- Floor Area Ratio (FAR)

Most of these approaches don't directly equate with density of units or residents. A building with allowed FAR, setbacks, and height, for example, could include only a few large units or a much larger number of small units. Because some elements of State law that interact with Berkeley's Zoning Code assume the presence of explicit density requirements, adopting clear density standards for C- and MU-R Districts will facilitate application of State requirements.

Berkeley's General Plan does provide some guidance on density, but the General Plan is not formally incorporated into the City's Zoning Ordinance, as is typical in other jurisdictions. The General Plan provides the following in the Land Use Element under Land Use Classifications:

**Neighborhood & Avenue Commercial:** *Population density will generally range from 44 to 88 persons per acre.*

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<sup>6</sup> A chart is provided in Attachment A to illustrate one method of organizing these recommendations.

**Downtown:** *Population density will generally range from 88 to 220 persons per net acre.*

**Mixed Use Residential:** *Population density will generally range from 22 to 44 persons per acre, where housing is allowed.*

Area plans may also address density in C- and MU-R Districts; staff and the consultants are requested to review applicable plans for potential guidance.

JSISHL<sup>7</sup> considered dwelling units per acre as well as form-based code and floor area ratio (FAR) as approaches to regulate lot buildout and development proportions. There was also interest in a units-per-acre approach that assumed average unit sizes and bedroom counts. No strong agreement could be reached as to the best path forward.

In the end, a recommendation was made using FAR as the primary standard in residential and commercial districts and form-based code, which emphasizes standards with predictable physical outcomes such as build-to lines and frontage and setback requirements, as a secondary approach. *These approaches, however, are already in use - Berkeley's Zoning Code is primarily "form-based,"* and Residential Districts already have unit-per-parcel or parcel-size limits in place.

*The missing density element in Berkeley's code is a unit- or person- per acre (or parcel) number for Commercial and MU-R Districts. This recommendation seeks explicit density standards for the C- and MU-R Districts, where the Zoning Code is currently silent.*

**RECOMMENDATION:**

Refer to the City Manager, Planning Commission, and City Attorney, the codification of units-per-acre standards for C- and MU-R Districts, as originally recommended by the City Council on July 17, 2017. The City's General Plan, Area Plans and the Purposes Section of each District provide guidance. Rezoning to increase density beyond what is already contemplated in existing plans and purposes will be considered in the context of the Housing Element Update.

**SUNLIGHT/SHADOWS**

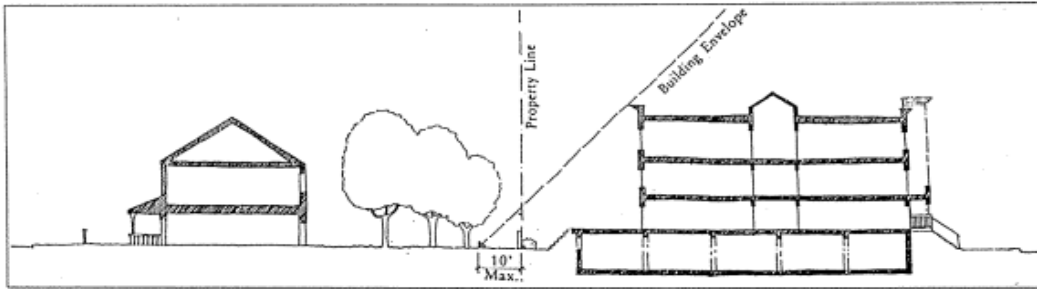
**DISCUSSION:**

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<sup>7</sup> Council established JSISHL, the Joint Subcommittee for the Implementation of State Housing Laws, which included representatives of the Planning Commission, Zoning Adjustments Board, and Housing Advisory Commission, to review approaches to and make recommendations about objective standards for density, design, shadows and views.

It is recommended that a “Daylight Plane” method be used as a basis to propose maximum shadowing for by-right/ministerial approvals, with extra-allowances, as appropriate. The Daylight Plane approach is already reflected in the [University Avenue Strategic Plan](#), and was used by El Cerrito for San Pablo Avenue. Many other zoning codes use this method and can serve as examples. Shadowing of residential properties, especially those in neighboring R-Districts, and of parks, schoolyards, and other public outdoor spaces should be considered.

Example from the City of Berkeley’s University Avenue Strategic Plan:



down as it approaches the rear property line, so as not to obstruct direct sunlight to adjacent

*A building may not cast a shadow greater than 10' on an adjacent rear yard when the southern sun is at a 45 degree angle.*

Example from [El Cerrito’s Avenue Specific Plan for San Pablo](#):

**2.01.05 FBC SUMMARY: SHADOWS**

**Rear and Upper Floor Rear Setback Adjacent to Residential Lot**

Buildings shall not cast shadows onto adjacent existing residential uses on Winter Solstice (December 21):

- Adjacent parcels to the east greater than 14'-0" deep at 1:30pm.
- There is no requirement for shadows onto adjacent parcels to the west because shadows are negligible due to solar angle.

**Front and Upper Floor Front Setback Along Street**

Buildings shall not cast shadows beyond the curb line on the opposite side of the street on Winter Solstice (December 21):

- Streets to the east of the parcel at 1:30pm.
- Streets to the north of the parcel at 10:00am or 4:00pm.
- There is no requirement for streets to the south and west of the parcel because shadows are negligible due to solar angle.

The first diagram shows a building with a height limit of 45' for 'High Density Medium Use' and 35' for 'Medium Density Wood Use'. It shows a shadow cast from the building onto an adjacent lot, with a '12' Min. Required Front Setback' and 'PCW/ Lot Line' indicated. The second diagram shows a building with a height limit of 45' for 'High Density Medium Use' and 35' for 'Medium Density Wood Use'. It shows a shadow cast from the building onto the opposite side of the street, with a 'Curb Line' indicated.

Shadows can also impact solar arrays. Berkeley needs to meet its climate action clean energy goals *and* build new housing, placing two important values in tension. This tension is not unique to Berkeley; all progressive communities that value both housing creation and the reduction of GHG emissions must find ways to ensure both can go forward in a robust manner.

It is therefore recommended that solar access regulations in other communities (and countries) be reviewed and solutions proposed that best support the maximization of *both goals*. In addition, Berkeley's Zoning Code has provisions for [private solar access easements](#) that include definitions and impact considerations that can be incorporated into objective standards.

**RECOMMENDATION:**

Using a Daylight Plane method, standards for shadowing and solar impacts should be proposed for all C- and the MU-R Districts. Proposed standards should include both base and, where appropriate, extra allowances and/or programs and consider the following:

- Consideration for public parks, gardens, schools and recreation and gathering areas
- Protections for solar panels and/or compensation for loss of solar panel access
- Standards for transitions where Commercial/MU-R and Residential Districts meet, to limit impacts
- If possible, allowance for adjustments (through the use permit process) to the location, orientation and massing of structures to minimize shadowing and/or solar access impacts, including allowances to reduce setbacks or lot coverage requirements.

**BUILDING FORM & BASIC DESIGN ELEMENTS**

The term "Design Standards" encompasses a wide variety of concepts, many of which make no sense for the City of Berkeley, where a wide variety of styles, from traditional to eclectic, co-exist (mostly) in harmony. In addition, overly complicated and prescriptive design standards can hamper development and in some cases add costs, none of which the City of Berkeley should endorse. Especially in private townhouse and subdivision-type developments, standards sometimes require an excessive level of uniformity, limiting allowable paint, fence types, trims, roof colors, and even the varieties of grass that can be grown. Berkeley should not enact these types of Design Standards.



Berkeley does, however, have some established standards relating to building form and other key building elements, and also conducts Design Review of buildings in Commercial areas. Some area plans and zoning, for the Downtown and University Avenue, for example, include objective standards such as articulated rather than flat facades, inset entries, step-backs at high elevations or where taller buildings meet lower-rise adjacent areas, and other basic building form requirements that are easy to quantify objectively. Many other jurisdictions that value housing production have similar standards in place.

As with other elements of the Zoning Ordinance that have traditionally been left partially or wholly to discretionary review, Berkeley must now codify a set of key base standards related to building form, step downs and set-backs, facades, and street-level elements (entries, commercial spaces, drop off and bike access zones, etc.) that are so *fundamental to good architecture and a positive pedestrian and community experience that buildings meeting those standards rightly can be approved through a ministerial process*. Again, as with other objective elements, appropriate base standards may vary across Districts, Zones, Overlays and at borders.

In addition to providing base standards, Berkeley can and should allow buildings that diverge from those standards to be reviewed and considered for approval on a case-by-case basis through the use permit process. In addition, in the long run (not through this process), Berkeley may wish to create more detailed Design Guidelines that would be advisory, as is the practice in many cities across the Bay Area and the State.

Thus, a two-tiered system (base standards appropriate for ministerially approved buildings and extra-allowance standards for structures that wish to go beyond base standards) can co-exist with a set of non-binding Guidelines that help architects and designers anticipate elements that would enhance their projects.

As Berkeley is increasingly required by State law to approve projects through a ministerial process, some standards that are already being applied by Staff, ZAB and Design Review, in particular those relating to building form, setbacks, and step-downs/setbacks and to basic elements that improve the street-level and retail experience for pedestrians and bicyclists, should be codified. As with other areas traditionally left to Staff or ZAB review, failure to codify basic elements of building form and articulation would represent *an affirmative decision to leave a void where community standards have long been successfully applied*.

All buildings built over the last 50 years in Berkeley’s commercial districts were subject to design review; the fact that few would fail to meet the kinds of base form and design standards that Staff has proposed is proof that the existing design review process has yielded the desired results. Abandonment of these standards in the ministerial/by-right context, by choosing not to codify them, would likely result in at least some buildings whose form and elements would be incompatible.

**RECOMMENDATION:**

Staff on March 23, 2021 filed [a supplemental proposing draft objective standards](#).<sup>8</sup> They cover in very basic terms a few key elements:

1. Building Form and Design  
(including massing, number of materials, rooflines, facades, and windows)
2. Ground Floors  
(including awnings, entries, storefronts, street trees, and signage)
3. Screening  
(for parking lots, garbage areas, lighting, fences and mechanical equipment)

Staff and the consulting team should continue refining these proposed base standards, including consultation with the Design Review Committee and ZAB and review of standards adopted or proposed in other similar California jurisdictions, and consider special standards (step-downs, for example) where C- and MU-R Districts meet each other or meet overlays or Residential areas.

In particular on Berkeley’s commercial “spines” and at the edges of the Downtown, step-downs avoid unnecessarily abrupt transitions and ensure buildings meet adjacent neighborhoods respectfully. They also help mitigate shadowing, view, and privacy impacts, thus serving many neighborly functions. Staff should also clarify that base standards for form and other building elements, applied to buildings seeking ministerial approvals, in no way present a bar to what can be approved. Proposals that do not conform with these standards should still be able to receive permits on a case by case basis.

Recent case law should also be reviewed to ensure compliance with quickly evolving legal standards for objective elements.

**VIEWS**

**DISCUSSION:**

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<sup>8</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Supp\\_3\\_Reports\\_Item\\_17\\_Supp\\_Planning\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Supp_3_Reports_Item_17_Supp_Planning_pdf.aspx)

Views are currently considered in Berkeley's land use decision-making processes, and are defined and addressed in several places in the Zoning Code. Evaluation of view impacts has traditionally been left to discretionary process; thousands - likely tens-of-thousands - of projects with view impacts have been approved over decades of land use decisions by the Zoning Officer, ZAB and the City Council - primarily in Residential Districts. Consideration of views is therefore a deeply embedded concept in Berkeley, and has not been a barrier to project approvals. Moreover, staff has developed administrative standards to guide its evaluation of impacts on protected views. However, this staff level guidance is not codified in the Municipal Code or any formal Administrative Regulation and is not considered an "objective standard".

As with sunlight and shadowing, many jurisdictions already have more objective standards for view impacts in place; Berkeley's lack of codified standards is a result of our Zoning Code and General Plan's more community-centered style and does not reflect a lack of concern for impacts. With a broadening of project types subject to ministerial approvals, including projects with potential view impacts that traditionally have been evaluated through Berkeley's use permit process, some view impact standards will need to be more fully codified. As with other elements typically left to discretionary review, failure to codify basic current practices would mean that an area of longstanding concern and application of standards would now be subject to no standards at all.

**RECOMMENDATION:**

Because Commercial and MU-R Districts are in flat areas of the City, view impacts are generally less prevalent. Most developments in these Districts present few, if any, significant view impacts to smaller neighboring residences, and developers building larger multi-family buildings know that their buildings' views, if any, are vulnerable to the addition of other tall buildings in the same area.

Step-downs and other features to mitigate shadowing, privacy and other concerns are already recommended. These mechanisms also mitigate view impacts which may exist at the interface/edges of C-/MU-R Districts and Residential areas. For the density that will be required in C- and MU-R Districts to meet our RHNA requirements, some views will inevitably be impacted by developments in these areas, mitigated somewhat by attention to step-downs and set-backs at borders.

**PRIVACY**

**DISCUSSION:**

Like “light,” “air,” and views, “privacy” is a longstanding element of consideration in zoning, but primarily for residential areas. In fact, every R-Zone in the Ordinance mentions consideration of privacy in its Purposes. The concept, however, isn’t defined or addressed with more precision anywhere in the Zoning Ordinance,<sup>9</sup> and is rarely, if ever, addressed in the context of Commercial Districts. One exception is in Section 23E.04, which addresses C-Lots abutting residential zones:

**23E.04.050 Special Yard Requirements for C- Lots Abutting Residential Zones**

E. The Board may approve a Use Permit authorizing yards smaller than those required above if it finds that such smaller yard would provide *greater privacy* or improved amenity to a lot in the residential District. [emphasis added]

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<sup>9</sup> See Attachment B

**RECOMMENDATION:**

Because privacy is a greater concern in residential areas, and because step-downs, setbacks and other similar requirements, especially where C- and MU-R Districts meet, serve the purpose of preserving privacy as well as mitigating shadowing and view impacts, no special recommendations regarding privacy are offered for these Districts.

**Attachments:**

- A - Suggested format for conceptualizing, segmenting and proposing base and extra-allowance standards
- B - Excerpts from Berkeley's Zoning Ordinance

**Key Links:**

- JSISHL report to Council 3/23/21, Objective Standards Recommendations for Density, Design and Shadows  
[https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Item\\_17\\_Objective\\_Standards.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Item_17_Objective_Standards.aspx)
- Staff Supplemental 3/23/21, Objective Standards  
[https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-23\\_Supp\\_3\\_Reports\\_Item\\_17\\_Supp\\_Planning\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-23_Supp_3_Reports_Item_17_Supp_Planning_pdf.aspx)
- JSISHL, Working Draft Recommendation Report Excerpt: OBJECTIVE STANDARDS FOR DESIGN, Jul 22, 2020  
[https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Commissions/JSISHL/2020-07-22\\_JSISHL\\_Item%2010.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Commissions/JSISHL/2020-07-22_JSISHL_Item%2010.pdf)

**ATTACHMENT A**

This chart is suggestive of how to conceptualize, segment, and present proposed objective standards for codification. Not all Elements listed below will require new standards in every Zone/District/Area. As is already the practice in Berkeley’s Zoning Code, extra-allowance standards may in some cases be appropriate, and, where recommended, may be finite or open-ended.

**ZONE/DISTRICT/AREA**

| Element                                                                | Base Standards | Extra Allowance Standards |
|------------------------------------------------------------------------|----------------|---------------------------|
| <b>Density</b>                                                         | •              | •                         |
| <b>Sunlight/<br/>Shadowing -<br/>on property<br/>within a District</b> | •              | •                         |
| <b>Sunlight/Shado<br/>wing on<br/>neighboring R-<br/>Districts</b>     |                |                           |
| <b>Sunlight/<br/>Shadowing -<br/>on solar panels</b>                   | •              | •                         |
| <b>Form and<br/>Separation -<br/>general</b>                           |                |                           |
| <b>Form &amp;<br/>Separation -<br/>Where Districts/<br/>Zones meet</b> |                |                           |
| <b>Etc.</b>                                                            |                |                           |

**ATTACHMENT B**

### **Excerpts from Berkeley's Zoning Ordinance**

The following is cut and paste of Berkeley General Plan and Zoning Ordinance references to elements being further codified through the Object Standards process. These are not comprehensive but provide examples of how our Zoning Code already considers some of these elements.

### **Sunlight/Shadows**

**Light, Sunlight, and Shadows are NOT defined in the zoning code**

#### **23F - Definitions**

**Privately-Owned Public Open Space:** Area on a lot that is designed for active or passive recreational use and that is accessible to the general public without a requirement for payment or purchase of goods. Such areas may include mid-block passageways and other amenities intended to improve pedestrian access. Such areas may be indoor or enclosed, **but shall include natural light in the form of windows, skylights, entryways, or other openings.**

#### **21.36.040 Solar access easements.**

For any division of land for which a tentative map is required pursuant to Section 66426 of the Subdivision Map Act, the Planning Commission may require, as a condition of approval of the tentative map, the dedication of easements for the purpose of assuring that each parcel or unit in the subdivision for which approval is sought **shall have the right to receive sunlight across adjacent parcels or units in the subdivision for which approval is sought for any solar energy system,** provided that such easements meet the following requirements:

- A. The standards for determining the exact dimensions of locations of such easements shall be:
1. The principal axis of the easement shall be true east-west, and the principal directions of the easement shall be in the direction of the principal axis, both east and west from the boundaries of the parcel or unit for which the solar access easement is provided.
  2. The width of the easement, at right angles horizontally to the principal axis, shall be equal to one-half of the length of the longest distance that can be measured in a true north-south direction horizontally between the boundaries of the parcel or unit for which the easement is being provided.
  3. A vertical plane, running in the direction of and containing the principal axis, shall pass through the centroid of volume of the enclosed living space as shown on the tentative map, or if living space is not shown, through the geometric center of a plane horizontal projection of the boundaries of the parcel or unit for which the easement is being provided, as determined within an accuracy of one foot. The easement shall lie entirely between two

vertical planes parallel to the plane containing the principal axis, lying equidistant on either side. Said parallel easement boundary planes shall be separated by a distance equal to the width of the easement.

4. A vertically projected boundary point is defined as any point lying on the horizontal boundary, within the width of the easement, of the parcel or unit for which the easement is being provided, projected vertically eight feet above the ground surface at said boundary point or to a vertically projected point lying in a horizontal plane which is three feet above a parallel horizontal plane containing the minimum point of elevation of the living space (if shown) of the parcel or unit, whichever is higher.

5. The easement shall exist above every line projected in either principal direction outward from any and all vertically projected boundary line points, at a direction of thirty degrees above the horizontal, to a distance of five hundred feet as measured horizontally from said point, or to a lesser distance such that the easement lies wholly within the vertically projected boundaries of the subdivision for which the tentative map is sought.

B. At the request of the subdivider, the Planning Commission may specify an easement of equal width for which:

1. The parallel easement boundary planes defined in subsection A,3. above and the principal directions are both rotated by not more than ten degrees in either direction and remain parallel to each other, about a vertical line through the centroid of volume or geometric center as defined in subsection A,3. above.

2. The parallel easement boundary planes defined in subsection A,3. above are both translated at right angles to the vertical plane of the principal axis by a distance equal to not more than one third of the width of the easement.

C. In requiring the dedication of a solar access easement as a condition of approval of a tentative map, the Planning Commission may specify an easement of lesser volume or dimensions, provided said easement lies wholly within the boundaries specified in subsections A or B, above.

D. No buildings or other objects with a dimension greater than one foot as measured in a projection at right angles to the principal axis of the easement, shall block such easement.

E. No trees or vegetation shall obstruct the passage of more than thirty percent of the incident sunlight which would otherwise reach the parcel through the path specifically blocked by said trees or vegetation.

F. The solar access easement, after being recorded as part of the final map, may not be terminated or revised except by the Planning Commission, on the showing of overriding public purpose, and with the consent of the owner of said unit or parcel and upon payment to said owner of just compensation for termination. Notice of the termination or revision shall be filed for record with the Alameda County Recorder in the same manner that other easements are recorded.



G. In establishing solar access easements, the Planning Commission shall give consideration to feasibility, contour, configuration of the parcel to be divided, and cost. Such easements shall not result in reducing allowable densities or the percentage of a lot which may be occupied by a building or a structure under other applicable planning and zoning regulations in force at the time the tentative map is filed.

This section is not applicable to condominium projects which consist of the subdivision of airspace in an existing building where no new structures are added.

Solar access easements shall meet the requirements specified in Section 66475.3 of the Subdivision Map Act. (Ord. 5793-NS § 2 (part), 1987)

## **Chapter 12.45 - SOLAR ACCESS AND VIEWS**

### **12.45.010 Purpose and objectives.**

A. The purpose of this chapter is to:

1. Set forth a procedure for the resolution of disputes between private property owners relating to the resolution of sunlight or views lost due to tree growth.

B. The objectives of this chapter are:

3. To encourage the use of solar energy for heat and light;
4. To encourage food production in private gardens;
5. To restore access to light and views from the surrounding locale;

### **12.45.020 Definitions.**

A. For the purposes of this chapter, the meaning and construction of words and phrases hereinafter set forth shall apply:

1. "Solar access" means the availability of sunlight to a property.
4. "Complaining party" means any property owner (or legal occupant without objection of property owner) who wishes to alter or remove a tree(s) on the property of another which creates an obstruction to their access to sunlight or view whether such access is gained from an original dwelling or any addition thereto used as a dwelling.
6. "Obstruction" means any substantial blocking or diminishment of a view from a structure lawfully used as a dwelling or access to sunlight to the real property which is attributable to the growth, maintenance or location of tree(s).

### **12.45.030 Procedures.**

A. The procedures described in this section shall be followed in the resolution of tree disputes between private parties.

1. Initial reconciliation:

A complaining party who believes in good faith that the growth, maintenance or location of tree(s) on the private property of another (hereinafter referred to as tree owner) diminishes the beneficial use of economic value of their property because such tree(s) interfere with the access to sunlight or views which existed prior to such growth, maintenance or location of the tree(s) on the property during the time the complaining party has occupied the property, shall notify the tree owner in writing of such concerns.

5. Litigation: In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for resolution of the sunlight access or view tree claim under the provisions of this chapter. The litigant must state in the lawsuit that arbitration was offered and not accepted, and that a copy of the lawsuit was filed with the City Clerk.

**12.45.040 Standards for resolution of disputes.**

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section [12.45.010](#) in determining what restorative actions, if any, are appropriate.

Burdens:

- b. The extent to which the trees diminish the amount of sunlight available to the garden or home of the complaining party.
- c. The extent to which the trees interfere with efficient operations of a complaining party's pre-existing solar energy system.
- e. The extent to which the alleged obstruction interferes with sunlight or view. The degree of obstruction shall be determined by means of a measuring instrument or photography.
- f. The extent to which solar access or the view is diminished by factors other than trees.

3. Restorative actions:

The tree mediator shall recommend or the tree arbitrator or court shall order restorative action or no action according to Section [12.45.040](#) (Standards)

- e. The extent of solar access or view available and documentable as present at any time during the tenure of the present owner or legal occupant is the limit of restorative action which may be required. If the complaining party is seeking a view or sunlight from an addition, the complaining party has no right to a view or solar access greater than that which existed at the time the construction of the addition was completed

**Chapter 23E.68 - C-DMU Downtown Mixed Use District Provisions**

### 23E.68.090 Findings

F. In order to approve a Use Permit for modification of the setback requirements of [23E.68.070.C](#), the Board **must find that the modified setbacks will not unreasonably limit solar access** or create significant increases in wind experienced on the public sidewalk.

### Chapter 23E.36 - C-1 General Commercial District Provisions

C. No yards for Main Buildings, Accessory Buildings or Accessory Structures shall be required, except that:

- a. **Solar Rear Yard Setback:** Buildings on the north side of University Avenue shall not cast a shadow at noon more than 20 feet onto any lot in a residential zone as calculated when the sun is at a 29 degree angle above the horizon (winter solstice).

### 23B.34.070 Development Standards for All Green Pathway Projects

Green Pathway projects shall comply with the applicable development standards in Section [23E.68.070](#) and the following additional requirements:

C. **Shadow** Analysis Required for Buildings With Heights Between 60 and 75 Feet:  
Applications shall include diagrams showing:

1. The extent of **shading on public sidewalks and open spaces** within a radius of 75 feet of the closest building wall that would be cast at two (2) hours after sunrise, 12 p.m., and two (2) hours before sunset, on March 21, June 21, December 21, and September 21, by a building 60 feet in height that complies with all applicable setback requirements;
2. Features incorporated into the building design, including, but not limited to, additional upper floor setbacks that will **reduce the extent of shadowing** of the proposed building to no more than 75 percent of the shadowing projected in paragraph 1 above.

## VIEWS

### 23F.04 Definitions

**View Corridor:** A significant view of the Berkeley Hills, San Francisco Bay, Mt. Tamalpais, or a significant landmark such as the Campanile, Golden Gate Bridge, and Alcatraz Island or any other significant vista that substantially enhances the value and enjoyment of real property.

### 23D.17.070 - Wireless Telecommunication Facilities

C. **No readily visible antenna shall be placed at a location where it would impair a significant or sensitive view corridor** except as provided in subsection 1, below.

1. Roof-mounted antennas shall be located in an area of the roof where the visual impact is minimized. Roof-mounted and ground-mounted antennas **shall not be placed in direct line of sight of significant or sensitive view corridors or where they adversely affect scenic vistas** unless the Zoning Officer or the Zoning Adjustments Board finds that the facility

incorporates appropriate, creative stealth techniques to camouflage, disguise, and/or blend into the surrounding environment to the extent possible

**Section 23D.08.010 Accessory Buildings & Structures May Exceed Limit with Use Permit**

- A. An Accessory Building or Accessory Structure that satisfies the requirements of this Ordinance is permitted, except in the ES-R District.
- B. The Zoning Officer may issue an AUP for an accessory structure or accessory building which does not comply with the height limits, minimum setback distances, site location and/or maximum length requirements of this chapter, except for the height limit in Section 23D.08.020.C, **subject to a finding that the proposed accessory building or enclosed accessory structure will not be detrimental to the light, air, privacy and view of adjacent properties.** (Ord. 7522-NS § 2, 2017: Ord. 6854-NS § 2 (part), 2005: Ord. 6478-NS § 4 (part), 1999)

**Section 23D.16.090 Findings (R-1)**

- B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.16.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, **the addition would unreasonably obstruct sunlight, air or views.** (Ord. 7426-NS § 8, 2015: Ord. 6980-NS § 1 (part), 2007: Ord. 6763-NS § 7 (part), 2003: Ord. 6478-NS § 4 (part), 1999)

**Section 23D.20.090 Findings (R-1A)**

- B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.20.070, the Zoning Officer or Board must find that **although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.**

**Section 23D.24.020 Purposes (ES-R)**

- H. **Give reasonable protection to views and privacy,** yet allow appropriate development of all property as long as public services and access are adequate to ensure protection of the health and safety of residents in this vulnerable area;

**Section 23D.28.090 Findings (R-2)**

- B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.28.070 the Zoning Officer or Board must find that **although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.**

**For all other residential districts - R-2A, R-3, R-4 and R-5, the same findings must be made to deny a use permit for a residential addition**

**CHAPTER 12.45 SOLAR ACCESS AND VIEWS (LOSS OF, DUE TO TREE GROWTH)**

**12.45.010 Purpose and objectives.**

A. The purpose of this chapter is to:

1. Set forth a procedure for the resolution of disputes between private property owners relating to the resolution of sunlight or views lost due to tree growth.
5. To restore access to light and views from the surrounding locale;

#### Section 12.45.020 Definitions

2. "Views" mean a distant vista or panoramic range of sight of Berkeley, neighboring areas or the San Francisco Bay. Views include but are not limited to skylines, bridges, distant cities, geologic features, hillside terrains and wooded canyons or ridges.
4. "Complaining party" means any property owner (or legal occupant without objection of property owner) who wishes to alter or remove a tree(s) on the property of another which creates an obstruction to their access to sunlight or view whether such access is gained from an original dwelling or any addition thereto used as a dwelling.
6. "Obstruction" means any substantial blocking or diminishment of a view from a structure lawfully used as a dwelling or access to sunlight to the real property which is attributable to the growth, maintenance or location of tree(s).

#### Section 12.45.030 Procedures.

A. The procedures described in this section shall be followed in the resolution of tree disputes between private parties.

1. Initial reconciliation: A complaining party who believes in good faith that the growth, maintenance or location of tree(s) on the private property of another (hereinafter referred to as tree owner) diminishes the beneficial use of economic value of their property because such tree(s) interfere with the access to sunlight or views which existed prior to such growth, maintenance or location of the tree(s) on the property during the time the complaining party has occupied the property, shall notify the tree owner in writing of such concerns. The notification should, if possible, be accomplished by personal discussions to enable the complaining party and tree owner to attempt to reach a mutually agreeable solution.
5. Litigation: In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for resolution of the sunlight access or view tree claim under the provisions of this chapter

#### Section 12.45.040 Standards for resolution of disputes

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section 12.45.010 in determining what restorative actions, if any, are appropriate.

2. Burdens:

- d. The existence of landmarks, vistas or other unique features which cannot be seen because of growth of trees since the acquisition of the property.
- e. The extent to which the alleged obstruction interferes with sunlight or view. The degree of obstruction shall be determined by means of a measuring instrument or photography.
- f. The extent to which solar access or the view is diminished by factors other than trees.

3. Restorative Actions

- e. The extent of solar access or view available and documentable as present at any time during the tenure of the present owner or legal occupant is the limit of restorative action which may be required. If the complaining party is seeking a view or sunlight from an addition, the complaining party has no right to a view or solar access greater than that which existed at the time the construction of the addition was completed

**23B.34.070 Development Standards for All Green Pathway Projects**

Green Pathway projects shall comply with the applicable development standards in Section [23E.68.070](#) and the following additional requirements:

- A. **Building Setbacks Within View Corridors:** To minimize interference with significant views, buildings that are 75 feet in height or less that are located on a corner lot at any intersection with University Avenue, Center Street, or Shattuck Avenue must include upper story setbacks as follows: any portion of a building between 45 feet and 75 feet must be set back from property lines abutting the street by at least one (1) foot for every one (1) foot by which the height exceeds 45 feet.

**“AIR”**

(To be expressed through Privacy and Building Form/Separation Requirements)

**Section 23A.04.030 Purpose of [Zoning] Ordinance and Relationship to Plans**

- D. Provide for adequate light and air by limiting the height, bulk and size of buildings and requiring building yard setbacks from property lines as well as separations between buildings.

**Section 23D.52.090 Findings**

To deny a Use Permit for a major residential addition or residential addition subject to Section 23D.52.070, the Zoning Officer or Board must find that the addition would unreasonably obstruct sunlight, air or views.

**Section 23D.16.020 Purposes (R-1)**

The purposes of the Single Family Residential (R-1) Districts are to:

- C. Protect adjacent properties from unreasonable obstruction of light and air; and

**Section 23D.16.090 - Findings (R-1)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.16.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

**Section 23D.20.020 Purposes (R-1A)**

The purposes of the Limited Two-family Residential Districts (R-1A) are to:

B. Protect adjacent properties from unreasonable obstruction of light and air;

**Section 23D.20.090 Findings (R-1A)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.20.070, the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

C. To approve an application for reduction of a required Rear Yard, or a reduction in building separation, the

Zoning Officer or the Board must find that the unit would not cause a detrimental impact on emergency

access; or on light, air or privacy for neighboring properties

**Identical or very similar provisions exist for PURPOSES and FINDINGS for R-2, R-2A, R-3, R-4**

**Section 23D.44.020 Purposes (R-5)**

The purposes of the High Density Residential (R-5) Districts are to:

B. Make available housing for persons who desire both convenience of location, but who require relatively small

amounts of Usable Open Space; yet assure adequate light, air, privacy and Usable Open Space to promote

and protect their physical and mental health;

C. Protect adjacent properties from unreasonable obstruction of light and air;

**Section 23D.44.090 Findings (R-5)**

B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.44.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.

**Identical or very similar provisions for air exist in R-S and R-SMU**

**PRIVACY**

**Privacy is NOT defined anywhere in the Zoning Code**  
**References to Privacy in the Zoning Code:**

**C-1 General Commercial District Provisions**

**Privacy** Rear Yard Setback: Buildings on lots abutting a residentially zoned lot along the south side of University Avenue shall be set back from the rear property line an average of 20 feet, i.e., a rear yard shall be maintained with a minimum area equal to the width of the lot (in feet) multiplied by 20 feet. The minimum depth of any rear yard shall be ten feet, or 10% of the depth of the lot, whichever is greater, as provided in Section [23E.04.050.C](#). The ZAB may approve a Use Permit to reduce the 20 foot average and ten foot minimum setback provisions to a minimum of six feet on the first floor provided that the square footage added on the first floor by this reduction in setback **is utilized to increase the average 20 foot setback on higher floors to facilitate the privacy of abutting residentially zoned lots.**

d. Front Yard Setback for Residential-Only Projects: For all floors, buildings shall provide an average two-foot setback. **A maximum setback of ten feet is permitted provided that this space is used to accommodate landscaping that enhances the streetscape and provides a sense of privacy for residential units on the first floor.**

**23D.48.020 Purposes (R-S Residential Southside District)**

**23D.48.020 Purposes**

B. Make housing available for persons who desire a convenient location with relatively small amounts of Usable Open Space, yet **assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;**

**23D.52.020 Purposes (R-SMU Southside Mixed Use Residential )**

The purposes of the Southside Mixed Use Residential (R-SMU) Districts are to:

A. Implement General Plan and Southside Plan policy by encouraging high density, multi-story residential development close to major shopping, transportation and employment centers;

B. Make housing available for persons who desire a convenient location, but who require relatively small amounts of Usable Open Space; yet **assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;**

**23D.20.090 Findings (R-1A)**

A. In order to approve any Permit under this chapter, the Zoning Officer or Board must make the finding required by Section [23B.32.040](#). The Zoning Officer or Board must also make the findings required by the following paragraphs of this section to the extent applicable:



C. To approve an application for reduction of a required Rear Yard, or a reduction in building separation, the Zoning Officer or the Board must find that the unit would not cause a detrimental impact on emergency access; or on light, air or privacy for neighboring properties.

**23D.44.020 Purposes (R-5)**

The purposes of the High Density Residential (R-5) Districts are to:

B. Make available housing for persons who desire both convenience of location, but who require relatively small amounts of Usable Open Space; yet assure adequate light, air, privacy and Usable Open Space to promote and protect their physical and mental health;

**12.45.040 Standards for resolution of disputes.**

A. In resolving the tree dispute, the tree mediator, tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction within the framework of the objectives of this chapter as set forth in Section [12.45.010](#) in determining what restorative actions, if any, are appropriate.

d. Visual, auditory and wind screening provided by the tree(s) to the tree owner and to neighbors. Existing privacy provided by the tree(s) to the tree owner's home shall be given particular weight.

**Chapter 23D.04 - Lot and Development Standards**

**23D.04.010 Lot Requirements**

E. The Zoning Officer shall designate the front, side and rear yards for main buildings for flag lots and irregular lots, in a manner to best protect light, air and privacy. The yard dimensions shall be as set forth in each District's provisions.

**23D.08.010 Accessory Buildings & Structures May Exceed Limit with Use Permit**

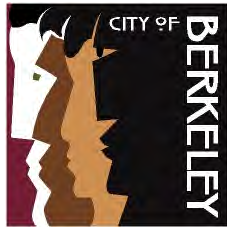
B. The Zoning Officer may issue an AUP for an accessory structure or accessory building which does not comply with the height limits, minimum setback distances, site location and/or maximum length requirements of this chapter, except for the height limit in Section [23D.08.020](#).C, subject to a finding that the proposed accessory building or enclosed accessory structure will not be detrimental to the light, air, privacy and view of adjacent properties. (Ord. 7522-NS § 2, 2017; Ord. 6854-NS § 2 (part), 2005; Ord. 6478-NS § 4 (part), 1999)

**23D.24.020 - ES-R - Purposes**

H. Give reasonable protection to views and privacy, yet allow appropriate development of all property as long as public services and access are adequate to ensure protection of the health and safety of residents in this vulnerable area;

**23E.04.050 Special Yard Requirements for C- Lots Abutting Residential Zones**

E. The Board may approve a Use Permit authorizing yards smaller than those required above if it finds that such smaller yard would provide greater **privacy** or improved amenity to a lot in the residential District.



Office of the City Manager

## SUPPLEMENTAL AGENDA MATERIAL

**Meeting Date:** March 23, 2021

**Item Number:** 17

**Item Description:** Objective Standard Recommendations for Density, Design and Shadows

**Supplemental/Revision Submitted By:** Alene Pearson, Secretary, Joint Subcommittee for the Implementation of State Housing Laws (JSISHL)

**“Good of the City” Analysis:**

*The analysis below must demonstrate how accepting this supplement/revision is for the “good of the City” and outweighs the lack of time for citizen review or evaluation by the Council.*

JSISHL’s recommendation for objective design standards references a set of proposed standards for review by other City Commissions. This supplemental communication provides the matrix of proposed objective design standards, for benefit of Council and public while discussing this item.

*[from page two of the staff report]*

*To aid JSISHL in making a recommendation, staff created a matrix of design guidelines to identify design goals, introduced objective language to reflect desired design outcomes, and test-fit approved projects to double-check objective language. JSISHL recommended the **proposed objective design standards** be reviewed by the Design Review Committee and further refined by Planning Commission.*

***Consideration of supplemental or revised agenda material is subject to approval by a two-thirds roll call vote of the City Council. (BMC 2.06.070)***

A minimum of **42 copies** must be submitted to the City Clerk for distribution at the Council meeting. This completed cover page must accompany every copy.

Copies of the supplemental/revised agenda material may be delivered to the City Clerk Department by 12:00 p.m. the day of the meeting. Copies that are ready after 12:00 p.m. must be delivered directly to the City Clerk at Council Chambers prior to the start of the meeting.

Supplements or Revisions submitted pursuant to BMC § 2.06.070 may only be revisions of the original report included in the Agenda Packet.

| Objective Standards for Design Guidelines |                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                  | Row # |
|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| Section                                   | Subsection                                                                                                                                            | Proposed Objective Design Standards                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Definitions                                                                                                                                                                                                                                                                                      |       |
| 1. Neighborhood Context                   | <p><b>Massing</b></p> <p>Goal: Promote harmony in scale and massing.</p>                                                                              | <p>Differentiate the base. A base shall visually carry the weight of the building. A base <i>is defined as a plane or material change between the ground floor and the upper floors</i> and can be made by thickening the walls or a change in material and color and <i>shall extend</i> at least 75% of <i>each individual</i> building facade.</p> <p>Buildings over three stories tall shall have major massing breaks at least every 100 feet <i>along every building frontage</i> through the use of varying setbacks, building entries, and recesses, courtyards or structural bays. Major breaks shall be a minimum of 5 feet deep and 10 feet wide and shall extend at least two-thirds of the height of the building.</p> | Base - a plane or material change between the ground floor and the upper floors                                                                                                                                                                                                                  | 1     |
|                                           | <p><b>Materials</b></p> <p>Goal: Provide texture and visual interest while minimizing glare.</p>                                                      | <p>At least two materials shall be used on any building face visible from the street or adjacent parcel in addition to glazing and railings. Any one material must comprise at least 20% of <i>street facing building facade</i>.</p> <p>Materials shall not cause glare on the public right of way or adjacent parcels.</p>                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                  | 2     |
| 2. Building Design                        | <p><b>Rooflines</b></p> <p>Goal: Vertically break up building mass at the roofline.</p>                                                               | Rooflines shall be <i>articulated at least every 50 feet along the street frontage, through the use of architectural elements such as cornices, clerestory windows, canopies, or varying roof height and/or form.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Roofline - Top termination of the massing.                                                                                                                                                                                                                                                       | 3     |
|                                           | <p><b>Façade Design</b></p> <p>Goal: Give depth to the building façade.</p>                                                                           | <p>Provide balconies or upper facade projections or recesses every 25 to 30 feet.</p> <p>Blank walls on side and rear facades shall not exceed 30 ft in length.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <p>Upper façade projection or recess - Any balcony, window box, window articulation that either creates a recess in or projects out from the building face.</p> <p>Blank wall - A length of uninterrupted wall space that does not include a window, door, material change, or plane change.</p> | 4     |
|                                           | <p><b>Windows</b></p> <p>Goal: Give depth to the building façade.</p>                                                                                 | <p>Windows <i>shall not exceed 75% of upper facades</i>.</p> <p>Windows set in wall surfaces shall be recessed a minimum of 2 inches <i>unless in a contiguous vertical bay, in which case the recess may be substituted with a vertical fin or projection.</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                  | 5     |
| 3. Ground Floor Design                    | <p><b>Residential Lobbies</b></p> <p>Goal: Create a focal point for residents and pedestrians.</p>                                                    | <p>A primary building entrance shall be visible from the street. Direct pedestrian access shall be provided between the public sidewalk and such primary entrance.</p> <p><i>A primary building entrance</i> must have a roofed projection <i>in the form of either a canopy or the extension of a vertical bay</i>, or recess with a minimum depth of 5 feet and a minimum area of 60 sq. feet. <i>Entrances to upper floors shall be distinguished with either plane changes, material transitions, or building signage.</i></p>                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                  | 6     |
|                                           | <p><b>Ground Floor Height</b></p> <p>Goal: Enhance ground floor experience.</p>                                                                       | Ground floor <i>commercial spaces</i> shall have a minimum interior height of <i>13 feet</i> .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                  | 7     |
|                                           | <p><b>Storefronts</b></p> <p>Goal: Enhance pedestrian experience and provide visual cues that distinguish between retail and residential entries.</p> | <p>Retail spaces shall be accessed directly from the sidewalk, rather than through lobbies or other internal spaces. Clear glass shall comprise at least 60% of the street facing façade where it is between 3 feet and 8 feet above elevation of adjacent sidewalk.</p> <p>Maintain the typical rhythm of 15-30 foot storefronts at ground level. Provide at least one of the following architectural features to protect pedestrians from inclement weather:</p> <p>A) awnings<br/>B) canopies<br/>C) recessed entries</p> <p>Except for recessed entries, a majority of storefront glazing shall be at the property line.</p>                                                                                                    |                                                                                                                                                                                                                                                                                                  | 8     |

| Objective Standards for Design Guidelines |                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                  |             | Row # |
|-------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-------|
| Section                                   | Subsection                                                                                                                 | Proposed Objective Design Standards                                                                                                                                                                                                                                                                                                                                                                                                              | Definitions |       |
| 3. Ground Floor Design                    | <p><b>Public Service Street Frontages</b></p> <p>Goal: Activate the public street.</p>                                     | <p>At least one publicly-accessible street-level entrance shall be provided for every 40 feet along a streetfacing property line. Any remainder exceeding 30 feet shall also have a publicly-accessible street-level entrance. No two entrances shall be separated by more than 50 feet.</p> <p>~ <i>Downtown only</i></p> <p>*reference Figure 43: Public Serving Frontages on page 61 of the Downtown Design Guidelines for applicability.</p> |             | 9     |
| 4. Parking Lots, Garages and Driveways    | <p><b>General Guidelines</b></p> <p>Goal: Reduce visual impact of parking on the street frontage.</p>                      | Locate parking structures underground or behind buildings or provide either landscape or architectural elements to screen view of parking from the street.                                                                                                                                                                                                                                                                                       |             | 10    |
|                                           | <p><b>Surface Lots</b></p> <p>Goal: Screen surface lots from view of the street while providing shade and landscaping.</p> | Perimeter landscaping shall include trees and shrubs. In addition to required screening, parking area shall have trees which achieve a canopy coverage of at least 50% within seven years.                                                                                                                                                                                                                                                       |             | 11    |
|                                           | <p><b>Garage Lighting and Ventilation</b></p> <p>Goal: Reduce impact of garages on neighboring parcels.</p>                | All parking garage lighting shall be shielded so that light does not shine through vents at night and headlights are not visible from the street and adjacent parcels. If forced venting is required for the garage, air shall not vent directly onto the sidewalk or podium courtyards.                                                                                                                                                         |             | 12    |
| 5. Building Accessories                   | <p><b>Lighting</b></p> <p>Goal: Prevent glare on public right of way.</p>                                                  | All lighting shall be downcast and not cause glare on the public right of way or neighboring parcels.                                                                                                                                                                                                                                                                                                                                            |             | 13    |
|                                           | <p><b>Security and Fences</b></p> <p>Goal: Reduce visual impact.</p>                                                       | <p>Security devices and grillwork visible from the street shall be integrated into the overall building design.</p> <p>Perimeter fencing utilized along public street shall be constructed of decorative iron, pre-painted welded steel, or wood picket material.</p>                                                                                                                                                                            |             | 14    |
|                                           | <p><b>Trash Service, Mechanical and Utilities</b></p> <p>Goal: Reduce visual impact.</p>                                   | Garbage receptacles, utility meters and mechanical and electrical equipment at rooftop and ground shall be screened from the view of pedestrians.                                                                                                                                                                                                                                                                                                |             | 15    |
| 6. Street Trees                           | <p>Goal: Preserve and/or add street trees.</p>                                                                             | Existing street trees shall be retained and protected <i>if determined to be healthy by the Urban Forester</i> . Work with Berkeley's Urban Forestry Department and Public Works to determine preferred locations for new street trees.                                                                                                                                                                                                          |             | 16    |
| 7. Signs and Awnings                      | <p>Goal: Cohesive sign program that is in keeping with the building design</p>                                             | <p>Coordinate the design and alignment of signs and awnings on buildings with multiple storefronts in order to achieve a cohesive appearance to the base of the building.</p> <p>Signs and awnings shall not obscure architectural elements such as clerestory windows or columns.</p> <p>All front faces shall be opaque.</p>                                                                                                                   |             | 17    |



Joint Subcommittee for the Implementation of State Housing Laws

ACTION CALENDAR

November 9, 2021

*(Continued from October 26, 2021)*

To: Honorable Mayor and Members of the City Council

From: Joint Subcommittee for the Implementation of State Housing Laws  
(JSISHL)

Submitted by: Igor Tregub, Chairperson

Subject: Objective Standards Recommendations for Density, Design and Shadows

RECOMMENDATION

Refer to the Planning Commission and Design Review Committee to review the recommendations from the Joint Subcommittee for the Implementation of State Housing Laws (JSISHL) for objective standards for density, design and shadows and draft Zoning Ordinance amendments for City Council consideration.

FISCAL IMPACTS OF RECOMMENDATION

This project will involve staff and consultant time that will total approximately \$200,000. Budget for the consultant time was previously allocated from the General Fund in the 2021-2022 fiscal year budget (\$115,000). Additional staff time amounting to \$100,000 would have to be covered by re-arranging staff priorities within existing resources to support the effort.

CURRENT SITUATION AND ITS EFFECTS

The City of Berkeley's Zoning Ordinance and permitting process for residential and mixed use projects relies heavily on discretion and subjective development standards. State laws, such as Senate Bill (SB) 35, limit interpretation of zoning regulations and require a streamlined permit approval process for many housing projects. JSISHL was tasked with reviewing approaches to objective standards for density, design, shadows and views. Between April 2018 and July 2020 JSISHL, including representatives of the Planning Commission, Zoning Adjustments Board, and Housing Advisory Commission, met eleven times to discuss these topics and ultimately prepared the recommendations summarized below.

Objective Standards for Density (Building Intensity)

The referral specifically requested that JSISHL consider dwelling units per acre as an objective measurement of density. JSISHL also considered a form-based code method and floor area ratio (FAR) as approaches to objectively regulate lot buildout and development proportions. No unanimous agreement could be reached as to the best

path forward. In the end, a recommendation was made using FAR as the primary density standard in residential and commercial districts and form-based code<sup>1</sup>, which emphasizes standards with predictable physical outcome such as build-to lines and frontage and setback requirements, as a secondary approach. There was also an interest in a units/acre approach that assumed average unit sizes and bedroom counts; however, this approach was not adopted. See Attachment 1 (July 22, 2020 Final Minutes) for the text of these options. **JSISHL recommended developing an objective standard for density using FAR and potentially form-based code.**

#### Objective Standards for Design

Berkeley's design review process relies heavily on four sets of design guidelines:

1. Design Review Guidelines (applied citywide);
2. Downtown Design Guidelines;
3. Southside Strategic Plan Design Guidelines; and
4. University Strategic Plan Design Guidelines.

This process heavily relies on the discretion of staff and the Design Review Committee; however, recent State laws require that cities develop objective standards for streamlined and ministerial approval processes for qualified projects. To aid JSISHL in making a recommendation, staff created a matrix of design guidelines to identify design goals, introduced objective language to reflect desired design outcomes, and test-fit approved projects to double-check objective language. **JSISHL recommended the proposed objective design standards be reviewed by the Design Review Committee and further refined by Planning Commission.**

#### Objective Standards for Shadows

The Berkeley Municipal Code (BMC) addresses shadows as follows:

- Section 23E.36.070(C)(1)(a): Projects on the north side of University Avenue within the University Avenue Strategic Plan Overlay area must meet a Solar Rear Yard Setback (subject to override by Density Bonus waivers). Required daylight plane analysis is incorporated directly into the development standards: “...*shall not cast a shadow at noon more than 20 feet onto any lot in a residential zone as calculated when the sun is at a 29 degree angle above the horizon (winter solstice).*”
- Section 23B.34.070(C): Green Pathway Projects<sup>2</sup> within the Downtown Mixed-Use District (C-DMU) that are between 60 and 75 feet tall. Shadow analysis for these projects must show that:

<sup>1</sup> <https://formbasedcodes.org/standards-of-practice/>

<sup>2</sup> As defined in in Chapter 23B.34 of the municipal code, the “Green Pathway” is a streamlined permit process for buildings that exceed the Green Building requirements applicable to the C-DMU district and confer extraordinary public benefits.

1. *The extent of shading on public sidewalks and open spaces within a radius of 75 feet of the closest building wall that would be cast at two (2) hours after sunrise, 12 p.m., and two (2) hours before sunset, on March 21, June 21, December 21, and September 21, by a building 60 feet in height that complies with all applicable setback requirements; and*
2. *Features incorporated into the building design, including, but not limited to, additional upper floor setbacks that will reduce the extent of shadowing of the proposed building to no more than 75 percent of the shadowing projected in paragraph 1 above.*

Otherwise, shading impacts are evaluated on a discretionary basis during Use Permit review and are permissible provided they are not “unreasonable” or provided they will not result in a “significant reduction in sunlight.” Although the review of shadow studies is somewhat objective – administrative guidelines establish methods for analyzing impacts by time of day and time of year on living area windows and yards - the ultimate finding is subjective. Therefore, while shadow studies provide accurate information on shading due to proposed projects, the amount of shading from new development that is deemed “reasonable” depends on the context.

JSISHL discussed many aspects of shadow impacts, including shading of solar panels and roofs, windows, yards and gardens. The recommendation is fairly detailed, including five applicability considerations and four methods of measuring shadow impacts that depend on project elements. **JSISHL recommended that the proposal for objective shadow standards be reviewed and further refined by staff and the Planning Commission.**

#### BACKGROUND

On July 17, 2017, the City Council adopted a referral to address the State Housing Accountability Act (Government Code Section 65589.5) and to preserve local land use discretion (see Attachment 2). The referral requested research into a set of objective zoning standards for new development projects in the following four topic areas:

- Density and/or building intensity;
- Public health and safety standards;
- Design review standards; and
- Views, shadows, and other impacts that often underlie detriment findings.

In the time since the referral was adopted by City Council in 2017, the State adopted several bills to streamline the approval process for housing developments. Legislation facilitates housing production for projects that comply with a jurisdiction’s objective standards and prohibits localities from adopting standards what would reduce the number of residential units allowed (i.e. downzones a property or area). As a result of



these legislative actions, jurisdictions benefit from adopting objective planning standards that can guide the development process and reflect goals of the local community.

JSISHL's first few meetings in 2018 were focused on understanding and analyzing 2017 State housing laws and associated City Council referrals. At its fourth meeting, in January 2019, JSISHL adopted a work plan (see Attachment 3) to direct efforts towards researching approaches to objective standards for density, design, shadows and views. In March and May of 2019, JSISHL examined existing conditions at the City of Berkeley and implementation of the Zoning Ordinance and of State law (i.e. Density Bonus, SB-35, the Housing Accountability Act). Since September 2019, JSISHL has evaluated objective standards for density, design and shadows in order to develop a recommendation to City Council. At its final meeting on July 22, 2020, JSISHL recommended approaches to objective standards for design, density and shadows to City Council for consideration. JSISHL was not able to address objective standards for views.

#### ENVIRONMENTAL SUSTAINABILITY

Adoption of objective standards will streamline the permitting process for housing projects, encouraging infill development and density, creating opportunities to live and work within close proximity and reduce reliance on private vehicle use and/or vehicles miles traveled.

#### RATIONALE FOR RECOMMENDATION

State law requires that jurisdictions adopt objective standards in order to ministerially approved projects.

#### ALTERNATIVE ACTIONS CONSIDERED

The city can choose to not adopt objective standards, in which case projects will be ministerially approved without meeting certain standards.

#### CITY MANAGER

The City Manager concurs with the content and recommendations of the Commission's Report.

#### CONTACT PERSON

Alene Pearson, Subcommittee Secretary, Planning and Development Department, 510-981-7489

#### Attachments:

- 1: Meeting Minutes (July 22, 2020)
- 2: City Council Referral (July 17, 2017)
- 3: Work Plan (January 17, 2019)



Planning Commission

**DRAFT MINUTES OF THE REGULAR MEETING OF THE JSISHL  
(JOINT SUBCOMMITTEE FOR IMPLEMENTATION OF STATE HOUSING LAWS)**

**July 22, 2020**

The meeting was called to order at 7:02 p.m.

**Location: N/A** (This meeting was conducted exclusively through videoconference and teleconference)

**Commissioners Present:** Teresa Clarke, Dohee Kim, Thomas Lord, Shoshana O’Keefe, Igor Tregub, Alfred Twu, Jeff Vincent, Marian Wolfe (left at 9:29), Rob Wrenn

**Commissioners Absent:** None

**Staff Present:** Alene Pearson, Nilu Karimzadegan, Anne Burns and Desiree Dougherty

**ORDER OF AGENDA:** No Change

**CONSENT CALENDAR:** N/A

**PUBLIC COMMENT:** 1 speaker

**PLANNING STAFF REPORT:** Staff announced that three supplemental communications were sent out via email prior to the meeting and are posted on the online agenda. Communications received “At the Meeting” will be posted by the end of Friday.

**COMMUNICATIONS IN PACKET:**

- Email from Cantor Lois on 10/24/19 re: BART apartments
- Email from Vicki Sommer on 10/24/19 re: Objective Standards for Sunlight Detriment
- Email from Alene Pearson on 11/15/19 to JSISHL re: JSISHL October follow up and December supplemental material request
- Letter from Toni Mester on 12/2/19 re: density and solar recommendation
- Letter from David Ushijima on 12/2/19 re: Objective Standards for Shadow and Sunlight
- Email from Commissioner Wolfe on 12/2/19 re: JSISHL October follow up and December supplemental material request

**COMMISSIONER ATTACHMENTS IN PACKET:**

- Email from Alene Pearson to JSISHL on June 26, 2020 re: JSISHL Meeting scheduled for July 22
- Email from Alene Pearson to JSISHL on May 15, 2020 re: JSISHL Meeting via Zoom

- Email from Timothy Burroughs, Planning Director on April 23, 2020 re: Update on status of board and commission meetings
- Email from Commissioner Lord on April 13, 2020 re: “The Constitution.....”
- Email from Commissioner Lord on March 30, 2020 re: Objectifying and Modernizing Study Standards
- Email from Commissioner Kim on March 30, 2020 re: Follow Up to February 26 JSISHL Meeting
- Email from Commissioner Wolfe on March 28, 2020 re: Follow Up to February 26 JSISHL Meeting
- Email from Commissioner Wright on March 12, 2020 re: Follow Up to February 26 JSISHL Meeting
- Email from Alene Pearson to JSISHL on March 6, 2020 re: Follow Up to February 26 JSISHL Meeting

**LATE COMMUNICATIONS** (Received after the Packet deadline):

- Supplemental Communication 1
- Supplemental Communication 2
- Supplemental Communication 3

**LATE COMMUNICATIONS** (Received and distributed at the meeting):

- Supplemental Communication 4

**CHAIR REPORT:** None

**COMMITTEE REPORT:** None

**7. APPROVAL OF MINUTES:**

Motion/Second/Carried (Wolfe/Clarke) to approve the JSISHL Meeting Minutes from February 26, 2020. Ayes: Clarke, Kim, Lord, Tregub, Vincent, Wolfe, Wrenn. Noes: None. Abstain: O’Keefe, Twu. Absent: None (7-0-2-0)

**8. FUTURE AGENDA ITEMS AND OTHER PLANNING-RELATED EVENTS:** None

**AGENDA ITEMS**

**9. Action: Objective Standards for Density**

**PUBLIC COMMENT:** 4 speakers

Primary Motion/Second/No Action Taken (O’Keefe/Wrenn) to recommend that the City Council refer to staff and Planning Commission development of a dwelling units per acre standard in all commercial districts and in the MULI and MUR districts with consideration of a cap on average number of bedrooms. Take into consideration size of parcel and develop an average bedroom/unit (to be determined) for multi-unit buildings. Develop Floor Area Ratios (FARs) for residentially zoned (“R” prefix) districts such as R-2, R-2A, and R-3, to help clarify and make more objective what is permitted in these districts.

Substitute Motion/Second/Carried (Kim/Clarke) to recommend using FAR as a density standard with a secondary form-based approach in Residential and Commercial districts. Ayes: Clarke, Kim, Wolfe, Twu, Vincent. Noes: Lord, O’Keefe, Tregub, Wrenn. Abstain: None  
Absent: None  
(5-4-0-0)

**10. Action: Objective Standards for Design**

**PUBLIC COMMENT:** 1 speakers

Primary Motion/Second/Carried (Wolfe/Clarke) to recommend to City Council the proposed design standards be reviewed and further developed by the Design Review Committee and Planning Commission. These standards were included in JSISHL’s July 22, 2020 packet. Ayes: Clarke, Kim, O’Keefe, Tregub, Vincent, Wolfe, Wrenn. Noes: None. Abstain: Lord, Twu. Absent: None  
(7-0-2-0)

Substitute Motion/Second/Not Carried (Twu/O’Keefe) to recommend to City Council the proposed design standards -- minus the first four design standards (massing, material, rooflines, facades) -- be reviewed and further developed by the Design Review Committee and Planning Commission. These standards were included in JSISHL’s July 22, 2020 packet. Ayes: O’Keefe, Twu. Noes: Clarke, Kim, Lord, Tregub, Vincent, Wolfe, Wrenn. Abstain: None. Absent: None  
(2-7-0-0)

**11. Action: Objective Standards for Shadows**

**PUBLIC COMMENT:** 2 speakers

Motion/Second/Not Carried (Wrenn/Tregub) to recommend to City Council the following:

In developing draft objective standards, staff should start with existing daylight plane standards, including the standards for San Pablo Avenue in El Cerrito, and with the City’s own standard in effect for University Avenue.

Shadowing standards would only apply if the proposed project was asking for a Use Permit, AUP, waiver or density bonus to exceed the “base” residential and commercial zoning district development standards that are in effect as of 7/1/20.

Where there is a lot coverage limit, adjustments to the location and orientation of the massing can be required in order to minimize shadowing impacts.

In the development of shadowing standards, impacts on light and air and existing windows and door openings of the applicable adjacent buildings will be taken into consideration.

JSISHL should recommend that the City Council direct staff to go forward with drafting of an objective standard to protect existing rooftop solar panels from shadowing by new development on adjacent and nearby parcels.

JSISHL should recommend that the City Council direct staff to go forward with drafting objective shadowing standards to limit shadowing of residential buildings by new development on adjacent or nearby parcels.

Standards should apply in residentially zoned (“R” prefix) districts and to properties in commercially zoned (“C” prefix) districts that are adjacent to residential properties, where new development could cause shadowing impacts on residential properties. Staff could present to Council a range of options with draft language for each.

JSISHL should recommend that the City Council direct staff to work on standards to protect open, currently unshadowed areas of public parks, and open currently unshadowed areas of school grounds that are used for student recreation.

Ayes: O’Keefe, Tregub, Vincent, Wrenn. Noes: Lord, Abstain: Clarke, Kim, Twu. Absent: Wolfe (4-1-3-1)

Motion/Second/Carried (Clarke/Vincent) to recommend to City Council the following proposed shadow standards be reviewed and further developed by the staff and Planning Commission.

1. Applicability of Shadow Impacts:
  - a. Shadow impacts would not be considered when a proposed new building or new construction meets all base development standards.
  - b. Shadow impacts on an adjacent property would only be considered when a side or rear yard setback reduction or an increase in height is requested by use permit or by state density bonus over the allowable standard. Shadow impacts for Front or Street yard setback reductions would not be included or considered.
  - c. The shadow impact would only be calculated on the increase in shadow caused by the additional height or reduced setback portion of the project, not the cumulative.
  - d. Adjustments would seek to limit reductions in overall building envelope and could compensate with increases in height in another portion of the building, or reduced setback in another portion of the site, or some other mutually agreed adjustment to a development standard or mitigation. Adjustments may require, if no other solution can be proposed to mitigate the impact, a reduction in the overall total building envelope proposed. However, for state density bonus projects, adjustments to a proposed new residential construction shall not require a reduction in the overall total building envelope, habitable area, or cause the number of bedrooms or units to be reduced.
  - e. If the adjacent building being affected has a reduced building setback on the adjacent side or rear yard, a light and air impact would not be applicable, except in those cases where the building has a historic designation or was built prior to the implementation of the zoning code.

2. Elements of consideration for Shadow Impact:

- a. Light & Air for Building Openings of Applicable adjacent buildings: The light and air shadow impact shall consider impact to light and air access only of the existing windows and door openings of the applicable adjacent buildings. The new construction would be required to adjust its setback such that a minimum 3 foot perpendicular distance was achieved and a 6 foot width, with minimum 1 foot on either side of the window or door for 2 stories (min. 6 foot for courts with openings on both sides) and 1 foot additional setback for each additional story up to 14 stories, or a total maximum setback of 15 feet from the adjacent building. For instance if the building is 3 feet away from the property line, a 12 foot maximum from the property line for the new building.
- b. Minimum Required Open Space of Adjacent properties: An increase in shadow impact caused by the additional height or reduced setback on the minimum required open space of the adjacent impacted property shall not be more than a 50% increase in direct shade averaged over the entire year. If the affected property has more than the required open space, the calculation would be made on the open space that is least impacted by the shadow. The setback or height shall be adjusted to result in a net shadow increase of no more than 50% (or suggest alternate per staff research) as limited in Section 1 above. The shadow impact would only be calculated on the increase in shadow caused by the additional height or reduced setback portion of the project, not the cumulative.
- c. Solar Access: An increase for the additional impact only of more than 50% of direct shading on existing solar panels averaged over the entire year and over the entire area of solar array would require that an adjustment to the requested height or setback be made, or other mutually agreed adjustment to a development standard or mitigation be made. If a mitigation such as moving the solar panels or re-orienting the solar panels has been mutually agreed upon in lieu of a development standard adjustment, this mitigation should be completed prior to building permit issuance, if possible.

The shadow impact would only be calculated on the increase in shadow caused by the additional height or reduced setback portion of the project, not the cumulative.

Ayes: Clarke, Kim, O’Keefe, Twu, Vincent. Noes: Lord, Wrenn. Abstain: Tregub. Absent: Wolfe. (5-2-1-1)

**The meeting was adjourned at 11: 01 p.m.**

**Commissioners in attendance: 9 of 9**

**Members in the public in attendance: 7**

**Public Speakers: 7**

**Length of the meeting: 2 hours and 59 minutes**

**APPROVED:**

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Alene Pearson

Page 6 of 6

Secretary to the JSISHL

DRAFT

RESOLUTION NO. 69,159-N.S.

EXTENSION OF THE JOINT SUBCOMMITTEE FOR THE IMPLEMENTATION OF  
STATE HOUSING LAWS

WHEREAS, the Joint Subcommittee for the Implementation of State Housing Laws (JSISHL) was established under Resolution No. 68,308-N.S. in January 2018; and

WHEREAS, the mission of JSISHL is to advise Council regarding issues around density bonuses, the Housing Accountability Act, inclusionary zoning, and permit streamlining to attain compliance with state law and take advantage of new opportunities for the development of affordable housing; and

WHEREAS, under its enabling legislation, JSISHL is tasked with completing its work by January 2020, reporting to Council by March 2020; and

WHEREAS, in order to fulfill its mission an extension is needed to provide adequate time to review recently passed State housing laws, and to provide adequate feedback on recommendations on units per acre density standards, Floor to Area Ratios (FARs) and daylight plane shadowing standards, along with anything else such as an objective definition of detriment.


NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby extends the timeline for the Joint Subcommittee for the Implementation of State Housing Laws to complete its work by July 2020, with the recommendations being brought to the City Council for consideration by the end of September 2020.

The foregoing Resolution was adopted by the Berkeley City Council on October 29, 2019 by the following vote:

Ayes: Bartlett, Davila, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

Noes: None.

Absent: None.

  
\_\_\_\_\_  
Jesse Arreguin, Mayor

Attest:   
\_\_\_\_\_  
Mark Numainville, City Clerk



RESOLUTION NO. 68,308–N.S.

ESTABLISHING A JOINT SUBCOMMITTEE FOR THE IMPLEMENTATION OF STATE HOUSING LAWS.

WHEREAS, Berkeley and California is facing an unprecedented housing affordability crisis; and

WHEREAS, rents for a two bedroom apartment in Berkeley have risen by 62.5% over the past five years; and

WHEREAS, Berkeley has so far achieved 48% of its housing allocation goals for 2014-2022 set out by the Association of Bay Area Governments, including 0% for extremely low income and moderate income; and

WHEREAS, many residential developments that have received zoning approval have yet to receive a building permit; and

WHEREAS, to address the rising crisis of housing in the State of California, 15 state bills were signed into law, with many dealing with how local municipalities respond to the development of new units; and

WHEREAS, issues around density bonuses, the Housing Accountability Act, inclusionary zoning, and permit streamlining need to be addressed by the City to be compliant with state law and to take advantage of new opportunities for the development of affordable housing; and

WHEREAS, because the Zoning Adjustments Board, Housing Advisory Commission, and Planning Commission have policy and quasi-judicial powers around housing, it would be beneficial for representatives of these commissions to meet jointly to develop policies for consideration by the Planning Commission and City Council; and

WHEREAS, community input is of vital importance in the review and implementation of these housing policies, and such input can be encouraged by regular publicly-noticed meetings of the Task Force; and

WHEREAS, the Joint Subcommittee should be comprised of nine voting members, with representatives from each commission.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley does hereby establish a Joint Subcommittee composed of members from the Zoning Adjustments Board, Housing Advisory Commission, and Planning Commission.

BE IT FURTHER RESOLVED that the Joint Subcommittee members shall be appointed from the membership of the Zoning Adjustments Board, Planning Commission or Housing Advisory Commission. Any Commissioner on any of those commissions is eligible for appointment to the Joint Subcommittee, as long as there is representation from each commission on the Joint Subcommittee.


BE IT FUTHER RESOLVED that the Joint Subcommittee shall complete its work by January 2020. Staff shall forward the Joint Subcommittee's recommendations to each parent Commission for comment, and bring the Joint Subcommittee's recommendations to the City Council for consideration by the end of March 2020, along with comments by any parent commissions.

The foregoing Resolution was adopted by the Berkeley City Council on January 23, 2018 by the following vote:

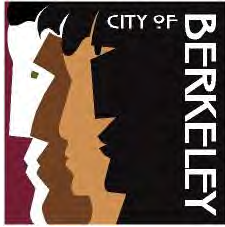
Ayes: Davila, Droste, Hahn, Harrison, Maio, Wengraf, Worthington and Arreguin.

Noes: None.

Absent: Bartlett.

  
\_\_\_\_\_  
Jesse Arreguin, Mayor

Attest:   
\_\_\_\_\_  
Mark Numalville, City Clerk



Mayor Jesse Arreguin  
Councilmember Sophie Hahn, District 5

## SUPPLEMENTAL AGENDA MATERIAL

**Meeting Date:** June 13, 2017

**Item Number:** # 59

**Item Description:** Housing Accountability Act

**Submitted by:** Mayor Jesse Arreguin and Councilmember Sophie Hahn

The revision removes the idea that staff and the Planning Commission consider as one of several options downzoning and then upzoning by increasing development standards on a discretionary basis.

These ideas largely reflect those originally proposed by the City Attorney and Planning staff.

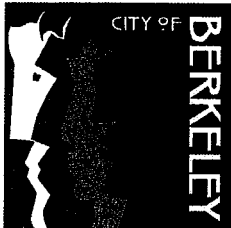


Mayor Jesse Arreguin  
Councilmember Sophie Hahn, District 5

### **Motion, Item # 59: Housing Accountability Act**

Refer to the City Manager and Planning Commission to consider the following actions, and others they may find appropriate, to address the potential impacts of the Housing Accountability Act and to preserve local land use discretion:

- Amend the General Plan and Zoning Ordinance to adopt numerical density and/or building intensity standards that can be applied on a parcel-by-parcel basis in an easy and predictable manner. These would constitute reliable and understandable “objective general plan and zoning standards” that would establish known maximum densities. This could be done across the board or for specified districts.
- Devise and adopt “objective, identified written public health or safety standards” applicable to new housing development projects.
- Adopt “design review standards that are part of ‘applicable, objective general plan and zoning standards and criteria’”.
- ~~Downzone & increase the number and amount of additional height, setback, and other elements available on a discretionary basis.~~
- Quantify and set standards for views, shadows, and other impacts that often underlie detriment findings.



Office of the Mayor

RECEIVED AT  
COUNCIL MEETING OF:

MAY 30 2017

OFFICE OF THE CITY CLERK  
CITY OF BERKELEY

**Motion, Item # 46: Housing Accountability Act**

Refer to the City Manager and Planning Commission to consider the following actions, and others they may find appropriate, to address the potential impacts of the Housing Accountability Act and to preserve local land use discretion:

- Amend the General Plan and Zoning Ordinance to adopt numerical density and/or building intensity standards that can be applied on a parcel-by-parcel basis in an easy and predictable manner. These would constitute reliable and understandable “objective general plan and zoning standards” that would establish known maximum densities. This could be done across the board or for specified districts.
- Devise and adopt “objective, identified written public health or safety standards” applicable to new housing development projects.
- Adopt “design review standards that are part of ‘applicable, objective general plan and zoning standards and criteria’”.
- Downzone & increase the number and amount of additional height, setback, and other elements available on a discretionary basis.
- Quantify and set standards for views, shadows, and other impacts that often underlie detriment findings.

Meeting Date: January 17, 2019

To: Joint Subcommittee for the Implementation of State Housing Law (JSISHL)

From: Chris Schildt, Chairperson

Subject: JSISHL background, mission, objectives, and developing 2019 Workplan

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## Background

JSISHL held three meetings last year in April, May, and July, and had two meetings cancelled in September and November. Due to the long gap since our last meeting, I thought it'd be helpful to revisit the mission and objectives of this subcommittee, as background to a discussion of our workplan for the coming year.

At our April 17, 2018 meeting, we reviewed the mission and objectives of this subcommittee (from April 17, 2018 staff presentation to JSISHL):

**Mission:** Assist the City of Berkeley to effectively implement new State housing laws and advance City Council priorities that are designed to increase affordable housing.

### Objectives:

- Learn about the new State housing law package and its implications for our community
- Assist the City to incorporate new practices designed to enable implementation of new State housing laws
- Based on City Council priorities and referrals, assist with development of new policies for consideration by parent commissions and City Council.

At our subsequent meetings, we heard information about and discussed new state housing laws and a range of related issues, including developing objective standards, streamlining affordable housing, density bonus, and inclusionary zoning.

## Developing a 2019 Workplan

While we heard information and had a lot of discussion last year, my aim for this coming year is for this body to move forward on a finite number of items that will best position the City to implement State housing laws. To that aim, I recommend we develop a workplan with agreed upon priorities that we will work on in the coming year. This would not preclude commissioners from submitting agenda items on other topics for JSISHL to consider, but would help to align our efforts and focus.

The workplan should build off of our existing work and discussion. In last year's meetings, we discussed the following areas that relate to implementation of new State housing laws:

- Developing objective standards
- Streamlining affordable housing
- Density bonus
- Inclusionary housing

**Proposal:**

Numerous state laws, including the Housing Accountability Act, SB 35, and other potential future state legislation (e.g. SB 50) have made it difficult to implement our local laws, which were developed to be flexible with local discretion. The City has recently undertaken a review of the applicable standards that can be enforced under these laws in the light of three recent projects that have applied for approval under SB 35. For an example of how the City applied objective standards for one of the projects, 1601 Oxford Street, see:

[https://www.cityofberkeley.info/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_ZAB/2018-12-21\\_Attachment%20C\\_SB35\\_Objective%20Standards\\_1601%20Oxford.pdf](https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_ZAB/2018-12-21_Attachment%20C_SB35_Objective%20Standards_1601%20Oxford.pdf)

One outcome of the recent reviews has been the clear identification of those areas where the City does not have objective standards, including design review and use permit findings, which are by necessity discretionary and flexible to address unique circumstances. Developing objective standards in areas such as view, sunlight, density, and detriment could help to ensure local needs and goals are included in the development review process for all projects. These objective standards would also help address some of the other topics that have come up on this commission, such as facilitating streamlined review of affordable housing projects and improving the density bonus process.

As a proposed workplan, we could decide as a commission to use each of the next several meetings to do research and discussion on a separate topic within objective standards, and develop a set of recommendations for the City Council and/or our parent commissions. For each topic, commissioners and members of the public would be encouraged to submit information and research to this commission related to the topic to inform discussion. Attached is an example of research provided by a member of public, David Ushijima, on providing objective standards for sunlight detriment.

For example, we could dedicate one of each of these topics for each upcoming meeting:

- Daylight.
- Views.
- Density standards (Note: The city has hired a consultant, Opticos Design, to develop density standards this year. They will be presenting to this commission in 2019, date TBD).
- Detriments to health, comfort, and general welfare.

We could also agendaize for a future meeting to review the City's existing objective standards table.

At the end of the year, we can compile our research and discussion and develop a set of recommendations to send to the City Council and/or our parent bodies.

**Questions for discussion:**

- Do the members of the commission agree to develop a workplan for 2019?
- If yes, what should our priorities be for 2019?



Planning Commission

1                   **DRAFT MINUTES OF THE REGULAR MEETING OF THE JSISHL**  
2                   **(JOINT SUBCOMMITTEE FOR IMPLEMENTATION OF STATE HOUSING LAWS)**

3  
4                   **January 17, 2019**

5                   The meeting was called to order at 7:05 p.m.

6                   **Location:** 2180 Milvia Street 1st Floor, Cypress Conference Room

7                   **Commissioners Present:** Thomas Lord, Shoshana O'Keefe (arrived at 7:16), Christine Schildt  
8                   Igor Tregub, Marian Wolfe, Rob Wrenn.

9                   **Commissioners Absent:** None

10                  **Staff Present:** Alene Pearson, Nilu Karimzadegan and Beth Greene

11                  **ORDER OF AGENDA:** Order of Agenda was changed to:

12                  Discussion Item 9 (Adopt 2019 JSISHL Work Plan ), Discussion Item 10 (Renewing  
13                  Democratized Planning in Berkeley), Action Item 11 (Approve 2019 JSISHL Meetings Calendar)  
14                  and Action Item 12 (Elections: Elect 2019 JSISHL Chair and Vice Chair).

15                  Motion/Second/Carried (Lord/ Tregub) to move Agenda Item 12 to Agenda Item 10 and vote  
16                  on the 2019 JSISHL Work Plan after Agenda Item 10. Ayes: Lord, O'Keefe, Schildt, Tregub,  
17                  Wolfe, Wrenn. Noes: None. Abstain: None. Absent: None (6-0-0-0)

18  
19                  **CONSENT CALENDAR:** N/A.

20                  **PUBLIC COMMENT:** 1 speaker

21                  **PLANNING STAFF REPORT:**

22                  Staff announced that 2019 meeting dates will be decided tonight with Agenda Item 11 and future  
23                  meeting location will depend upon room availability.

24                  **COMMUNICATIONS IN PACKET:**

- 25                  • White Paper on Sunlight Impacts by David Ushijima (October 15, 2018).  
26                  • 2019-01-08\_Communication\_BNC\_Support of White Paper by Dean Metzger (January 8,  
27                  2019)

28  
29                  **LATE COMMUNICATIONS** (Received after the Packet deadline): None

30



31 **LATE COMMUNICATIONS** (Received and distributed at the meeting): None

32 **CHAIR REPORT:** None

33 **COMMITTEE REPORT:** None

34 **7. APPROVAL OF MINUTES:**

35 Motion/Second/Carried (Tregub/Wrenn) to approve the JSISHL Meeting Minutes from July 17,  
36 2018. Ayes: Lord, O’Keefe, Schildt, Tregub, Wrenn. Noes: None. Abstain: Wolfe. Absent:  
37 None (5-0-1-0)

38  
39 **8. FUTURE AGENDA ITEMS AND OTHER PLANNING-RELATED EVENTS:** None.

40 **AGENDA ITEMS**

41 **9. Discussion:** Adopt 2019 JSISHL Work Plan:

42 The Commission discussed a work plan for 2019 and developed a proposed schedule with  
43 meeting dates and topics that focus on objective standards for the implementation of State  
44 Housing Law. Below is a summary of that discussion:

45 January 17: Work Plan Development

46 March 27: Existing Objective Standard Framework

47 May 22: Density Standards and Density Bonus

48 September 25: Daylight, shadowing, and solar access

49 October 23: Views and other objective standards

50 December 12: Report out.

51 The Commissioners and the members of the public were encouraged to submit information and  
52 research related to future meeting topics. This work plan will result in a set of recommendations  
53 to parent commissions and/or City Council.

54 **PUBLIC COMMENT:** 1 speaker

55 **10. Discussion:** Renewing Democratized Planning in Berkeley

56 Commissioner Lord explained his memo and suggested modifications to the work plan  
57 developed during discussion of Agenda Item 9. The Commission added the topic of local  
58 overlay zones to the September and October meetings.

59 **PUBLIC COMMENT:** 1 speaker

60 Motion/Second/Carried (O’Keefe/Wolfe) to adopt the proposed 2019 workplan. Ayes: O’Keefe,  
61 Schildt, Tregub, Wolfe, Wrenn. Noes: Lord. Abstain: None. Absent: None (5-1-0-0)

62  
63 **11. Action:** Approve 2019 JSISHL Meetings Calendar:

64 The Commission discussed their availability and agreed on the following 2019 calendar:

65 January 17, 2019 (Wednesday)

66 March 27, 2019 (Wednesday)

67 May 22, 2019 (Wednesday)

68 September 25, 2019 (Wednesday)

69 October 23, 2019 (Wednesday)

70 December 12, 2019 (Thursday)

71 Motion/Second/Carried (O’Keefe/Tregub) to adopt the proposed 2019 calendar. Ayes: Lord,  
72 O’Keefe, Schildt, Tregub, Wolfe, Wrenn. Noes: None. Abstain: None. Absent: None  
73 (6-0-0-0)

74  
75 **12. Elections:** Elect 2019 JSISHL Chair and Vice Chair:

76 Motion/Second/Carried (Wolfe/O’Keefe) to Elect Chris Schildt as Chair and Igor Tregub as  
77 Vice Chair for 2019 JSISHL. Ayes: Lord, O’Keefe, Schildt, Tregub, Wolfe, Wrenn. Noes: None.  
78 Abstain: None. Absent: None (6-0-0-0)

79  
80 **The meeting was adjourned at 9: 03 p.m.**

81 **Commissioners in attendance: 6 of 6**

82 **Members in the public in attendance: 2**

83 **Public Speakers: 2**

84 **Length of the meeting: 1 hour and 58 minutes**



Parks and Waterfront Commission

ACTION CALENDAR  
November 9, 2021

To: Honorable Mayor and Members of the City Council

From: Parks and Waterfront Commission

Submitted by: Gordon Wozniak, Chairperson

Subject: Proposal to allocate revenues generated by the Transient Occupancy Tax in the Waterfront Area to the Marina Fund to avoid insolvency, rebuild its fund balance and to stabilize its finances

RECOMMENDATION

That Council adopt a Resolution adopting a policy that all Transient Occupancy Taxes (TOT hotel tax) generated at the Berkeley Waterfront be allocated to the City's Marina Enterprise Fund. All other property, sales, utility users, and parking taxes, as well as business license and franchise fees, would continue to be allocated to the City's General Fund.

POLICY COMMITTEE RECOMMENDATION

On September 23, 2021, the Budget & Finance Policy Committee took the following action: M/S/C (Harrison/Arreguin) to send the item to Council with a negative recommendation. Additionally, the committee would like to request a referral to the Budget & Finance Policy Committee to discuss and develop alternative revenue streams for the Marina Fund including a dedicated reserve.

Vote: All Ayes.

FINANCIAL IMPLICATIONS

Allocating funding from the Transient Occupancy Tax annually, generated at the Waterfront, will create a healthy Marina Fund that is able to operate, maintain, and keep safe the existing assets. The sizeable past and ongoing contributions from Waterfront-generated revenues to the City's General Fund should be taken into consideration when assessing the financial implications.

CURRENT SITUATION AND ITS EFFECTS

The area now comprising the Berkeley Waterfront was granted to the City by the State of California in 1913, as a grant of state tidelands. In 1962, the City obtained a state loan to develop the current marina with 1,000 slips, parking lots, launch ramps, restrooms, parks, and several commercial plots for lease.

- By 1966, 15 boat dock systems were constructed.
- By 1970, two restaurants, a hotel, and an office building were developed.

- By 1980, the two sailing clubs and sailing docks, the boat yard, and a third restaurant were developed.
- By 1991, the City landfill at the marina was capped and graded to become North Waterfront Park. In 1996, it was renamed Cesar Chavez Park.

The total area under City management includes the entrance to the Marina (University Avenue and the Bay Trail, from Frontage Road to Marina Blvd) and all the infrastructure and Marina waters west of Marina Blvd. In all, there are:

- 100 acres of open space and parks,
- over 1,000 berths in the Berkeley Marina,
- a large hotel, 4 restaurants,
- the Adventure Playground,
- Shorebird Nature Center,
- the Berkeley Marine Center boat yard,
- a two-story office building,
- a 4-lane public launch ramp,
- 9 restroom buildings, and
- 11 parking lots.

The Waterfront requires the daily administration of what essentially is a “small city”.

#### Marina Fund

***A requirement of the State Tidelands Grant is that revenue generated at the Waterfront be spent at the Waterfront.*** The Marina Enterprise Fund was set up to comply with this requirement for managing revenue and expenditures at the Berkeley Waterfront. Marina Revenues come primarily from boat slip rental fees and business leases, and a number of smaller sources. Community users of the open space and amenities at the Berkeley Waterfront such as independent fishermen, windsurfers, small boat users, tourists, walkers, runners, dogwalkers, and other park users do not provide direct income to the Marina Fund.

By FY2019, one-third of the total revenue generated annually at the Waterfront was being transferred to the General fund as follows:

- \$10.9 Million in Total Waterfront Revenue
- \$6.9 Million allocated to the Marina Fund
- \$4 Million allocated to the General Fund

In addition, \$0.59 Million was being transferred annually from the Marina Fund to the City’s internal service funds.

In FY2020, the Covid Pandemic decimated the hospitality industry and the lease portion of the Marina revenue. While revenues have plummeted during the pandemic, community use of recreation and open space at the Waterfront has soared.

Marina Fund Financial Sustainability

From FY18-20, the Marina Fund contributed ~\$11 Million to the General Fund. Now, the Marina Fund needs help from the General Fund to survive this pandemic-induced fiscal crisis.

**To immediately avoid the eminent insolvency of the Marina Fund, the TOT tax generated in the Waterfront should be allocated to the Marina Fund.**

Waterfront Capital Fund

The estimated \$87.5 M - \$131 M in future infrastructure costs are too large to be solved by stabilizing the Marina operations budget. To fund such large capital costs, a Reserve Fund needs to be created with new revenues developed as a result of the BMASP process that is underway.

Commission

At a regular meeting on March 10, 2021, the Parks and Waterfront Commission M/S/C to send this action to Council for consideration: (McGrath/Kamen/U). Ayes: Cox; Diehm; Kamen; Kawczynska; Landoni; McGrath; Skjerping; Srioudom; Wozniak; Noes: None; Absent: None; Leave of Absence: None.

ENVIRONMENTAL SUSTAINABILITY

No environmental impacts or opportunities were identified as a result of this recommendation.

RATIONALE FOR RECOMMENDATION

See body of report

ALTERNATIVE ACTIONS CONSIDERED

None

CITY MANAGER

The City Manager recommends referring the contents of this commission report to the budget process because this action will potentially impact revenue available to the General Fund. The Marina Fund revenue losses associated with Covid-19 are projected to exceed \$3.6M from FY20-23 in comparison to FY 19 and a potential funding source to offset actual and projected revenue losses is the American Rescue Plan. Additionally, City Council may want to explore other long-term revenue sources to stabilize the Marina Fund, as discussed during February 16, 2021 work session presentation on the Berkeley Marina Area Specific Plan.

CONTACT PERSON

Roger Miller, Secretary, Parks and Waterfront Commission, (510) 981-6704  
Gordon Wozniak, Chairperson, (510) 654-4103

Allocate Transient Occupancy Tax (TOT) generated at the Waterfront  
back to the Marina Fund

ACTION CALENDAR  
October 26, 2021

Attachments  
1: Resolution

RESOLUTION NO. ##,###-N.S.

ALLOCATE REVENUES GENERATED BY THE TRANSIENT OCCUPANCY TAX IN  
THE WATERFRONT AREA TO THE MARINA FUND TO AVOID INSOLVENCY,  
REBUILD ITS FUND BALANCE, AND STABILIZE ITS FINANCES

WHEREAS, the Parks and Waterfront Commission reviews the policies, projects, programs, planning efforts, activities, funding and the physical condition of parks, pools, camps, recreation centers, the Marina, and public greenery, and advises the City Council on these matters; and

WHEREAS, a requirement of the State Tidelands Grant is that revenue generated in the Waterfront be spent at the Waterfront; and

WHEREAS, in FY2019, one-third of the total revenue (\$10.9 million) generated annually at the Waterfront was transferred to the General Fund (GF) and an additional \$0.58 million was transferred to the City's Internal Service Funds; and

WHEREAS, in FY2020, Waterfront revenues have plummeted due the shutdown of the hospitality industry by the Covid Pandemic; and

WHEREAS, the Marina Fund is projected to be insolvent in FY2022 and beyond; and

WHEREAS, over the last three years, the revenues generated in the Waterfront Area contributed ~\$11 million to the City's General Fund; and

WHEREAS, Transient Occupancy Tax (TOT) was generated annually at the Waterfront during pre-pandemic times; and

WHEREAS, by allocating the TOT revenue generated at the Waterfront to the Marina fund, it could be made solvent; and

WHEREAS the Marina Fund is facing an unprecedented financial crisis, with more than \$100M of unfunded capital need and an annual structural deficit of \$1 million.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby adopts a policy that all Transient Occupancy Taxes (TOT hotel tax) generated at the Berkeley Waterfront be allocated to the City's Marina Enterprise Fund. All other property, sales, utility users, and parking taxes, as well as business license and franchise fees, would continue to be allocated to the City's General Fund.

NOW THEREFORE, BE IT FURTHER RESOLVED that all other property, sales, utility users, and parking taxes, as well as business license and franchise fees, would continue to be allocated to the General Fund.







Agenda & Rules Committee

### **ACTION CALENDAR**

November 9, 2021

*(Continued from October 26, 2021)*

To: Honorable Members of the City Council  
 From: Agenda & Rules Policy Committee: Mayor Jesse Arreguin and Councilmembers Sophie Hahn and Susan Wengraf  
 Subject: Amending the Berkeley Election Reform Act (BERA) Relating to Officeholder Accounts

### **RECOMMENDATION**

Take one of the following actions:

1. Refer a proposal to the Fair Campaign Practices Commission (FCPC) amending the Berkeley Election Reform Act (BERA), BMC Chapter 2.12, and Lobbyist Registration Act, BMC Chapter 2.09, to enact “a reasonable set of limitations and rules” to regulate the maintenance of officeholder accounts, as developed and referred for consideration by the Agenda and Rules Committee; or
2. Refer a proposal to the FCPC amending BERA, BMC Chapter 2.12, to prohibit Officeholder Accounts, as originally proposed by the Fair Campaign Practices Commission.

Pursuant to BMC Section 2.12.051.A, BERA may be amended by the “double green light” process. This process requires that the amendment first be adopted by a two-thirds vote of the FCPC and then adopted by a two-thirds vote of the City Council, following a public hearing. This item would submit a proposal to the FCPC for its consideration. If adopted by a two-thirds vote of the FCPC, the item would return to the Council for final adoption.

### **POLICY COMMITTEE RECOMMENDATION**

On March 29, 2021, the Agenda & Rules Policy Committee adopted the following action:<sup>1</sup> M/S/C (Wengraf/Arreguin) to send the item to Council with two proposed alternatives: 1) Councilmember Hahn’s proposal to regulate officeholder accounts [with modifications brought forward by Committee members], and 2) the Fair Campaign Practices Commission proposal to prohibit officeholder accounts; and to include the Commission’s analysis of regulating officeholder accounts in the item that goes to the full Council. Vote: All Ayes.

<sup>1</sup> [https://www.cityofberkeley.info/uploadedFiles/Clerk/City\\_Council/2021/03\\_Mar/Documents/03-29%20Minutes%20-%20Agenda%20Committee.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/City_Council/2021/03_Mar/Documents/03-29%20Minutes%20-%20Agenda%20Committee.pdf)

**BACKGROUND**

On February 4, 2020, the Fair Campaign Practices Commission (FCPC) submitted a recommendation to Council to adopt an ordinance amending the Berkeley Election Reform Act (BERA), BMC Chapter 2.12, to prohibit Officeholder Accounts.<sup>2</sup> Council took action to refer a discussion on Officeholder Accounts and Council District (D-13) Accounts to the Agenda & Rules Committee, to “consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the FCPC.”<sup>3</sup>

The Agenda & Rules Committee considered this referral with input from FCPC commissioners. The FCPC and Open Government Commission (OGC)<sup>4</sup> also submitted subsequent recommendations to Council related to this process, which were included as part of the discussion regarding officeholder and D-13 accounts. The OGC submitted a recommendation that a special temporary joint advisory committee be created consisting of members of the OGC and Council to review the practice of councilmembers making donations to community organizations from their D-13 accounts. This proposal was referred directly to the Agenda & Rules Committee on August 31, 2020. On January 11, 2021, the FCPC and OGC jointly submitted a proposal to the Council clarifying the desire to create a joint subcommittee of FCPC-OGC members and members of the Council to consider both regulation of officeholder accounts as well as D-13 account grant practices and expressing willingness to consider either prohibition or regulation of officeholder accounts. D-13 account grant practices have since been addressed separately by Council.<sup>5</sup>

The Agenda & Rules Committee discussed the question of officeholder accounts at multiple meetings in early 2021 with input from three FCPC-OGC commissioners (Chair Brad Smith, Vice Chair Jedidiah Tsang and Commissioner Patrick O’Donnell). On March 29, 2021, the Agenda & Rules Committee took action to send this item to Council with two proposed alternatives: 1) a proposal to regulate officeholder accounts in a manner based on existing regulation of campaign committees, and 2) the Fair

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<sup>2</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2020/02\\_Feb/Documents/2020-02-04\\_Special\\_Item\\_02\\_Amendments\\_to\\_the\\_Berkeley\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/02_Feb/Documents/2020-02-04_Special_Item_02_Amendments_to_the_Berkeley_pdf.aspx)

<sup>3</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2020/02\\_Feb/Documents/02-04\\_Special\\_Annotated\\_Agenda\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/02_Feb/Documents/02-04_Special_Annotated_Agenda_pdf.aspx)

<sup>4</sup> The OGC is composed of the same membership as the FCPC and the two bodies meet concurrently. The FCPC has jurisdiction over BERA while the OGC has broad authority to make recommendations to Council regarding “open and effective government.” (BMC § 2.06.190.A.2.) Therefore, proposals regarding the prohibition or regulation of officeholder accounts in BERA have been presented by the FCPC, while recommendations regarding D-13 accounts have been offered by the OGC.

<sup>5</sup> On February 8, 2021, the Agenda & Rules Committee took action to make a positive recommendation to the City Council on part two of the Commission recommendation to prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members. The Council approved this recommendation on March 9, 2021.

Campaign Practices Commission proposal to prohibit officeholder accounts. The Committee's action also required the Commission's analysis of regulating officeholder accounts to be included in the item that goes to the full Council.<sup>6</sup>

Officeholder accounts are currently allowed in the City of Berkeley, subject only to limitations provided in State Law. The Agenda & Rules Committee's proposal to regulate officeholder accounts would establish local rules that mirror and adapt Berkeley's existing, voter-approved regulations for campaign committees, including regulation of donations and reporting requirements, and narrow the uses for which officeholder account funds can be used.

Officeholder accounts are accounts an elected official can open, and raise funds for, to pay for expenses related to the office they hold.<sup>7</sup> They are not campaign accounts, and cannot be used for campaign purposes. The types of expenses officeholder accounts can be used for include research, conferences, events attended in the performance of government duties, printed newsletters, office supplies, travel related to official duties, and similar expenses. Cities can place limits on officeholder accounts, as Oakland has done.<sup>8</sup> Under State law, officeholder accounts must be registered as official committees, and adhere to strict public reporting requirements, like campaign accounts. These reporting requirements provide full transparency to the public about sources and uses of funds in officeholder accounts.

The FCPC's recommendation to outlaw officeholder accounts in Berkeley was set aside by the City Council on when it referred on February 4, 2020 to the Agenda & Rules Committee to "consider a reasonable set of limitations and rules for such [officeholder] accounts and bring back recommendations to the full Council."<sup>9</sup> Some members of the FCPC who participated in the Agenda & Rules Committee discussion continued to advocate for the original proposal to outlaw Officeholder Accounts, so the Committee acted to send both the Council-requested "reasonable set of limitations" and the FCPC's original recommendation back to the Council for consideration.

### FISCAL IMPACTS

Regulating the maintenance of officeholder accounts by councilmembers and the Mayor would have a moderate impact on staff time.

### CONTACT INFORMATION

Agenda & Rules Policy Committee: Jesse Arreguin, Mayor, (510) 981-7100;  
Councilmember Sophie Hahn, District 5, 510-682-5905 (cell); and Susan Wengraf,  
Councilmember, District 6, (510) 981-7160.

<sup>6</sup> [https://www.cityofberkeley.info/uploadedFiles/Clerk/City\\_Council/2021/03\\_Mar/Documents/03-29%20Minutes%20-%20Agenda%20Committee.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/City_Council/2021/03_Mar/Documents/03-29%20Minutes%20-%20Agenda%20Committee.pdf)

<sup>7</sup> <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter5/18531.62.pdf>

<sup>8</sup> <http://www2.oaklandnet.com/w/OAK052051>

<sup>9</sup> [https://www.cityofberkeley.info/Clerk/City\\_Council/2020/02\\_Feb/Documents/02-04\\_Special\\_Annotated\\_Agenda\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/02_Feb/Documents/02-04_Special_Annotated_Agenda_pdf.aspx)

ATTACHMENTS

1. Officeholder Accounts Proposal As Forwarded to the City Council by the Agenda Committee on March 29, 2021
2. Proposed Ordinance Amending the Berkeley Election Reform Act and Lobbyist Registration Act to Regulate Officeholder Committees
3. Fair Campaign Practices Commission Proposal to Prohibit Officeholder Accounts,  
[https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/03-29\\_Agenda\\_Committee\\_Agenda\\_Packet.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/03-29_Agenda_Committee_Agenda_Packet.aspx)

## Officeholder Accounts As Forwarded to the City Council by the Agenda Committee on March 29, 2021

This set of terms is presented as a basis to discuss a potential amendments to the Berkeley Election Reform Act (“BERA”) (BMC Ch. 2.12) to regulate the maintenance of officeholder accounts by elected officials in Berkeley. The proposal following elements are proposed for discussion by the Agenda Committee:

### General Requirements and Donation Limits

1. **Amend BERA to expressly permit the creation of officeholder accounts** by elected officials in Berkeley
2. Officeholder accounts would **be subject to the same donor requirements as campaign accounts under BERA:**
  - a. May only receive donations from natural persons.
  - b. Per-person donation limit set the same as the contribution limit under BERA (currently \$250; if BERA changes, so would these limits – idea is for them to always be parallel)
  - c. Etc. – All requirements and limitations on who can give, how much, and how donations can be made would be “by reference” to BERA and thus identical over time.
3. Officeholder accounts would be **subject to the same registration and reporting regime as campaign accounts under BERA**. State law currently requires Officeholder Accounts to report using the same forms as campaign accounts; this proposal would also incorporate the reporting requirements of BERA – for example lower thresholds for initial reporting, lower amounts reported, etc.
4. **Cumulative annual donations, not including an officeholder’s own donations to their officeholder account would be capped at fixed amounts**. Suggest the amount be set at the approximate cost of producing and mailing one newsletter to constituents, although use of funds would not be limited to that use (see below). Amount should be indexed.
5. As with campaign accounts, **an officeholder’s own donations to their officeholder account would not be subject to any limits** but would be reported. An officeholder would also still be allowed to spend their own money on officeholder expenses without using an officeholder account. This is a First Amendment issue that can’t be infringed upon.

### Complete Separation from Campaign Accounts and Expenditures

1. An officeholder would **not be allowed to simultaneously maintain an officeholder account and a campaign account of any kind:**
  - a. A winning candidate taking office would be required to close their campaign account before opening an officeholder account.

- b. An incumbent officeholder running for re-election or running for any other elected position – local, state, or federal – would be required to close their officeholder account before opening a campaign account.
- 2. An officeholder could not redesignate their officeholder account as a campaign account or use any officeholder funds to pay campaign expenses, ever.
- 3. Officeholder account funds could not be transferred to or from a candidate committee account for any elective office, local, state or federal.
- 4. “Extra” funds in an officeholder account could be used only for a legitimate officeholder expense, refunded to donors on a pro rata basis, or donated to the City’s General Fund.

### **Impermissible and Permissible Uses of Officeholder Funds**

- 5. **Officeholder accounts would not be used for the following** expenditures:
  - a. Expenditures in connection with an election for any city, county, regional, state, or federal elective office or ballot measure
  - b. Campaign consulting, research, polling, and similar expenditures related to any campaign
  - c. Membership in athletic, social, fraternal, veteran, or religious organizations
  - d. Supplemental compensation for employees for performance of their ordinary duties
  - e. Any expenditure that would violate BERA or state law
- 6. **Officeholder accounts would only be used for the following** expenditures (list likely needs to be honed/expanded – this list reflects narrowing and adaptation of the Oakland ordinance, which is overly broad):
  - f. Office equipment, furnishings, and office supplies
  - g. Officeholder communications not related to a campaign, including but not limited to:
    - i. Mailings, newsletters, and other communications, whether by electronic or traditional media
    - ii. Websites and communications by all media including email, publication, and social media
    - iii. Email and address management
    - iv. Professional/consulting services and/or staff time related to communications.
  - h. Registration, travel, lodging, meals, and related expenses for attending an activity which supports a legislative or governmental purpose, including activities which involve international travel, including but not limited to:
    - i. Conferences, meetings, receptions, sister-city visits, and other events
    - ii. Membership and participation in programs for civic, service, or professional organizations
    - iii. Educational, training, and professional development courses and events

when incurred by the officeholder, their staff, or a community representative of the officeholder (but not a family member or an individual whose organization or who themselves is subject to registration under the City's Lobbyist Ordinance)

- i. Fundraising for the officeholder account.
- j. Consulting, research, surveys, photographic or similar services not related to a campaign.
- k. Expressions of congratulations, appreciation or condolences to constituents or other persons the officeholder communicates/works with in their official capacity.
- l. Salaries or other compensation for consultants/staff working on officeholder activities, including for time spent by regular staff on officeholder activities separate/different from their ordinary duties.
- m. Tax liabilities and other official fees/costs incurred by the officeholder account.
- n. Accounting, legal, and other professional services provided to the officeholder account.
- o. Attorneys' fees and other costs related to administrative procedures, litigation, or other processes arising from the officeholder's activities, duties, or status as an elected officer.

### **Termination of Account on Leaving Office (+ Not running for any office)**

- 1. An officeholder would be **required to terminate their account within 90 days after leaving office.**
- 2. An officeholder **could not make expenditures after their last day in office** except to pay outstanding officeholder debts, repay donations on a pro rata basis, or donate remaining funds to the City's general fund.
- 3. Officeholders running for another office, local, state, or federal, would be required to close their officeholder account before opening a campaign account (see above).

### **Enforcement**

- 1. Violations of the officeholder account rules **would be subject to all enforcement provisions under BERA**, including enforcement by the Fair Campaign Practices Commission ("FCPC").

ORDINANCE NO. -N.S.

AMENDING THE BERKELEY ELECTION REFORM ACT AND  
LOBBYIST REGISTRATION ACT TO REGULATE OFFICEHOLDER  
COMMITTEES

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

Section 1. That Berkeley Municipal Code section 2.09.220 is amended to read as follows:

**2.09.220 Restrictions on payments and expenses benefiting local public officials.**

A. No local government lobbyist or a registered client shall make any payment or incur any expense, including any gift of travel, that directly benefits an elected city officeholder, candidate for elected city office, a designated employee, or a member of the immediate family of one of these individuals, in which the cumulative value of such payments or expenses exceeds \$240 during any calendar year. This \$240 limit may be adjusted every four years by the OGC to account for inflation. The payments and expenses specified in subsections 2.09.220(A)-(D) include gifts, honoraria and any other form of compensation but do not include:

1. gifts of food or refreshment worth \$25 or less per occasion, if the local governmental lobbyist is a 501 (c)(3) nonprofit organization, the gift of food or refreshment is offered in connection with a public event held by the 501 (c)(3) nonprofit organization, and the same gift of food or refreshment is made available to all attendees of the public event;
2. payments or expenses that, within thirty (30) days after receipt, are returned unused or are reimbursed;
3. gifts of food or beverage worth \$25 or less per occasion, if said gift is provided in the home of an individual local governmental lobbyist or individual local governmental lobbyist's registered client when the individual or member of the individual's family is present;
4. a pass or ticket to a fundraising event for a campaign committee or candidate, or for an organization exempt from taxation under Section 501 (c)(3) of the Internal Revenue Code;
5. informational material;
6. campaign or officeholder contributions not to exceed the limits imposed by the Berkeley Election Reform Act or state law, as applicable; and
7. salaries, consulting fees or other payments for services rendered or bargained



for. No other exception to, or exclusion from, the definition of gift or honoraria contained in the Political Reform Act of 1974 as amended, and the regulations issued pursuant thereto, shall apply to this section.

For purposes of the gift limits imposed by subsections (A)-(C), gifts shall be aggregated set forth in California Code of Regulations, Title 2, Section 18945.1, as it may hereafter be amended.

B. No lobbyist or a lobbyist's registered client shall make any payment to a third-party for the purpose of making any payment or incurring any expense, including any gift of travel, that directly benefits an elected city officeholder, candidate for elected city office, a designated employee, or a member of the immediate family of one of these individuals.

C. No elected city officeholder, candidate for elected city office, or designated employee may accept or solicit any payment or expense, including any gift of travel, from any lobbyist for the individual's personal benefit or for the personal benefit of a member of the immediate family of one of these individuals.

D. No elected city officeholder, candidate for elected city office, or designated employee may accept or solicit any payment or expense, including any gift of travel, from a third-party if the officer knows or has reason to know that the third-party is providing the payment or expense on behalf of a lobbyist.

Section 2. That Berkeley Municipal Code section 2.12.100 is amended to read as follows:

**Section 2.12.100 Contribution.**

A. "Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or voter approval of one or more measures. The term "contribution" includes the purchase of tickets for events such as dinners, luncheons, rallies and similar fund-raising events; a candidate's own money or property used on behalf of his or her candidacy; the granting to a candidate or committee of discounts or rebates not available to the general public; and payments for the services of any person serving on behalf of a candidate or committee, when such payments are not made from contributions the candidate or committee must otherwise report under the terms of this chapter. The term "contribution" further includes any transfer, gift, loan, advance, deposit, forgiveness of indebtedness, payment of a debt by a third party, pledge, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, received directly or indirectly by a

committee from another committee. The term "contribution" shall not include a gift of service or labor, but shall include service or labor for which a payment is made, nor shall the term "contribution" include a gift of the use of personal or real property where the value of such use is not in excess of fifty dollars, nor shall it include food and beverages the value of which for any one event is no more than fifty dollars.

B. In the case of an officeholder committee, "contribution" means a monetary payment to an officeholder committee to be used for expenses associated with holding City office as provided in Article 9 of this Chapter.

Section 3. That Berkeley Municipal Code section 2.12.130 is amended to read as follows:

**Section 2.12.130 Expenditure.**

A. "Expenditure" means a payment, pledge or promise of payment of money or anything of value or other obligation, whether or not legally enforceable, for goods, materials, services or facilities in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or adoption of one or more measures. The term "expenditure" includes any transfer, payment, gift, loan, advance, deposit, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly by one committee to another committee. "Expenditure" also includes the forgiving of a loan or the repayment of a loan by a third party.

B. In the case of an officeholder committee, "expenditure" means payment of money by an officeholder committee for expenses associated with holding elective office in the City of Berkeley as provided in Article 9 of this Chapter.

Section 4. That Berkeley Municipal Code section 2.12.157 is added to read as follows:

**Section 2.12.157 Officeholder committee.**

"Officeholder committee" means a committee established by an Elective Officer of the City of Berkeley, as defined in Article V Section 8 of the Charter of the City of Berkeley, to receive contributions and make expenditures associated with holding elective office in the City of Berkeley as provided in Article 9 of this chapter.

Section 5. That Berkeley Municipal Code Section 2.12.545 is amended to read as follows:

**Section 2.12.545 Cost of living adjustments.**

The Commission shall adjust the dollar amounts specified in Sections 2.12.167, 2.12.500.A.3, 2.12.505.B and 2.12.530.B.3.b and 2.12.602 for cost of living changes pursuant to Section 2.12.075 in January of every odd-numbered year following Council implementation. Such adjustments shall be rounded to the nearest ten dollars (\$10) with respect to Sections 2.12.167, 2.12.500.A.3 and 2.12.530.B.3.b and one thousand dollars (\$1,000) with respect to Sections 2.12.505.B and 2.12.602.

Section 6. That Article 9 of Chapter 2.12 of the Berkeley Municipal Code is added to read as follows

### **Article 9. Officeholder Committees**

#### **Section. 2.12.600 Regulation of officeholder committees.**

- A. Elective Officers (the “officeholder” or “officeholders”) shall each be permitted to establish one officeholder committee, as defined in Section 2.12.157.
- B. Nothing in this section shall require an officeholder to open an officeholder committee or, if they have established an officeholder committee, to contribute to their officeholder committee to spend personal funds on their own officeholder expenses.
- C. Expenditures of an officeholder’s personal funds for their own officeholder expenses which are not contributed to an officeholder committee are not reportable under this chapter.

#### **Section 2.12.602 Cumulative contribution limits**

- A. For each Elected Officer representing a district within the City of Berkeley, total contributions to an officeholder committee from all contributors other than the officeholder shall not exceed five thousand dollars (\$5,000) in the aggregate per calendar year.
- B. For citywide Elected Officers, total contributions to an officeholder committee from all contributors other than the officeholder shall not exceed in the aggregate per calendar year an amount equal to four times the maximum allowed for elected officers representing districts, as provided in Section 2.12.602.A

#### **Section 2.12.604 Prohibited officeholder expenditures**

An officeholder committee shall not make expenditures for the following purposes:

- A. Expenditures in connection with an election for any city, county, regional, state or federal elective office or in connection with a ballot measure.
- B. Expenditures for campaign consulting, research, polling, photographic or similar services for election to city, county, regional, state or federal elective office.
- C. Membership in any athletic, social, fraternal, veterans or religious organization.
- D. Supplemental compensation for officeholder staff for performance of duties required or expected of the person in the regular course or hours of their employment as a City official or employee.
- E. Any expenditure that would violate any provision of the Berkeley Election Reform Act (BMC Chapter 2.12.) or the California Political Reform Act (Cal. Gov. Code § 81000 et seq.), including but not limited to the gift laws pertaining to travel payments, advancements and reimbursements under Government Code section 89506 and provisions related to permissible expenditures which serve legislative or governmental purposes under Government Code sections 89512 through 89519.

**Section 2.12.606 Permissible officeholder expenditures**

An officeholder committee may make expenditures only for the following purposes:

- A. Expenditures for fundraising for the officeholder committee.
- B. Expenditures for office equipment, furnishings and office supplies used for governmental or legislative purposes.
- C. Expenditures for compensation of staff, consultants, or other persons employed by the officeholder for time spent on officeholder activities, provided that such expenditures are not prohibited by Section 2.12.604.D.
- D. Expenditures for research, surveys, photographic, or similar services, provided such services are only for officeholder purposes.
- E. Expenditures for attendance, travel, lodging, meals and other related expenses which serve a legislative or governmental purpose by the officeholder and members of the officeholder's City staff or others employed by the officeholder to perform duties related to officeholder activities. Such permissible expenditures shall include but not be limited to:
  - 1. Expenditures for attendance at conferences, meetings, receptions, and other events occurring within or outside of the United States, including but not limited to registration or other attendance fees, travel, lodging, food, and

incidentals;

2. Expenditures for membership and participation in programs for civic, service, or professional organizations, if such membership bears a reasonable relationship to a governmental or legislative purpose; and
  3. Expenditures for educational courses or events reasonably related to a governmental or legislative purpose.
- F. Expenditures for constituent and community communications, including but not limited to:
1. Mailings, newsletters and other paper, electronic, or other communications which provide information related to community events, an officeholder's governmental duties, an officeholder's position on a particular matter, or any other matter of public concern or interest;
  2. An officeholder's website and social media;
  3. Email and address list management.
- G. Expenditures for expressions of congratulations, appreciation or condolences sent to constituents, employees, governmental officials, or other persons with whom the officeholder communicates in their official capacity.
- H. Expenditures for payment of tax liabilities incurred as a result of permissible officeholder committee transactions.
- I. Expenditures for accounting, legal, professional, administrative, and similar services provided to the officeholder committee.
- J. Expenditures for attorneys' fees and other costs related to litigation, administrative procedures, or other processes arising directly from the officeholder committee's activities or the officeholder's activities, duties, or status as an elected officer.

### **Section 2.12.608 Prohibitions on transfer or reallocation of funds**

The following restrictions apply to the transfer or reallocation of officeholder funds:

- A. No funds may be contributed, redesignated, or transferred to an officeholder committee from any campaign committee for any city, county, regional, state, or federal elective office or ballot measure, or any other political committee.
- B. No funds may be contributed, redesignated, or transferred from an officeholder

committee to any candidate or campaign committee for any city, county, regional, state, or federal elective office or ballot measure, or any other political committee.

- C. No officeholder committee may be redesignated as a campaign committee for any city, county, regional, state, or federal elective office or ballot measure.
- D. No campaign committee for any city, county, regional, state, or federal elective office or ballot measure may be redesignated as an officeholder committee.

**Section 2.12.610 Prohibition on simultaneously maintaining officeholder and campaign committees**

- A. An officeholder may not simultaneously maintain an officeholder committee and a campaign committee for any city, county, regional, state or federal elective office.
- B. A candidate who is elected to any elective office in Berkeley must terminate their campaign committee before opening an officeholder committee.
- C. An officeholder must terminate any open officeholder committee prior to filing a Statement of Organization or equivalent initial filing for a campaign committee for any city, county, regional, state, or federal elective office.

For officeholders filing a Statement of Organization with the City Clerk to form a campaign committee for a City of Berkeley office, the Clerk shall provide notice of the need to close any open officeholder committee prior to accepting the campaign committee Statement of Organization.

**Section 2.12.612 Termination of officeholder committees upon leaving office**

- A. An officeholder who does not file a Statement of Organization or equivalent initial filing to seek a subsequent city, county, regional, state, or federal elective office shall terminate their officeholder committee within 90 days of leaving office.
- B. Following the date of leaving office, an officeholder shall not make any new expenditures from their officeholder committee except for the following purposes:
  - 1. Paying for legitimate, outstanding officeholder expenses accrued on or prior to the date of leaving office.
  - 2. Repaying contributions to contributors to the officeholder committee on a pro rata basis.
  - 3. Donating funds to the City's general fund.

**2.12.615 Limits and requirements for contributions and expenditures**

- A. The limit on cumulative contributions to an officeholder committee by a person other than the officeholder in a calendar year shall be the same as the limit on contributions to a candidate with respect to a single election under Section 2.12.415. Contributions to a candidate shall not be counted against the limit on contributions to an officeholder committee in the same calendar year.
- B. Officeholder committees shall be subject to the limits on contributions from organizations and entities to candidates and committees under Section 2.12.440.
- C. Nothing in this Article shall limit the amount an officeholder may contribute to their own officeholder committee or spend on officeholder expenses either through or not through an officeholder committee.
- D. All requirements and prohibitions for campaign contributions and expenditures under Sections 2.12.300, 2.12.305, 2.12.310, 2.12.315, and 2.12.320 shall apply to officeholder committees.

**2.12.645 Officeholder Committee Treasurer**

Each officeholder committee shall appoint a committee treasurer and shall comply with all requirements for campaign committee treasurers under section 2.12.245.

**2.12.650 Officeholder expenditure and contribution account – Establishment required – Procedure for use**

An officeholder committee treasurer shall establish and manage a checking account. All provisions of Section 2.12.250 regarding the establishment and use of campaign accounts shall also apply to the establishment and use of officeholder committee checking accounts, unless otherwise provided in this Article.

**2.12.655 Statement of organization – Committee required to file.**

- A. Every officeholder committee shall file with the City Clerk a statement of organization before accepting contributions.
- B. The date on which an officeholder committee is formed by filing a statement of organization shall determine the officeholder committee's obligation to file statements and reports required by this chapter.

**2.12.660 Statement of organization – information required**

The statement of organization required by Section 2.12.655 shall include:

- A. The name, street address and telephone number of the officeholder committee;
- B. The name of the officeholder;
- C. The full name, street address and telephone number of the treasurer and other principal officers;
- D. The elected office held by the officeholder;
- E. The account number and name of the bank at which the checking account, required by Section 2.12.650, is maintained; if the information required by this section is unavailable at the time of filing the statement of organization, the filer shall promptly submit an amended statement after such information becomes available;
- F. The cash on hand at the time of filing the statement of organization;
- G. Such other information as shall be required by the rules or regulations of the commission consistent with the purposes and provisions of this chapter.

**Section 2.12.665 Statement of organization--Change of information--Amendment required.**

Whenever there is a change in any of the information contained in the statement of organization, an amendment shall be filed within ten days to reflect the change.

**Section 2.12.670 Officeholder statements – filing requirements**

- A. Each officeholder committee statement shall be filed in accordance with the filing dates prescribed by state law for campaign committee statements. If state law does not establish the filing dates for campaign statements, the commission shall set the necessary filing dates.

**Section 2.12.675 Officeholder statements - Verification**

- A. Reports and statements required by this Article shall be subject to the filing requirement of Sections 2.12.025, 2.12.030, 2.12.032, 2.12.033, 2.12.035, 2.12.040, 2.12.045 and 2.12.050.
- B. An officeholder shall verify his or her officeholder statement. The verification shall be in accordance with the provisions of Section 2.12.025 except that it shall state that they have made reasonable inquiry into the truthfulness and completeness of such officeholder statement and that to the best of their knowledge, the treasurer of the officeholder committee used all reasonable diligence in the preparation of the committee's statement. This section does not relieve the treasurer of any officeholder committee from the obligation to verify each officeholder statement filed pursuant to Section 2.12.025.



**Section 2.12.680 Officeholder Statement – Information required**

Officeholder committee statements required by this article shall include all applicable information required for campaign committee statements by Section 2.12.280.

**Section 2.12.685 Enforcement**

Violations of this article involving the unlawful use of officeholder committees are subject to the enforcement procedures and penalties in Article 7 of this chapter.

## MEMORANDUM

DATE: March 29, 2021

TO: Mayor Jesse Arreguin and Councilmembers Sophie Hahn and Susan Weingraf, Members of the Council Agenda and Rules Committee

FROM: Brad Smith, Patrick O'Donnell and Jedidiah Tsang, Delegation from the Fair Campaign Practices and Open Government Commissions

SUBJECT: Officeholder Accounts

Two main approaches have been considered regarding local Officeholder Accounts in California. The first, adopted by the City of San Jose, would prohibit these accounts. The second, adopted by the city of Oakland, would permit these accounts but regulate them.

For the reasons discussed below, the FCPC previously recommended that Officeholder Accounts be prohibited (Exhibit 3). However, the Council decided in February 2020 not to approve the FCPC's recommendation and referred the issue of Officeholder Accounts, along with concomitant issues related to D-13 accounts, to the Council's Agenda and Rules Committee.

The Fair Campaign Practices and Open Government Commissions have been studying Officeholder and D-13 Accounts since 2019. At its regular meeting on November 21, 2019, the FCPC voted without opposition to recommend amendments to the Berkeley Election Reform Act (BERA) that would prohibit Officeholder Accounts. The FCPC's recommendation was presented to the City Council at a February 4, 2020 special meeting. (A copy of the Report to Council is attached as Exhibit 3.)

Although the Council did not approve the FCPC's recommendations at that time and is considering alternatives that would allow for regulated Officeholder Accounts, a discussion in which the FCPC is glad to participate, the FCPC continues to believe that the prohibition of such accounts may ultimately be the preferable solution.

Briefly, our reasons for recommending prohibiting Officeholder Accounts are as follows:

1. Donations to an elected official's Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.
2. The City of San Jose has prohibited Officeholder Accounts (Section 12.06.810) since January 2008, providing as a rationale "to prevent the perception by the public that such contributions may give rise to undue or improper influence over elected officials" (Section 12.06.1100).

3. There are a number of permissible expenditures that could be made from Officeholder Accounts, now made from the Councilmember's discretionary council office budget (D-13 account), that put the elected official in a favorable light. Such expenditures include contributions to nonprofit organizations and newsletters mailed to constituents related to events, information or an officeholder's position on matters before the Council. We are not arguing these expenditures should be prohibited, only not paid for by funds collected in Officeholder Accounts.

4. As evidenced by contributions to nonprofit organizations from the Councilmember's D-13 accounts, which in total increased from \$50,938 in FY 2017 to \$113,526 in FY2018, enough funds are now available to Councilmembers to cover office expenses. It stretches the imagination to see donations to nonprofit organizations as an "office expense." If not enough funds are available for office expenses, the allocation to the D-13 accounts should be increased by the Council rather than relying on funds solicited from donors for an Officeholder Account.

5. Members of the FCPC are concerned about the amount of staff time required to track paperwork required for the administration of Officeholder Accounts and to assist in the enforcement process.

6. Members of the FCPC have discussed concerns that Councilmembers from wealthier areas of the City will have an easier time of raising funds for Officeholder Accounts.

7. Finally, we note the Officeholder Account has been rarely used in Berkeley, only once in the last several years that we are aware of.

While we look forward to a good, frank discussions and careful consideration of the alternative of permitting and regulating Officeholder Accounts, we respectfully request that Council members continue to consider that a prohibition of these accounts may, in the end, be the preferable approach.

Exhibit 1. Although the FCPC continues to support prohibition, it has prepared a draft version of an ordinance that would allow for regulated Officeholder Accounts. This draft identifies the issues that a regulated approach, if pursued, would need to address.

Exhibit 2. RESOLUTION NO. 67,992-N.S. (City Council Expenditures and Reimbursement Policies), referred to in the proposed language for changes to BERA to regulate Officeholder Accounts.

Exhibit 3. Language for amending the Berkeley Election Reform Act to prohibit Officeholder Accounts included in the FCPC submission to the City Council of February 4, 2020.

[DRAFT]

[Annotations are in RED. These include ISSUES for discussion and RECOMMENDATIONS of the three FCPC members participating in the joint meetings.]

ORDINANCE NO. -N.S.

AMENDING THE BERKELEY ELECTION REFORM ACT TO REGULATE OFFICEHOLDER ACCOUNTS

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

Section 1. That the Berkeley Municipal Code section 2.12.157 is added to read as follows:

**Section 2.12.157 Officeholder Account.**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Article 9 of Chapter 2.12 of the Berkeley Municipal Code is added to read as follows

Article 9. Officeholder Accounts

**Section. 2.12.600 Regulation of Officeholder Accounts.**

A. The Mayor and Council members (the “officeholder” or “office holders”) shall each be permitted to establish one Officeholder Account, as defined in section 2.12.157.

ISSUE: What limitations should be placed on which public officials may be authorized to open Officeholder Accounts? Currently, Berkeley law is silent on this issue, as it is generally with respect to matters relating to Officeholder Accounts. Should the authorization to have Officeholder Accounts be limited to the Mayor and Council members?

State law applies to “elected state officeholder[s],” which includes the Governor, members of the state senate and assembly, and “other statewide elected official[s] other than the Governor.” (Gov. Code sec.85316(b)(1).)

RECOMMENDATION: Amendments to BERA authorizing Officeholder Accounts should be limited to the offices of Mayor and members of the City Council. Extending the authorization more broadly appears to other city officeholders at this time appears to be fiscally unnecessary and would impose significant burdens on the clerk’s office and the FCPC, which would be responsible for compliance with reporting requirements and the enforcement of the laws relating to Officeholder Accounts. If Berkeley’s experience with Officeholder Accounts proves to be positive, BERA could be amended in the future to expand the categories of elected officials authorized to establish Officeholder Accounts.

B. All donations deposited into an Officeholder Account shall be deemed to be held in trust solely for expenses associated with holding the office currently held by the elected city

officer. For the purpose of this section, “donation” means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, in support of the office currently held by an elected official.

ISSUE: This draft uses the term “donation” throughout new section 2.12.600 instead of “contribution.” The use of the term “donation” in the proposed new section of the BERA reflects that funds made for Officeholder Accounts are different from campaign contributions; prevents making all the legal provisions applicable to campaign fund arguably applicable to officeholder donations; and avoids confusion in how the funds for this specific purpose are treated.

RECOMMENDATION: Include the new definition of “donation” in this section and use it – and related terms such as “donor” – consistently throughout, instead of using the term “contribution” in the new section on Officeholder Accounts.

C. Only a natural person who is a resident of the City may make a donation to an Officeholder Account.

ISSUE: To prevent undue influence in election campaigns, BERA currently contains limitations on who may make contributions to such campaigns. Proposed new paragraph C. would provide a similar limitation for donations to Officeholder Accounts. Specifically, like the limitation similar in the Berkeley Elections Reform Act (BERA sec. 2.12.167.), it would limit donations to Officeholder Accounts to natural persons residing in Berkeley.

There is a need for an express provision on this subject to be included in the proposed amendments. As currently written, neither of the BERA limitations relating to campaign contributions would apply by their own terms to donations to Officeholder Accounts nor would a cross-reference work.

The limitation in the Berkeley Election Reform Act to natural person residing in Berkeley is part of the definition of “qualifying contribution” to be eligible for public financing (BERA sec. 2.12.167); and so would not apply to Officeholder Accounts. The limitation in BERA section 2.12.440 prohibits “contributions” by any “proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, including non-profit corporations, or labor union”; but such contributions are prohibited only to “any candidate or committee (supporting or opposing any candidate)” and so would not apply to Officeholder Accounts. Cross-references to these sections would be confusing since by their own terms the referenced sections apply only to campaign contributions, and not to donations to Officeholder Accounts.

RECOMMENDATION: The proposed language that would expressly limit the persons eligible to make donations to “natural persons who are residents of the City of Berkeley” should be adopted. This will avoid undue influence by entities and persons outside Berkeley whose donations might improperly influence officeholders.

D. Donations to an Officeholder Account must be made by a separate check or other separate written instrument. Single donations may not be divided between the Officeholder Account and any candidate committee or other entity.

E. No donor shall make, and no elected officer shall receive from a donor, a donation or donations under this section totaling more than fifty [or two-hundred and fifty] dollars (\$50.00 [or \$250.00]) per person for the calendar year. "Donor" means a natural person who is a resident of the City who makes a donation as defined in paragraph B.

ISSUE: Any regulated scheme for Officeholder Accounts should include a limit on the amount of that each individual is permitted to donate each year. The amount of the individual donations permitted each year is an issue that the Council and the FCPC need to decide, as well as the manner in which this limit is prescribed.

The California state statute on Officeholder Accounts provides explicit limits on the amount that a person is permitted to make for each officeholder per calendar year (e.g., \$3,000 for Senate and Assembly members and \$20,000 for Governor). (Gov. Code sec. 85316(b)(1)(A)-(B).)

The proposed draft amendments to the BERA, above, currently provide for a limit on donations in the range of \$50-\$250; the exact amount is an issue to be determined. Assuming the amount chosen is \$250, this amount could be explicitly placed in the ordinance, as the draft does. Alternatively, the amount might be specified by cross-reference to the maximum campaign amount permitted under BERA (e.g., by a cross-reference stating the amounts of any individual annual donation shall not exceed the amount of a campaign contribution permitted for a single election under BERA section 2.12.415).]

RECOMMENDATION: An explicit amount should be included in the new section of BERA on Officeholder Accounts. This will make the officeholder section—including the exact amount of the donation limit—clear and easy to understand. If in the future the campaign limits under BERA are increased and it makes sense also to increase the amount of the permitted annual individual donations to Officeholder Accounts to a similar (or other) amount, the permissible amount of the donations can be revised at that time.

F. For the office of Mayor, total donations to an Officeholder Account from all donors shall not exceed ten thousand dollars (\$10,000.00) in the aggregate per calendar year. For each member of the City Council, total donations to an Officeholder Account from all donors shall not exceed five thousand dollars (\$5,000.00) in the aggregate per calendar year.

ISSUE: Any regulated scheme for Officeholder Accounts should also include a limit on the total amount of donations from all donors that can be contributed to an officeholder each year. The amount of the total "cap" is an issue that the Council and the FCPC need to decide.

RECOMMENDATION: The total aggregate donations permitted to be made to specific officeholders in Berkeley should be proportional to their offices' size, scope, and needs.

G. All donations received for, and expenditures made from, an Officeholder Account during a calendar year shall be reported at least annually on the date or dates prescribed by the FCPC and the report shall be made available to the public promptly thereafter. The FCPC shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer's Officeholder Account. The forms shall be filed electronically. The information on the form or forms shall be verified by the officeholder. The information that shall be included in the Officeholder Account report shall include the following:

1. The name of the officeholder and the office held;
2. The reporting period covered by the report;
3. A description of all receipts and expenditures.
4. The full name of each donor from whom a donation or donations has been received together with their street address, occupation, and the name of their employer, if any, or the principal place of business if they are self-employed; the amount which they donated; the date on which the each donation was received during the period covered by the report; and the cumulative amount that the donor donated. Loans received shall be set forth in a separate schedule and the foregoing information shall be stated with regard to each lender, together with the date and amount of the loan, and if the loan has been repaid, the date of the payment and by whom paid;
5. The full name and street address of each person to whom an expenditure or expenditures have been made, together with the amount of each separate expenditure to each person during the period covered by the report; a description of the purpose for which the expenditure was made; and the full name and street address of the person receiving the expenditure.
6. Under the heading "receipts," the total amount of donations received, and under the heading "expenditures," the total amount of expenditures made during the reporting period and cumulative amount of such totals;
7. The balance of cash and cash equivalents, including the amounts in the officeholder bank account, at the beginning and end of each period covered by the report.

ISSUE: The amended BERA provisions on Officeholder Accounts (Section 2.12.600.G.1-7, above), like those for campaign statements (see BERA sec. 2.12.200 A.-K.), would specify the information that must be disclosed. In new section 2.12.600, the provisions have been tailored to address donations, donors, donors' names and addresses, and so forth. Having these requirements specified in the ordinance will provide the legal foundation for the information requested about Officeholder Accounts on statements or forms. Also, having these requirements in the ordinance will make it possible for the City more easily to add or modify the information required on statements.

Subsection G. also provides that the FCPC shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer's Officeholder Account. This would permit, but not require, the City to require officeholders to use California Form 460 or 470 to comply with the reporting requirements. This flexibility is important so that the City will be able to exercise its discretion as to what information needs to be reported about donations to, and expenditures from, Officeholder Accounts.

Finally, this section provides that the commission shall prescribe the time for filing the forms and that the forms shall be verified and filed electronically. These provisions will improve the effectiveness of the reporting on Officeholder Accounts.

RECOMMENDATION: Section G. should be adopted as proposed for the reasons stated above.

H. Expenditures from an Officeholder Account may be made only for lawful officeholder

purposes, and may not be used for any of the purposes prohibited in subsections J. and K. of this section.

ISSUE: This provision clarifies the intent of these amendments—that they authorize “true” Officeholder Accounts whose purpose is strictly limited to lawful officeholder purposes—and are not intended for any other broader purposes. This approach should help officeholders avoid the pitfalls of running afoul of campaign finance laws (as warned against in past opinions by the Berkeley City Attorney).

RECOMMENDATION: Section H. should be adopted as proposed for the reasons stated above.

I. Allowable expenses from an Officeholder Account are limited to expenses for travel, meals, and lodging incurred in connection with the following types of activities:

1. Communicating with representatives of local, regional, state and national governments on City policy positions;
2. Attending educational seminars designed to improve officials’ skill and information levels, provided that a brief report of such seminar shall be made by the Mayor and Council at a subsequent Council meeting;
3. Participating in local, regional, state and national organizations of cities whose activities affect the City’s interests;
4. Recognizing service to the City (for example, thanking a longtime employee with a retirement gift or celebration of normal value and cost);
5. Attending City events; or events sponsored by organizations or entities whose activities affect the City’s interests where the primary purpose of the event is to discuss subjects which relate to City business;
6. Implementing City approved policies; and
7. Meals where the primary purpose of the meal is to conduct City-related business (other than simply meeting constituents) as long as the amount of such meal does not exceed the daily maximum set forth in city, state, and federal standards for when meal reimbursement may be allowed.

J. Expenditures from an Officeholder Account shall not be used for any of the following types of activities:

- 1 The personal portion of any trip, such as where the official is on his/her own vacation activities;
2. Political contributions or attendance at political or charitable events;
3. Family expenses, including partner’s expenses when accompanying the official on agency-related business, as well as children or pet-related expenses;
4. Entertainment expenses, including theater, movies (either in-room or at the theater), sporting events (including gym, massage, and or golf related expenses); or other recreational and cultural events;
5. Alcoholic beverages;
6. Non-mileage personal automobile expenses, including repairs, traffic, citations, insurance or gasoline; and
7. Personal losses incurred while on City Business.

RECOMMENDATION: Sections I. and J. should be based on the list of Authorized Activities and Unauthorized Expenses in Sections IIA. and B. of the City Council Expenditure and Reimbursement Policies, Resolution No. 67,992—N.S. (“Policies”). The lists identified in the Policies are thoughtful, carefully prepared lists of which expenses are permissible or impermissible for officeholders under current law. The policies were unanimously adopted



by the Berkeley City Council on May 30, 2017. For the purposes of the proposed ordinance on Officeholder Accounts, the lists in the Policies are more appropriate for adoption than the lists developed by the Oakland City Council that appear to be based largely on state laws relating to on campaign expenditures.

I. Prohibitions:

1. No funds may be contributed or transferred from an Officeholder Account to any candidate or committee, as defined in sections 2.12.085 and 2.12.095 of this chapter, including to any committee in which the officeholder is a candidate. An officeholder may not redesignate his or her Officeholder Account as a committee for a future term of the same office or redesignate his or her Officeholder Account funds to be used as campaign funds by his or her committee for a future term of the same office.

2. No funds may be used from an Officeholder Account to pay any campaign expenses.

3. An officeholder may not transfer or contribute funds from any other committee he or she controls to the Officeholder Account.

ISSUE: These prohibitions make it clear that funds from an Officeholder Account may never be used for any type of campaign purposes. This is consistent with the ordinance's intent that Officeholder Accounts be strictly limited to officeholder purposes. The provision also makes it explicit that these strictly officeholder funds cannot be redesignated as funds for a future campaign.

L. Once an officeholder's term of office ends or she or he leaves that office, whichever is earlier, the former officeholder may use his or her Officeholder Account funds only for the following purposes:

1. Paying for legitimate, outstanding officeholder expenses.

2. Repaying contributions to donors to the Officeholder Accounts.

3. Making a donation to a bona fide charitable, educational, civic, religious or similar tax-exempt, non-profit organization if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

M. The officeholder shall terminate the Officeholder Account within 90 days of the date that the officeholder's term of office ends or he or she leaves that office, whichever is earlier. The FCPC may for good cause extend the termination date. The disposition of all funds from the closed Officeholder Account, including the identification of all persons and entities that have received funds from the account and the amounts distributed, shall be described on a form prescribed by the FCPC. The officeholder must verify and file the form electronically no later the date prescribed for the termination of the Officeholder Account or an approved extension thereof.

N. All funds from a closed Officeholder Account not properly disposed of within the 90 day period prescribed above, or an approved extension thereof, shall be deposited in the City's General Fund.

ISSUES: Several issues exist with respect to the termination of Officeholder Accounts.

Draft sections 2.12.600 L.-N., above, propose procedures for terminating Officeholder Accounts in Berkeley based, in large part, on the state regulations on terminating Officeholder Accounts and committees (see Regulations of the Fair Political Practices Commission, Cal. Code of Reg., sec. 18531.63(g)).

The proposed provisions include the main options for disposing of Officeholder Account funds listed in the regulations (i.e., paying legitimate expenses, returning funds to donors, and making donations to bona fide organizations). However, the provision in the state regulations (sec. 18531.63(g)(2)) allowing for redesignation of Officeholder Accounts as accounts for a future campaign has been omitted because the Berkeley ordinance would authorize only strict Officeholder Accounts, prohibit the use of those accounts for any campaign purposes, and prohibit the redesignation of those accounts for use by campaign committees.

The proposed provisions, though, are incomplete: they do not address what should happen to an Officeholder Account if an incumbent wins re-election? Maybe it would be appropriate, under certain circumstances, for an incumbent who is elected to a new term of office, to redesignate a previous Officeholder Account for use in the officeholder's new term of office (as envisaged in the state regulations (see sec. 18531.63(g)(3)). Alternatively, as suggested at a previous joint meeting, perhaps it might be better for incumbents to terminate their Officeholder Accounts completely by a certain time before an election; and, if successful, they could open up a new Officeholder Account after their re-election.

The issues around the termination of Officeholder Accounts should be discussed by the joint committee and decisions made about what additions or modifications to the proposed ordinance are warranted.

**M. Violations of this article involving the unlawful use of Officeholder Accounts are subject to the procedures of, and the penalties in, Article 7 of this chapter.**

ISSUE: Are there any other issues on enforcement besides this general provision that need to be addressed?

\* \* \*

**OTHER ISSUES TO BE CONSIDERED:**

Some of the other issues not yet incorporated into the draft, but which merit consideration, include:

**1. Establishment of an Officeholder Committee.** State law requires an officeholder to create an Officeholder Controlled Committee if the officeholder receives more than \$2,000; and it provides guidance on the procedures for establishing such a committee, the committee's name, and other requirements. (Cal. Code of Reg., sec. 18531.63(c).) The Berkeley ordinance should probably include similar provisions.

**2. Return of Excess Contributions/Donations.** State law requires that an excess contribution to an officeholder be returned. (Gov. Code sec.85316(b)(3).) The regulations prescribe that the officeholder return the contribution within 14 days. (Cal. Code of Reg., sec. 18531.63(f).) The Berkeley ordinance should probably include similar provisions.

**3. Conforming Amendments to BERA.** A BERA section on the disposition of excess

campaign funds will probably need to be amended to be consistent with the new section 2.12.600 on Officeholder Accounts (see BERA sec. 2.12.245.C.). There may be other sections to BERA that require similar conforming changes.

## RESOLUTION NO. 67,992-N.S.

## CITY COUNCIL EXPENDITURE AND REIMBURSEMENT POLICIES

WHEREAS, each fiscal year, the City Council appropriates funds in the Mayor and Councilmember's departmental budgets to cover the costs of Mayor and Council staff and non-personnel expenditures which are reasonable and necessary for the performance of the duties of Mayor and Councilmember; and

WHEREAS, the Council needs to ensure that the expenditures are incurred and paid in conformity with the requirements of the City Charter; and

WHEREAS, AB 1234, adopted in 2005 and codified as Government Code Sections 53232, et. seq., requires that all cities adopt an expense reimbursement policy for Mayor and Council expenses; and

WHEREAS, on July 25, 2006, the City Council adopted Resolution No. 63,412-N.S. to establish the expenditure and reimbursement policy required by state law; and

WHEREAS, on September 10, 2103, the City Council rescinded Resolution No. 63,412-N.S. and replaced it with Resolution No. 66,295-N.S., which revised the expenditure and reimbursement policy required by state law.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Councilmember Office Budget Relinquishment and Grant Policy enumerated in Exhibit A is incorporated by reference into the policy for City Expenditures and Expense Reimbursement for Mayor and Council.

BE IT FURTHER RESOLVED that Resolution No. 66,295-N.S. and any amendments thereto are hereby rescinded.

BE IT FURTHER RESOLVED that the policy concerning City Expenditures and Expense Reimbursement for Mayor and Council departments is hereby adopted to read as follows:

**CITY EXPENDITURES AND EXPENSE REIMBURSEMENT FOR MAYOR AND COUNCIL DEPARTMENTS**

**I. City Expenditures for Mayor and Council**

The Mayor and Council members shall purchase all office supplies, office equipment, furniture, computers, or any other product, good, or service for the actual and necessary expense of their office in the manner normally applicable to all other purchases of goods and services by the City. Such expenses may include membership in organizations of elected officials and the purchase of newspapers and periodicals that provide information needed for the performance of official duties.

**II. Reimbursement of Actual and Necessary Expense of Office**

The Mayor and Council members and their staff may be reimbursed for the actual and necessary expenses for the categories of activities set forth below under "Authorized Activities."

**A. Authorized Activities.**

Travel, meals and lodging incurred in connection with the following types of activities set forth below constitute authorized expenses, as long as the other requirements of this Resolution are fulfilled:

1. Communicating with representatives of local, regional, state and national government on City policy positions;
2. Attending educational seminars designed to improve officials' skill and information levels, provided that a brief report of such seminar shall be made by the Mayor and Council at a subsequent Council meeting;
3. Participating in local, regional, state and national organizations of cities whose activities affect the City's interests;
4. Recognizing service to the City (for example, thanking a longtime employee with a retirement gift or celebration of nominal value and cost);
5. Attending City events; or events sponsored by organizations or entities whose activities affect the City's interests where the primary purpose of the event is to discuss subjects which relate to City business;
6. Implementing City approved policies;
7. Meals where the primary purpose of the meal is to conduct City-related business (other than simply meeting constituents) as long as the amount of such meal does not exceed the daily maximum as set forth in this Resolution and meets applicable federal and state standards as to when meal reimbursement may be allowed; and
8. Expenditures for these purposes approved in advance by a Mayor or Council member and undertaken by that person's staff.

Expenditures for all other activities require prior approval by the City Council and must meet an articulated municipal purpose that must be recited in the report proposing the expenditure and the resolution authorizing the expenditure. Most frequently, prior approval by the City Council is given in items to authorize relinquishment of Council office budget fund to general fund and grant of such funds for charitable events, which would be unauthorized expenses if not pre-approved by Council. The policy for relinquishments and grants from Councilmember office budgets is enumerated in Exhibit A.

**B. Unauthorized Expenses**

The following personal expenditures incurred by City officials shall not be reimbursed:

1. The personal portion of any trip, such as where the official is on his/her own vacation activities;
2. Political contributions or attendance at political or charitable events;
3. Family expenses, including partner's expenses when accompanying official on agency-related business, as well as children or pet-related expenses;

4. Entertainment expenses, including theater, movies (either in-room or at the theater), sporting events (including gym, massage and/or golf related expenses), or other recreational and cultural events;
5. Alcoholic beverages;
6. Non-mileage personal automobile expenses, including repairs, traffic citations, insurance or gasoline; and
7. Personal losses incurred while on City business.

Any questions regarding the propriety of a particular type of expense should be resolved by the City Council before the expense is incurred.

### C. Particular Types of Authorized Expenditures Defined

To conserve City resources and keep expenses within community standards for public officials, expenditures should adhere to the following guidelines. In the event that expenses are incurred which exceed these guidelines, the cost borne or reimbursed by the City will be limited to the costs that fall within the guidelines.

1. **Registration.** Registration fee charged for any authorized convention, conference, seminar or meeting is reimbursable.
2. **Transportation.** The most economical mode and class of transportation reasonably consistent with scheduling needs and cargo space requirements must be used, using the most direct and time-efficient route. Charges for rental-vehicles may be reimbursed under this provision if more than one City official is attending an out of town conference, and it is determined that sharing a rental vehicle is more economical than other forms of transportation. In making such determination, the cost of the rental vehicle, parking and gasoline will be compared to the combined cost of such other forms of transportation. Government and group rates must be used when available.
3. **Airfare.** Airfares that are equal to or less than those available through the California Department of General Services (DGS) Statewide Travel Program offered through the League of California Cities, [www.dgs.ca.gov/travel](http://www.dgs.ca.gov/travel)<sup>1</sup>, are presumed to be the most economical and reasonable for purposes of reimbursement under this policy. If DGS rates are not available, reimbursement for airfare must not exceed 110% of either the state DGS rates or the Federal rates published by the U.S. General Services Administration (GSA) rates, [www.gsa.gov](http://www.gsa.gov)<sup>2</sup>, whichever is greater. Any exceptions to these rates must be approved at a public Council meeting before the expense is incurred.

<sup>1</sup> California Department of General Services Statewide Travel Program (DGS): [www.dgs.ca.gov/travel](http://www.dgs.ca.gov/travel)

<sup>2</sup> U.S. General Services Administration (GSA): [www.gsa.gov](http://www.gsa.gov)

4. **Automobile.** Automobile mileage is reimbursed at Internal Revenue Service rates presently in effect. These rates are designed to compensate the driver for gasoline, insurance, maintenance, and other expenses associated with operating the vehicle. This amount does not include bridge and road tolls, which are also reimbursable. The Internal Revenue Service rates will not be paid for rental vehicles; only receipted fuel expenses will be reimbursed.
5. **Car Rental.** Rental rates that are equal or less than those published by the California Department of General Services (DGS) Statewide Travel Program available through the League of California Cities shall be considered the most economical and reasonable for purposes of reimbursement under this policy. If DGS rates are not available, reimbursement for car rental must not exceed 110% of either the state DGS rates or the Federal GSA rates, whichever is greater. Any exceptions to these rates must be approved at a public Council meeting before the expense is incurred.
6. **Taxis/Ride Shares/Shuttles.** Taxis, ride shares, or shuttles fares may be reimbursed, including a 15 percent gratuity per fare, when the cost of such fares is equal or less than the cost of car rentals, gasoline and parking combined, or when such transportation is necessary for time-efficiency.
7. ~~7.~~ **Lodging.** Lodging expenses will be reimbursed or paid for when travel on official City business reasonably requires an overnight stay. If such lodging is in connection with a conference, lodging expenses must not exceed the group rate published by the conference or activity sponsor, provided that lodging at the group rate is available to the Council member at the time of booking. If lodging at the group rate is not available, or if travel is not in connection with a conference, rates that are equal to or less than those available through the California Department of General Services (DGS) Statewide Travel Program offered through the League of California Cities, are presumed to be the most economical and reasonable for purposes of reimbursement under this policy. If DGS rates are not available, reimbursement for lodging must not exceed 120% of the state DGS rates or 100% of the Federal rates published by the GSA, whichever is greater. Any exceptions to these rates must be approved at a public Council meeting before the expense is incurred. **Meals.** Meal expenses and associated gratuities will be reimbursed at the rate set forth in Administrative Regulation 3.9. "Meals which are served at regular meetings of associations to which the city belongs (i.e. Alameda County Mayors' Conference, league of California Cities, or ABAG) shall be exempt from this policy.
8. **Telephone/Fax/Cellular.** Council members will be reimbursed for actual telephone and fax expenses incurred on City business. Telephone bills should identify which calls were made on City business. For calls made on an official's personal cell phone, the official may obtain reimbursement for business calls based on the following formula: minutes used on public business divided by the total minutes allowed under a monthly plan, plus

long-distances charges for those calls.

9. **Airport Parking.** Short-term airport parking may not be used for travel exceeding 24-hours.
10. **Other Travel Related Expenses.** Reasonable baggage fees given the duration of the travel will be reimbursed. Expenses for which City officials receive reimbursement from another agency are not reimbursable.
11. **Miscellaneous Office Products.** Notwithstanding the requirement in Section I, occasionally an elected officer or officer's staff may need to make an immediate small out of pocket purchase of office supplies that are normally ordered by the City for which payment is paid directly to the vendor. In accordance with the applicable City Manager Administrative Regulation concerning petty cash refunds, the City may reimburse such purchases.

**D. Cash Advance Policy for Airfare and Hotel Only (per A.R. 3.9)**

From time to time, it may be necessary for an official to request a cash advance to cover anticipated expenses while traveling or doing business on the City's behalf. Such request for an advance should be submitted to the City Auditor, and copied to the City Manager, ten (10) working days prior to the need for the advance with the following information:

1. The purpose of the expenditure(s);
2. Whether the expenditure is for an authorized activity;
3. The benefit to the residents of the City;
4. The anticipated amount of the expenditure(s) (for example, hotel rates, meal costs, and transportation expenses); and
5. The dates of the expenditure(s).

Any unused advance must be returned to the City within five (5) working days of the official's return, along with an expense report and receipts documenting how the advance was used in compliance with this expense policy.

**E. Expense Report Content and Submission Deadline**

1. A statement of expense must be completed, signed and submitted to the City Auditor for review and forwarded to the Finance Department for payment. The statement of expense must document that the expense in question met the requirements of this Resolution. For example, if the meeting is with a legislator, the local agency official should explain whose meals were purchased, what issues were discussed and how those relate to the City's adopted legislative positions and priorities.
2. Officials must submit their statement of expense reports to the Auditor's Office within 60 days of an expense being incurred, accompanied by receipts documenting each expense. Itemized restaurant receipts, including number of individuals served, in addition to any credit card receipts, are also part of the necessary documentation. Receipts for gratuities and tolls under \$5 are not required.
3. Inability to provide such documentation in a timely fashion may result in the expense being borne by the official.



ITEM 14  
ATTACHMENT 2

EXHIBIT A

**F. Audits of Expense Reports**

All expenses are subject to verification by the City Auditor of compliance with this policy.

**G. Reports**

At the following City Council meeting, each official shall briefly report on meetings attended at City expense. If multiple officials attended, a joint report may be made.

**H. Compliance with Laws**

City officials should keep in mind that some expenditures may be subject to reporting under the Political Reform Act and other laws. All agency expenditures are public records subject to disclosure under the Public Records Act.

**I. Violation of This Policy**

Use of public resources or falsifying expense reports in violation of this policy may result in any or all of the following:

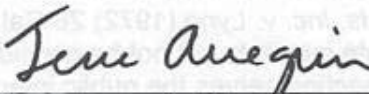
1. loss of reimbursement privileges;
2. a demand for restitution to the City;
3. the City's reporting the expenses as income to the elected official to state and federal tax authorities;
4. civil penalties of up to \$1,000 per day and three times the value of the resources used; and
5. prosecution for misuse of public resources.

The foregoing Resolution was adopted by the Berkeley City Council on May 30, 2017 by the following vote:

Ayes: Bartlett, Davila, Droste, Hahn, Harrison, Maio, Wengraf, Worthington and Arreguin.

Noes: None.

Absent: None.

  
Jesse Arreguin, Mayor

Attest:   
Mark Numalville, City Clerk

Exhibit A

**Councilmember Office Budget Relinquishment and Grant Policy**Introduction – Limitations on the Expenditure of Public Funds

The basic purpose of the City as an entity is to exist and function as a *municipality*. This is also reflected in the Charter, which limits the Council's powers only to those "municipal affairs adequate to a complete system of local government". (Section 38.)

Exercises of this power may not be used solely to further the interests of particular individuals, although they may incidentally benefit private interests:

The exercise of the police power is available only for the purpose of promoting the general welfare, the interests of the public as distinguished from those of individuals or persons. It cannot be used to promote private gain or advantage, except so far as the same may also promote the public interest and welfare, and it is the latter, and not the former, effect which forms the basis of the power and warrants its exercise.

(*Binford v. Boyd* (1918) 178 Cal. 458, 461.)

The Council's basic powers circumscribe its ability to spend public funds. In other words, the Council cannot spend public funds for purposes that are beyond its authority in the first place. Thus the City may only use its funds for municipal purposes. In any given case the crucial inquiry is whether an expenditure serves such a purpose:

The determination of what constitutes a public purpose is primarily a matter for the legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis.

(*County of Alameda v. Carlson* (1971) 5 Cal.3d 730, 745-746.)

If the courts find that there is a valid public purpose, they next examine whether the government's actions are reasonably related to effectuating this purpose. (*Tip Top Foods, Inc. v. Lyng* (1972) 28 Cal.App.3d 533, 541.) Public appropriations granted to private interests will not be considered unlawful diversions of public funds when the transaction serves the public interest, merely granting an incidental benefit to the private individual. (*Cane v. City and County of San Francisco* (1978) 78 Cal.App.3d 654, 660.)

Criteria for Grants of City Funds from Councilmember Office Budgets

Relinquishments and grants for purposes and recipients that fall within the categories listed in Table 1 may be "pre-approved" each fiscal year by Council resolution.

Table 1.

| Recipient                                                                                                                                                | Purpose                                                                                                                                                                                                                                                                                    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The City ( <i>e.g.</i> , the Berkeley Public Library, the Berkeley Animal Shelter)                                                                       | Any purpose already being undertaken, because it already serves a public purpose. This includes both grants and attendance at fundraising events in capacity as the Mayor or a Councilmember.                                                                                              |
| BUSD and other public agencies operating in Berkeley                                                                                                     | Any purpose already being undertaken, because it already serves a public purpose, assuming the activity is in Berkeley. This includes both grants and attendance at fundraising events in capacity as the Mayor or a Councilmember.                                                        |
| Entities with which the City is co-sponsoring a public event in Berkeley ( <i>e.g.</i> , Earth Day, Solano Stroll).                                      | City co-sponsorship suggests but is not conclusive of public purpose; public purpose would need to be stated, and all such events should be open to the public at no cost. Alternatively, a list of ongoing events that have been determined to serve a public purpose could be developed. |
| Entities in Berkeley to which the City already contributes funds for municipal purposes ( <i>e.g.</i> , affordable housing or social service nonprofits) | To advance the same public purposes for which the entities are funded. This includes both grants and attendance at fundraising events in capacity as the Mayor or a Councilmember.                                                                                                         |

Proposed relinquishments and grants that do not meet the criteria for pre-approval, but that meet an appropriate municipal purpose, may be approved by resolution with a majority vote of the City Council.



Fair Campaign Practices Commission

PUBLIC HEARING

February 4, 2020

To: Honorable Mayor and Members of the City Council  
 From: Fair Campaign Practices Commission  
 Submitted by: Dean Metzger, Chairperson, Fair Campaign Practices Commission  
 Subject: Amendments to the Berkeley Election Reform Act to prohibit  
 Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an ordinance amending the Berkeley Election Reform Act, Berkeley Municipal Code Chapter 2.12, to prohibit Officeholder Accounts (See Section 18531.62. Elected State Officeholder Bank Accounts, Regulations of the Fair Political Practices Commission).

SUMMARY

Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also a goal of the Fair Elections Act of 2016.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The proposed amendments to the Berkeley Election Reform Act (BERA) were adopted by the Fair Campaign Practices Commission (FCPC) at its regular meeting of November 21, 2019.

**Action:** M/S/C (Smith/Saver) to adopt the proposed amendments to BERA related to Officeholder Accounts.

**Vote:** Ayes: Metzger, Ching, Saver, Blome, McLean, Tsang, Smith; Noes: none; Abstain: none; Absent: O'Donnell (excused).

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the "double green light" process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

**BACKGROUND**

The Fair Campaign Practices Commission has supported creating the circumstances in which the incumbent and challengers during an election play on as level a playing field as possible and reducing the influence of private campaign contributions. For instance, the Berkeley Fair Elections Act of 2016, which was passed by voters and recommended to Council by the Commission, included the following express purposes:

- Eliminate the danger of actual corruption of Berkeley officials caused by the private financing of campaigns.
- Help reduce the influence of private campaign contributions on Berkeley government.
- Reduce the impact of wealth as a determinant of whether a person becomes a candidate.

(Section 2.12.490(B)-(D).)

A recent inquiry to the Commission Secretary regarding the regulation of Officeholder Accounts resulted in a request from a Commissioner to have discussion of these accounts placed on the May 16, 2019 agenda for possible action. The following motion was made and passed at that meeting:

Motion to request staff work with Commissioner Smith to bring to a future meeting background information and a proposal to eliminate officeholder accounts (M/S/C: O'Donnell/Blome; Ayes: Blome, Ching, McLean, Metzger, O'Donnell, Saver, Smith, Tsui; Noes: None; Abstain: None; Absent: Harper (excused)).

**Definition of an Officeholder Account**

Under state law, an "officeholder account" refers to the funds held in a single bank account at a financial institution in the State of California separate from any other bank account held by the officeholder and that are used for "paying expenses associated with holding public office." Officeholder Account funds cannot be used to pay "campaign expenses." This definition is drawn from state law applicable to statewide elected officials: Government Code section 85316 (Attachment 2), and the accompanying regulation by the Fair Political Practices Commission (FPPC) codified at Title 2, Division 6, of the California Code of Regulations, Section 18531.62 (Attachment 3).

Contributions to or expenditures from an Officeholder Account are not subject to BERA's reporting requirements. (The FPPC still requires the reporting of activity relating to Officeholder Accounts, which is available to view on Berkeley's Public Access Portal.) If, however, a complaint is filed that an Officeholder Account is used for

campaign contributions or to pay “campaign expenses,” BERA can be used to respond to the complaint. The legal arguments for these statements are contained in a memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert, dated December 28, 1999 and a December 9, 1991 memorandum by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, that is attached to the December 28, 1999 memo. (Attachment 4.) Because the BERA provisions relied on in these memoranda have not been amended, and because no other BERA provisions have been added to regulate officeholder accounts, the memoranda’s conclusions remain valid and are still controlling guidance.

### **Contributions to Officeholder Accounts**

Funds raised for Officeholder Accounts in Berkeley are not subject to any limitations, either from the FPPC or BERA. Neither is there a limit on the total amount the Officeholder Account fund may receive in contributions per year. Contributions to an elected official’s Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.

### **Expenditures from Officeholder Accounts**

Except for the restriction that Officeholder Account funds cannot be used for “campaign expenses,” BERA does not restrict how funds from Officeholder Accounts can be used.

There are a number of permissible expenditures from Officeholder Accounts that could put an elected official in a favorable light with voters that are not available to a challenger for that office. A donation to a nonprofit organization, although technically not a “campaign expense,” would be seen favorably by those receiving the funds as well as individuals favorably disposed to the nonprofit organization receiving the funds. An individual running against this incumbent would have to draw on their own resources to make contributions to nonprofit organizations.

As long as political campaigns are not included, newsletters mailed to constituents related to events, information, or an officeholder’s position on matters before the Council are a permissible Officeholder Account expenditure. This keeps the incumbent’s name in front of the voter in a way unavailable to a challenger unless they pay for a newsletter and its distribution from their own resources.

Expenditures from Officeholder Account funds for flowers and other expressions of condolences, congratulations, or appreciation, while technically not “campaign expenses,” also increase the probability that the recipient will be favorably predisposed toward the elected official as a candidate for reelection or election to another office. Again, a challenger would have to draw on their own resources to express condolences, congratulations, or appreciation to their potential supporters.

Further, officeholder accounts can be used to pay for a broad range of office expenses, such as meals, travel, parking tickets, or contributions to other candidates or political parties.<sup>1</sup> Eliminating officeholder accounts would reduce reliance on and the influence of private contributions for these expenditures.

### Recommendation

To make elections more equitable between challengers and incumbent and for the reasons given above, the Fair Campaign Practices Commission recommends prohibiting Officeholder Accounts.

Berkeley will not be the first to prohibit Officeholder Accounts. The San Jose Municipal Code was amended to prohibit officeholder accounts in January 2008. (Chapter 12.06 – ELECTIONS, San Jose, CA Code of Ordinances, p. 10)

#### Part 8 - OFFICEHOLDER ACCOUNTS

##### 12.06.810 - Officeholder account prohibited.

No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or an account established under the Political Reform Act, California Government Code Section 8100 et seq. as amended, for the solicitation or expenditure of officeholder funds. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities.

The following additions to BERA are proposed:

#### **2.12.157 Officeholder Account**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

#### **2.12.441 Officeholder account prohibited**

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.

<sup>1</sup> Under state law applicable to state elected officials, officeholders may use campaign contributions for “expenses that are associated with holding office.” (Govt. Code, § 89510.) To qualify, expenditures must be “reasonably related to a legislative or governmental purpose.” (*Id.*, § 89512.) “Expenditures which confer a substantial personal benefit shall be directly related to a political, legislative, or governmental purpose.” (*Ibid.*)

- C. Anyone holding an active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account, in accordance with FPPC guidelines.

ENVIRONMENTAL SUSTAINABILITY

There are no identified environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

This proposed change to BERA will help to level the playing field between challengers and the incumbent running for elective office.

ALTERNATIVE ACTIONS CONSIDERED

A Subcommittee was formed to consider the options of (1) amending the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts, (2) amending BERA to mitigate possible advantages incumbents with an Officeholder Accounts have over challengers, or (3) doing nothing with regard to Officeholder Accounts. The four members of the Subcommittee recommended unanimously to the full Commission to amend the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts.

CITY MANAGER

The City Manager takes no position on the content and recommendations of this report.

CONTACT PERSON

Dean Metzger, Chair, Fair Campaign Practices Commission. 981-6998

Attachments:

- 1: Proposed Ordinance
- 2: Government Code section 85316
- 3: Section 18531.62 (Elected State Officeholder Bank Accounts), Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations
- 4: Memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert (including attached memorandum signed by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, to the FCPC)



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

OFFICEHOLDER ACCOUNT PROHIBITED; AMENDING BERKELEY MUNICIPAL CODE  
CHAPTER 2.12

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

Section 1. That Berkeley Municipal Code section 2.12.157 is added to read as follows:

**BMC 2.12.157 Officeholder account**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Berkeley Municipal Code section 2.12.441 is added to read as follows:

**BMC 2.12.441 Officeholder account prohibited**

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.
- C. This provision does not affect a candidate’s ability to establish a legal defense fund or the requirements for such a fund, as set forth in the Political Reform Act or by regulation.
- D. Any active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation


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## GOVERNMENT CODE - GOV

**TITLE 9. POLITICAL REFORM [81000 - 91014]** ( Title 9 added June 4, 1974, by initiative Proposition 9. )

**CHAPTER 5. Limitations on Contributions [85100 - 85802]** ( Chapter 5 added June 7, 1988, by initiative Proposition 73. )

### ARTICLE 3. Contribution Limitations [85300 - 85321]

( Article 3 added June 7, 1988, by initiative Proposition 73. )

**85316.** (a) Except as provided in subdivision (b), a contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

(b) Notwithstanding subdivision (a), an elected state officer may accept contributions after the date of the election for the purpose of paying expenses associated with holding the office provided that the contributions are not expended for any contribution to any state or local committee. Contributions received pursuant to this subdivision shall be deposited into a bank account established solely for the purposes specified in this subdivision.

(1) No person shall make, and no elected state officer shall receive from a person, a contribution pursuant to this subdivision totaling more than the following amounts per calendar year:

(A) Three thousand dollars (\$3,000) in the case of an elected state officer of the Assembly or Senate.

(B) Five thousand dollars (\$5,000) in the case of a statewide elected state officer other than the Governor.

(C) Twenty thousand dollars (\$20,000) in the case of the Governor.

(2) No elected state officer shall receive contributions pursuant to paragraph (1) that, in the aggregate, total more than the following amounts per calendar year:

(A) Fifty thousand dollars (\$50,000) in the case of an elected state officer of the Assembly or Senate.

(B) One hundred thousand dollars (\$100,000) in the case of a statewide elected state officer other than the Governor.

(C) Two hundred thousand dollars (\$200,000) in the case of the Governor.

(3) Any contribution received pursuant to this subdivision shall be deemed to be a contribution to that candidate for election to any state office that he or she may seek during the term of office to which he or she is currently elected, including, but not limited to, reelection to the office he or she currently holds, and shall be subject to any applicable contribution limit provided in this title. If a contribution received pursuant to this subdivision exceeds the allowable contribution limit for the office sought, the candidate shall return the amount exceeding the limit to the contributor on a basis to be determined by the Commission. None of the expenditures made by elected state officers pursuant to this subdivision shall be subject to the voluntary expenditure limitations in Section 85400.

(4) The commission shall adjust the calendar year contribution limitations and aggregate contribution limitations set forth in this subdivision in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars (\$100).

(Amended by Stats. 2007, Ch. 130, Sec. 149. Effective January 1, 2008. Note: This section was added by Stats. 2000, Ch. 102, and approved in Prop. 34 on Nov. 7, 2000.)

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

**§ 18531.62. Elected State Officeholder Bank Accounts.**

(a) Application and Definitions. For purposes of Section 85316(b) and this regulation, the following definitions apply:

- (1) "Officeholder" means an elected state officer.
- (2) "Officeholder controlled committee" means a committee formed pursuant to subdivision (c) of this regulation.
- (3) "Officeholder account" means the bank account established at a financial institution located in the State of California pursuant to Section 85316(b).
- (4) "Officeholder funds" means money in the officeholder account.

(b) Establishing the Officeholder Account: For purposes of Section 85316(b), an officeholder shall maintain officeholder funds in a single bank account separate from any other bank account held by the officeholder.

(c) Establishing the Officeholder Controlled Committee, Reporting and Recordkeeping:

(1) Formation: The officeholder shall establish a controlled committee by filing a statement of organization pursuant to Section 84101 if the officeholder receives \$2,000 or more in officeholder contributions in a calendar year.

(2) Committee Name: The controlled committee name shall include the officeholder's last name, the office held, the year the officeholder was elected to the current term of office, and the words "Officeholder Account." The statement of organization shall include the name, account number, and address of the financial institution where the committee established the officeholder account.

(3) Filing Requirements: The controlled committee shall file campaign statements and reports pursuant to Chapters 4 and 5, except Sections 85200 and 85201, of Title 9 of the Government Code at the same times and in the same places as it otherwise would be required to do for any other controlled committee formed by the officeholder for election to state office.

(4) Required Recordkeeping and Audits. The officeholder and treasurer shall be subject to recordkeeping requirements under Section 84104. The officeholder account and officeholder controlled committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code. Any audit of the officeholder, or any of his or her controlled committees, under Section 90001 shall include all officeholder accounts and officeholder controlled committees maintained by the officeholder during the audit period as described in Regulation 18996(a)(1).

(d) Prohibitions:

(1) Officeholder funds may not be contributed or transferred to another state or local committee, including any other controlled committee of the officeholder, except as permitted in subdivisions (g) (2) and (g)(3).

(2) Officeholders may not use officeholder funds to pay "campaign expenses" as defined in Regulation 18525(a).

(3) The officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account, except as permitted in subdivision (g)(2) and (g)(3).

(e) Contributions to the Officeholder Account:

(1)(A) Required Notices: In addition to the requirements of Regulation 18523.1, a written solicitation for contributions to the officeholder account shall include the following: "For purposes of the Political Reform Act's contribution limits, a contribution to an officeholder

account is also considered to be a contribution to all campaign committees for future elective state office the officeholder seeks during his or her current term of office.

(B) In addition to the requirements of subparagraph (A) above, an officeholder who files a statement of intention to be a candidate for any elective state office during the officeholder's term of office shall provide notice of this filing to every person that has made a contribution to his or her officeholder account. The notice shall contain the language in subparagraph (A) and be transmitted or mailed within 10 days of filing the statement of intention to be a candidate.

(2) Cumulation: A contribution to the officeholder account shall also be deemed a contribution to the officeholder's controlled committee for election to elective state office for the purposes of Section 85316(b)(3) only under all of the following circumstances:

(A) The contributor makes the contribution between the day the election was held for the term of office for which the officeholder account was established and the end of that term of office;

(B) The officeholder maintains the controlled committee, established for a future term of elective state office, at any time during the period covered in subparagraph (A).

(3) Cumulation and Primary and General Elections: A person's contributions to the officeholder account, when combined with contributions from the same person for a primary and general election to the elective state office may not exceed the contribution limits applicable to the primary and general election.

(4) Multiple Officeholder Accounts: When an officeholder maintains more than one officeholder account in the same calendar year, he or she may not receive the following contributions to any of those accounts during that calendar year:

(A) Contributions from a single contributor that, when cumulated for all the accounts, exceed the maximum amount the contributor could give to the officeholder account having the highest per person contribution limit under Section 85316(b)(1).

(B) Contributions from all contributors that, when cumulated for all the accounts, exceed the maximum amount in total contributions the officeholder could receive in the officeholder account having the highest aggregate contribution limit under Section 85316(b)(2).

(f) Contributions Over the Limits:

(1) An officeholder shall return to the contributor the portion of any contribution to his or her officeholder account that exceeds the limits of Section 85301, 85302 (after cumulation) or 85316 (either alone or after cumulation) by the earlier of 14 days of receipt or 14 days of the date the officeholder files a statement of intention to be a candidate for elective state office pursuant to Section 85200.

(2) A contributor to the officeholder account does not violate the contribution limits applying to the officeholder's election to a future elective state office as otherwise provided under Section 85316(b)(3) if, when he or she makes the contribution, the officeholder has not filed a statement of organization to establish a controlled committee for election to a future elective state office.

(g) Terminating Officeholder Accounts and Committees.

(1) The officeholder may not accept contributions after the officeholder's term of office ends or the date he or she leaves that office, whichever is earlier.

(2) The officeholder may redesignate the officeholder account as an officeholder controlled committee for a future term of the same office by amending the statement of

organization for the committee to reflect the redesignation for the future term of office prior to the date the officer's term of office ends.

(3) An officeholder may redesignate officeholder funds in the redesignated officeholder account as officeholder funds for the new term of office, subject to the limitations in subdivision (e)(4).

(4) Once the officeholder's term of office ends or he or she leaves that office, whichever is earlier, the officeholder may only use his or her officeholder funds for the following purposes:

- (A) Paying outstanding officeholder expenses.
- (B) Repaying contributions to contributors to the officeholder account.
- (C) Making a donation to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

(D) Paying for professional services reasonably required by the officeholder controlled committee to assist in the performance of its administrative functions.

(5) The officeholder shall terminate the officeholder controlled committee within 90 days of the date the officer's term of office ends or he or she leaves that office, whichever is earlier. The Executive Director may for good cause extend the termination date or permit the candidate to reopen the account.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 84104, 85316 and 90000-90007, Government Code.

**HISTORY**

1. New section filed 7-3-2007; operative 8-2-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2007, No. 27). For prior history, see Register 2007, No. 26.
2. Change without regulatory effect amending section filed 3-22-2016; operative 4-21-2016 pursuant to 2 CCR 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2016, No. 13).





Office of the City Attorney

**DATE:** December 28, 1999

**TO:** BARBARA GILBERT,  
Aide to Mayor Shirley Dean

**FROM:** MANUELA ALBUQUERQUE, City Attorney *MA*  
By: CAMILLE COUREY, Deputy City Attorney

**SUBJECT:** APPLICATION OF BERKELEY ELECTION REFORM ACT TO OFFICEHOLDER ACCOUNTS

ISSUE:

Does the Berkeley Election Reform Act (BERA) govern officeholder accounts?

CONCLUSION:

No. The BERA does not govern true officeholder accounts per se. However, the mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under the BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable local laws.

ANALYSIS:

Sarah Reynoso, former secretary and staff counsel to the Fair Campaign Practices Commission (FCPC), issued an opinion to the FCPC dated December 2, 1991, a copy of which is attached, stating that the BERA's contribution limit does not apply to contributions made to an officeholder account. The opinion reasons that the BERA's contribution limit applies only to "contributions" as defined in the BERA, i.e., which are made directly or indirectly in support of or in opposition to the nomination or election of one or more candidates to elective office. (See Berkeley Municipal Code (BMC) § 2.12.100.) Contributions to a true officeholder account are not made for the purpose of nominating or electing a candidate to office, but rather for the use of an officeholder in carrying out the duties of his or her office. Therefore, the contribution limit of the BERA is inapplicable to officeholder accounts.<sup>1</sup> For similar reasons, the BERA does not

<sup>1</sup> However, the opinion also provided that contributions to officeholder accounts still had to be reported on campaign statements because the State Fair Political Practices Commission (FPPC) Regulations broadly defined contributions as any contribution for "political purposes." Since officeholder expenses are for political purposes, they must be reported to the State.

Barbara Gilbert  
Re: Application of Berkeley Election Reform Act To Officeholder Accounts  
December 28, 1999  
Page 2

apply to true officeholder accounts.

The BERA requires the filing of statements to report the amounts received and expended in municipal elections. (See BMC §§ 2.12.015, 2.12.030 through 2.12.050) Specifically, a "campaign statement" required to be filed under the BERA is an itemized report which provides the information required by Sections 2.12.245 through 2.12.325 of the BERA. (BMC § 2.12.080.) Sections 2.12.245 through 2.12.325 govern the reporting of contributions and expenditures. "Contributions" and "expenditures" are defined by the BERA as any amounts received or expended, respectively, in aid of or in opposition to the nomination or election of one or more candidates to elective office. (See BMC §§ 2.12.100 and 2.12.130.) Contributions to or expenditures from a true officeholder account are not subject to the BERA's reporting requirements because they are made for the purpose of carrying out the duties of elective office, and not for the purpose of aiding or opposing the nomination or election of one or more candidates to elective office.<sup>2</sup> Therefore, the BERA does not apply to true officeholder accounts.

However, the fact that an account may be designated as an officeholder account will not shield it from scrutiny under the BERA if the officeholder account is, in fact, being used for the receipt of contributions or the making of expenditures in aid of the nomination or election of a candidate for local elective office. Nor will BERA requirements, such as the \$250 contribution limit or the prohibition against contributions from businesses to candidates, be held inapplicable if contributions made initially to an officeholder account are transferred subsequently to a campaign account. Where the actions taken with respect to an officeholder account implicate campaign contributions and expenditures in municipal elections, the officeholder account will be scrutinized under the BERA and other applicable local law.

Attachment

cc: Fair Campaign Practices Commission  
Sherry Kelly, City Clerk

City Attorney Opinion Index: ILE 1. and IILG.

CCM

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<sup>2</sup> Again, however, the State FPPC still requires the reporting of activity relating to an officeholder account. (See footnote 1.)

**NOTICE OF PUBLIC HEARING  
BERKELEY CITY COUNCIL**

**AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT**

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the prohibition of officeholder accounts.

The hearing will be held on, February 4, 2020, at 4:00 p.m. in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City’s website at [www.CityofBerkeley.info](http://www.CityofBerkeley.info) as of **January 30, 2020**.

For further information, please contact Samuel Harvey, Commission Secretary at 981-6998.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

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

**Published:** January 24, 2020 – The Berkeley Voice  
Pursuant to Berkeley Municipal Code Section 2.12.051

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City’s website, on January 30, 2020.

Mark Numainville, City Clerk



Fair Campaign Practices Commission

Date: September 17, 2020

To: Fair Campaign Practices Commission and Open Government Commission

From: Commissioner Patrick O'Donnell

Subject: Amendments to the Berkeley Election Reform Act (BERA) to Regulate Officeholder Accounts and Proposed Changes to City Council Expenditure and Reimbursement Policies (Resolution 67,992-N.S.)

This memorandum to the Fair Campaign Practices Commission (FCPC) and the Open Government Commission (OGC) substitutes for the one previously posted, mailed to members of the FCPC, and appearing as Item 7 on the agenda of the FCPC. The key difference is that this memorandum addresses not only officeholder accounts, but also proposed changes to City Council Expenditure and Reimbursement Policies (so-called D-13 Accounts). These two proposals are closely linked and should be considered together. Because the proposal relating to officeholder accounts falls under the jurisdiction of the FCPC and that relating to D-13 accounts falls under the jurisdiction of the OGC, the FCPC and OGC should act jointly in considering the proposed changes to BERA and the Reimbursement Policies.

The memorandum also makes the following recommendation:

Form a subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to (1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts and (2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

The preceding recommendations are consistent with previous discussions and the annual workplans of the FCPC and the OGC.

To implement the recommendations in this memorandum, a revised report to the Council is attached.

At this stage, the Council has referred both the issues relating to officeholder accounts and those relating to D-13 accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee had an initial discussion of these topics. It agreed that the Council Committee would work collaboratively with the FCPC and OGC on matters relating to officeholder accounts and D-13 accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

Consistent with the prior actions of the Council and the FCPC/OGC, I propose that the Commissions recommend the establishment of a subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to (1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts, and (2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

PUBLIC HEARING
XXXXX XX, XXXX

To: Honorable Mayor and Members of the City Council

From: Brad Smith, Chair, Fair Campaign Practices and Open Government Commissions

Submitted by: Samuel Harvey, Secretary, Fair Campaign Practices and Open Government Commissions

Subject: Amendments to the Berkeley Election Reform Act (BERA) and Change to City Council Expenditure and Reimbursement Policies (Resolution 67,992-N.S.)

RECOMMENDATION

Form a subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to (1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts and (2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

Officeholder accounts are not expressly regulated by BERA. However, under existing law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and may trigger various local and state legal requirements.

Donations to nonprofit organizations from Councilmember’s discretionary council budgets (D-13 accounts) are allowed by the authority of City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.).

Action:

Vote:

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the “double green light” process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

Changes to the City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) can be made by a majority vote of the Council.

BACKGROUND

Officeholder Accounts

During 2019, the Fair Campaign Practices Commission (FCPC) discussed whether there is a need to amend the law relating to these accounts. These accounts are not expressly regulated by BERA, but under current law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and trigger various local and state legal requirements. A 1999 legal opinion from the City Attorney stated: “[t]he mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable laws.”

In the course of its review of the issue of officeholder accounts, the FPPC considered three options: (1) leaving the law on officeholder accounts unchanged; (2) prohibiting officeholder accounts entirely (an approach used by the City of San Jose), or (3) authorizing officeholder accounts but limiting their use and imposing various restrictions and requirements on them (an approach used by the City of Oakland).

The Commission referred the issue of officeholder accounts to a subcommittee, which met several times in the fall of 2019 and considered the options. The subcommittee unanimously recommended prohibiting officeholder accounts entirely. At its regular meeting on November 21, 2019 the Commission voted without opposition to recommend amendments to the BERA that would prohibit officeholder accounts.

The Commission’s proposal was presented to the City Council at a February 4, 2020 special meeting. (Report to the Council, with Attachments, is attached.) The FCPC report summarized its proposal: “Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also the goal of the Fair Elections Act of 2016.” (Report, page 1.)

At the February 4, 2020 meeting, the Council had a lengthy discussion about their D-13 accounts and the lack of discretionary funds that members have to spend. They also decided not to approve the FCPC recommendation to prohibit officeholder accounts. The City Council referred the issues relating to officeholder and D-13 accounts to its Agenda and Rules Committee for further consideration.

Proposed Changes to City Council Expenditure and Reimbursement Policies

At the April 23, 2020 meeting of the Open Government Committee (OGC), a motion to direct staff to develop a proposal recommending Council change City policy to remove councilmember names from donations to nonprofit organizations from D-13 accounts was approved unanimously.

Donations to nonprofit organizations from the Councilmember's discretionary council budget (D-13 accounts) puts that elected official in a favorable light with Berkeley citizens at no cost to the Councilmember, an option not available to a challenger for that office. A look at the Consent Calendar of City Council Meeting Agendas will often contain one or more items from one or more Councilmembers making a donation to a nonprofit organization "from the discretionary council budget" of the Councilmember. This line item ("Services and Materials") from the General Fund was increased from \$50,938 in FY 2017 to \$113,526 in FY 2018 (approximately \$40,000 for the Mayor, the balance evenly divided among the Councilmembers; see Attachment 1 – Council Office Budget Summaries). While not technically a "campaign contribution," those individuals in the organization as well as individuals favorably disposed to the nonprofit organization receiving the funds would certainly see it favorably. A person running against this incumbent would have to draw on their own resources to match a Councilmember's contribution from public funds and without the public notice of the contribution the Councilmember receives.

In addition to favoring incumbents, the use of public moneys for contributions to nonprofit organizations from the discretionary council budgets of individual Council members is arguably improper and certainly bad optics. The commissioners of the OGC have no argument with contributions being made to nonprofit organizations from the City of Berkeley, but believe they should be made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley, not from individual Council members. Perhaps a nonprofit fund could be set up from which the donations could be made from recommendations made to one of the Council's Policy Commissions. This would free funds for other purposes now being directed to nonprofit organizations from individual Councilmember's D-13 accounts.

Proposed Action:

At this stage, the Council has referred both the issues relating to officeholder accounts and those relating to D-13 accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee agreed to work collaboratively with the FCPC and OGC on matters relating to officeholder

accounts and D-13 accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

Consistent with the prior actions of the Council and the FCPC/OGC, the Commissions recommend the establishment of a subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to:

(1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts, and

(2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

The “double green light” process requires that the FCPC adopt an amendment by a two-thirds vote, and that the City Council hold a public hearing and also adopt an amendment by a two-thirds vote. Evidence to date suggests there are differences of perspective regarding this matter between the City Council and the FCPC regarding the D-13 accounts. It would seem to be a rational step to discuss and come to agreement and possibly compromise prior to the “double green light” process.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

CONTACT PERSON

Brad Smith, Chair, Fair Campaign Practices and Open Government Commissions,
(510) 981-6998

Samuel Harvey, Commission Secretary, Fair Campaign Practices and Open
Government Commissions, (510) 981-6998



Fair Campaign Practices Commission

Date: September 17, 2020

To: Fair Campaign Practices Commission

From: Commissioner Patrick O'Donnell

Subject: Amendments to the Berkeley Election Reform Act to regulate officeholder accounts

In 2019, the FCPC approved an amendment to the Berkeley Election Reform Act (“BERA”) prohibiting officeholder accounts. That proposal was submitted to Council. However, some councilmembers have expressed opposition to an outright ban on officeholder accounts and a preference for developing regulations for those accounts. This report contains a new alternative proposal to regulate – rather than prohibit – officeholder accounts. At its July 16, 2020 meeting, the Commission voted to direct Commissioner O'Donnell to return at the Commission's September 17, 2020 meeting with a version of the proposal drafted as an amendment to BERA that can be voted on and presented to Council.

Background

During 2019, the Commission discussed whether there is a need to amend the law relating to the use of officeholder accounts. These accounts are not expressly regulated by BERA. But under current law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and may trigger various local and state legal requirements. A 1999 legal opinion from the City Attorney stated: “[t]he mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable laws.” (Report, page 14.)

In the course of its review of the issue of officeholder accounts, the Commission considered three options: (1) leaving the law on officeholder accounts unchanged; (2) prohibiting officeholder accounts entirely (an approach used by the City of San Jose), or

(3) authorizing officeholder accounts but limiting their use and imposing various restrictions and requirements on them (an approach used by the City of Oakland).

The Commission referred the issue of officeholder accounts to a subcommittee, which met in the fall of 2019 and considered the options. The subcommittee unanimously recommended prohibiting officeholder accounts entirely. At its regular meeting on November 21, 2019 the Commission voted without opposition to recommend amendments to the BERA that would prohibit officeholder accounts.

The Commission's proposal was presented to the City Council at a February 4, 2020 special meeting. (Report to the Council, with Attachments, is attached.) The FCPC report summarized its proposal: "Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also the goal of the Fair Elections Act of 2016." (Report, page 1.) At the February 4 meeting, the Council had a lengthy discussion about their D13 accounts and the lack of discretionary funds that members have to spend. They also decided not to approve the FCPC recommendation to prohibit officeholder Accounts. (See Memorandum to FCPC dated February 12, 2020, a copy of which is attached.)

The City Council, however, referred both the issues relating to D13 accounts and those relating to officeholder accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee had an initial discussion of these topics. At that meeting, it was agreed that the Council Committee would work collaboratively with the FCPC on matters relating to D13 accounts and officeholder accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

Alternative Proposal for Legislation on Officeholder Accounts

Given the Council's opposition to accepting an outright prohibition of officeholder accounts, the FCPC should at least explore some alternatives, including the option of amending the BERA to allow for officeholder accounts that would be subject to limitations, as the City of Oakland has done. The subcommittee which examined officeholder accounts briefly discussed this option but, given that there was unanimous support for prohibiting officeholder accounts entirely, it never developed a detailed proposal for this kind of alternative. However, now that the FCPC/OGC will be in conversation with the council about the options going forward, it seems to make good sense to examine in more detail what the alternative might look like.

For discussion purposes, a draft proposal to amend the BERA is attached (Attachment 1). It is based generally on the Oakland ordinance but differs in important ways from that statute. The basic concept behind this alternative is to allow officeholders to have *true* officeholder accounts, but to insure that the funds in these accounts are

used *strictly* for officeholder purposes and may not be used for political campaigns or other non-officeholder purposes. The proposal would also include limitations on the amount each donor may contribute and the total amount of donations to each officeholder account permitted annually. The amendments would require disclosures of the sources and amounts of all donations and expenditures. And they would specify how officeholder accounts are to be terminated.

Although not as fully effective as the complete prohibition of officeholder accounts previously recommended by the FCPC, this approach would allow officeholders to create regulated accounts for proper officeholder purposes. At the same time, these true officeholder accounts would be subject to public scrutiny and express limitations that would prevent serious abuses. Finally, the strict prohibitions in the proposed legislation against using any funds from officeholder accounts for campaign purposes would greatly simplify the management and oversight of these accounts. Current state law, which permits certain officeholder funds to be redesignated for campaign purposes under certain circumstances and subject to various disclosure and notice requirements, creates a nightmare of administrative and reporting requirements. It has made it difficult for officeholders to comply with the law and has established traps for the unwary. Thus, it is hardly surprising that most candidates elected to public office do not even attempt to set up officeholder accounts.

In the end, it may well be that the alternative presented here—or any other—may be unable to carry the day. Because of the double-green light requirements of BERA, no proposal may be able to garner the 2/3 votes of both the Council and Commission required to change the law. But for the purposes of collaborating with the Council on ways of improving the officeholder account process, the Commission should review the attached proposal which offers at least one possible scenario for addressing the problems and pitfalls involved with officeholder accounts.

Prior to approving this item, the Commission will need to make a determination regarding the dollar amounts for limits on donations to officeholder accounts. These amounts are highlighted in the attached Proposal in Section 2.12.600.E & F.

Attachments:

1. New draft proposed amendments to BERA to allow for officeholder accounts, to limit such accounts to being used strictly for officeholder purposes, and to subject these accounts to various other limitations and disclosure requirements (“Proposal”)
2. Report to the City Council from the Fair Campaign Practices Commission entitled “Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts: Amending BMC Chapter 2.12” (for Public Hearing on February 4, 2020) (with Attachments) (“Report”)
3. Memorandum from Dean Metzger, Chair, to FCPC dated February 12, 2020 (with Attachments) (“Memorandum”)



Fair Campaign Practices Commission

PUBLIC HEARING
XXXXX XX, XXXX

To: Honorable Mayor and Members of the City Council
From: Brad Smith, Chair, Open Government Commission
Submitted by: Samuel Harvey, Secretary, Fair Campaign Practices Commission
Subject: Amendments to the Berkeley Election Reform Act

RECOMMENDATION

Adopt an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to regulate officeholder accounts.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

These recommended amendments to the Berkeley Lobbyist Registration Act were approved by the Open Government Commission at its regular meeting of XXXXX XX, XXXX.

Action:

Vote:

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the “double green light” process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

BACKGROUND

In 2019, the FCPC approved an amendment to the Berkeley Election Reform Act (“BERA”) prohibiting officeholder accounts. That proposal was submitted to Council. However, some councilmembers have expressed opposition to an outright ban on officeholder accounts and a preference for developing regulations for those accounts. This report contains a new alternative proposal to regulate – rather than prohibit – officeholder accounts.

During 2019, the Commission discussed whether there is a need to amend the law relating to the use of officeholder accounts. These accounts are not expressly regulated

by BERA. But under current law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and may trigger various local and state legal requirements. A 1999 legal opinion from the City Attorney stated: “[t]he mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable laws.” (Report, page 14.)

In the course of its review of the issue of officeholder accounts, the Commission considered three options: (1) leaving the law on officeholder accounts unchanged; (2) prohibiting officeholder accounts entirely (an approach used by the City of San Jose), or (3) authorizing officeholder accounts but limiting their use and imposing various restrictions and requirements on them (an approach used by the City of Oakland).

The Commission referred the issue of officeholder accounts to a subcommittee, which met in the fall of 2019 and considered the options. The subcommittee unanimously recommended prohibiting officeholder accounts entirely. At its regular meeting on November 21, 2019 the Commission voted without opposition to recommend amendments to the BERA that would prohibit officeholder accounts.

The Commission’s proposal was presented to the City Council at a February 4, 2020 special meeting. (Report to the Council, with Attachments, is attached.) The FCPC report summarized its proposal: “Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also the goal of the Fair Elections Act of 2016.” (Report, page 1.) At the February 4 meeting, the Council had a lengthy discussion about their D13 accounts and the lack of discretionary funds that members have to spend. They also decided not to approve the FCPC recommendation to prohibit officeholder Accounts. (See Memorandum to FCPC dated February 12, 2020, a copy of which is attached.)

The City Council, however, referred both the issues relating to D13 accounts and those relating to officeholder accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee had an initial discussion of these topics. At that meeting, it was agreed that the Council Committee would work collaboratively with the FCPC on matters relating to D13 accounts and officeholder accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

Alternative Proposal for Legislation on Officeholder Accounts

At its September 17, 2020 meeting, the FCPC passed the attached proposal to amend the BERA (Attachment 1). It is based generally on the Oakland ordinance but differs in important ways from that statute. The basic concept behind this alternative is to allow officeholders to have *true* officeholder accounts, but to insure that the funds in these accounts are used *strictly* for officeholder purposes and may not be used for political

campaigns or other non-officeholder purposes. The proposal also includes limitations on the amount each donor may contribute and the total amount of donations to each officeholder account permitted annually. The amendments would require disclosures of the sources and amounts of all donations and expenditures, and specify how officeholder accounts are to be terminated.

This approach would allow officeholders to create regulated accounts for proper officeholder purposes. At the same time, these true officeholder accounts would be subject to public scrutiny and express limitations that would prevent serious abuses. Finally, the strict prohibitions in the proposed legislation against using any funds from officeholder accounts for campaign purposes would greatly simplify the management and oversight of these accounts. Current state law, which permits certain officeholder funds to be redesignated for campaign purposes under certain circumstances and subject to various disclosure and notice requirements, creates a nightmare of administrative and reporting requirements. It has made it difficult for officeholders to comply with the law and has established traps for the unwary. Thus, it is hardly surprising that most candidates elected to public office do not even attempt to set up officeholder accounts.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

This proposal is offered as an alternative to the proposed ban on officeholder accounts previously submitted to Council by the FCPC. This proposal would regulate – rather than prohibit – officeholder accounts.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

CONTACT PERSON

Brad Smith, Chair, Open Government Commission, (510) 981-6998

Samuel Harvey, Commission Secretary, Open Government Commission (510) 981-6998

Attachments:

1. Proposed ordinance amending BERA to allow and regulate officeholder accounts
2. Report to the City Council from the Fair Campaign Practices Commission entitled “Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts: Amending BMC Chapter 2.12” (for Public Hearing on February 4, 2020) (with Attachments) (“Report”)
3. Memorandum from Dean Metzger, Chair, to FCPC dated February 12, 2020 (with Attachments) (“Memorandum”)

ORDINANCE NO. -N.S.

AMENDING THE BERKELEY ELECTION REFORM ACT TO REGULATE
OFFICEHOLDER ACCOUNTS

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

Section 1. That the Berkeley Municipal Code section 2.12.157 is added to read as follows:**Section 2.12.157 Officeholder account.**“Officeholder account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.Section 2. That Article 9 of Chapter 2.12 of the Berkeley Municipal Code is added to read as followsArticle 9. Officeholder Accounts**Section. 2.12.600 Regulation of officeholder accounts.**A. The mayor and council members (the “officeholder” or “office holders”) shall each be permitted to establish one officeholder account, as defined in section 2.12.157.B. All donations deposited into an officeholder account shall be deemed to be held in trust solely for expenses associated with holding the office currently held by the elected city officer. For the purpose of this section, “donation” means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, in support of the office currently held by an elected official.C. Only a natural person who is a resident of the City may make a donation to an officeholder account.D. Donations to an officeholder account must be made by a separate check or other separate written instrument. Single donations may not be divided between the officeholder account and any candidate committee or other entity.E. No donor shall make, and no elected officer shall receive from a donor, a donation or donations under this section totaling more than fifty [or two-hundred and fifty] dollars (\$50.00 [or \$250.00]) per person for the calendar year. “Donor” means a natural person who is a resident of the City who makes a donation as defined in paragraph B.F. For the office of mayor, total donations to an officeholder account from all donors shall not exceed ten thousand dollars (\$10,000.00) in the aggregate per calendar year. For each member of the city council, total donations to an officeholder account from all donors shall not exceed five thousand dollars (\$5,000.00) in the aggregate per calendar year.

G. All donations received for, and expenditures made from, an officeholder account during a calendar year shall be reported at least annually on the date or dates prescribed by the commission and the report shall be made available to the public promptly thereafter. The commission shall adopt or designate a form or forms for the purpose of reporting the information about each elected officer's officeholder account. The forms shall be filed electronically. The information on the form or forms shall be verified by the officeholder. The information that shall be included in the officeholder account report shall include the following:

1. The name of the officeholder and the office held;
2. The reporting period covered by the report;
3. A description of all receipts and expenditures.
4. The full name of each donor from whom a donation or donations has been received together with his or her street address, occupation, and the name of his or her employer, if any, or the principal place of business if he or she is self-employed; the amount which he or she donated; the date on which the each donation was received during the period covered by the report; and the cumulative amount that the donor donated. Loans received shall be set forth in a separate schedule and the foregoing information shall be stated with regard to each lender, together with the date and amount of the loan, and if the loan has been repaid, the date of the payment and by whom paid;
5. The full name and street address of each person to whom an expenditure or expenditures have been made, together with the amount of each separate expenditure to each person during the period covered by the report; a description of the purpose for which the expenditure was made; and the full name and street address of the person receiving the expenditure.
6. Under the heading "receipts," the total amount of donations received, and under the heading "expenditures," the total amount of expenditures made during the reporting period and cumulative amount of such totals;
7. The balance of cash and cash equivalents, including the amounts in the officeholder bank account, at the beginning and end of each period covered by the report.

H. Expenditures from an officeholder account may be made only for-lawful officeholder purposes, and may not be used for any of the purposes prohibited in subsections J. and K. of this section.

I. Allowable expenditures from an officeholder account include the following:

1. Expenditures for fundraising (including solicitations by mail) for the officeholder account;
2. Expenditures for office equipment, furnishings and office supplies;

3. Expenditures for office rent;

4. Expenditures for salaries of part-time or full-time staff employed by the officeholder for officeholder activities;

5. Expenditures for consulting, research, polling, photographic or similar services except for campaign expenditures for any city, county, regional, state or federal elective office;

6. Expenditures for conferences, meetings, receptions, and events attended in the performance of government duties by (1) the officeholder (2) a member of the officeholder's staff; or (3) such other person designated by the officeholder who is authorized to perform such government duties;

7. Expenditures for travel, including lodging, meals and other related disbursements, incurred in the performance of governmental duties by (1) the officeholder, (2) a member of the officeholder's staff, (3) or such other person designated by the officeholder who is authorized to perform such government duties;

8. Expenditures for memberships to civic, service or professional organizations, if such membership bears a reasonable relationship to a governmental, legislative or political purpose;

9. Expenditures for an educational course or educational seminar if the course or seminar maintains or improves skills which are employed by the officeholder or a member of the officeholder's staff in the performance of his or her governmental responsibilities;

10. Expenditures for mailing to persons within the city which provide information related to city-sponsored events, an official's governmental duties or an official's position on a particular matter pending before the Council or Mayor;

11. Expenditures for expressions of congratulations, appreciation or condolences sent to constituents, employees, governmental officials, or other persons with whom the officeholder communicates in his or her official capacity;

12. Expenditures for payment of tax liabilities incurred as a result of authorized officeholder expense fund transactions; and

13. Expenditures for accounting, professional and administrative services provided to the officeholder account.

J. Officeholder expense funds shall not be used for the following:

1. Expenditures in connection with a future election for any city, county, regional, state or federal elective office or in connection with a ballot measure;

2. Expenditures for campaign consulting, research, polling, photographic or similar services for election to city, county, regional, state or federal elective office;

3. Membership in any athletic, social, fraternal, veteran or religious organization;

4. Supplemental compensation for employees for performance of an act which would be required or expected of the person in the regular course or hours of his or her duties as a city official or employee;

5. Any expenditure that would violate the provisions the California State Political Reform Act, including Government Code Sections 89506 and 89512 through 89519, and any provisions of the BERA.

K. Prohibitions:

1. No funds may be contributed or transferred from an officeholder account to any candidate or committee, as defined in sections 2.12.085 and 2.12.095 of this chapter, including to any committee in which the officeholder is a candidate. An officeholder may not redesignate his or her officeholder account as a committee for a future term of the same office or redesignate his or her officeholder funds to be used as campaign funds by his or her committee for a future term of the same office.

2. No funds may be used from an officeholder account to pay any campaign expenses.

3. An officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account.

L. Once an officeholder's term of office ends or she or he leaves that office, whichever is earlier, the former officeholder may use his or her officeholder funds only for the following purposes:

1. Paying for legitimate, outstanding officeholder expenses.

2. Repaying contributions to contributors to the officeholder accounts.

3. Making a donation to a bona fide charitable, educational, civic, religious or similar tax-exempt, non-profit organization if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

M. The officeholder shall terminate the officeholder account within 90 days of the date that the officeholder's term of office ends or he or she leaves that office, whichever is earlier. The Commission may for good cause extend the termination date. The disposition of all funds from the closed officeholder account, including the identification of all persons and entities that have received funds from the account and the amounts distributed, shall be described on a form prescribed by the Commission. The officeholder must verify and file the form electronically no later the date prescribed for the termination of the officeholder account or an approved extension thereof.

N. All funds from a closed officeholder account not properly disposed of within the 90 day period prescribed above, or an approved extension thereof, shall be deposited in the City's general fund.

O. Violations of this article involving the unlawful use of officeholder accounts are subject to the procedures of, and the penalties in, Article 7 of this chapter.

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the regulation of officeholder accounts.

The hearing will be held on, [date of hearing] at [6:00 p.m.] in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City’s website at www.CityofBerkeley.info as of [date of agenda posting].

For further information, please contact Samuel Harvey, Commission Secretary at 981-6998.

Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

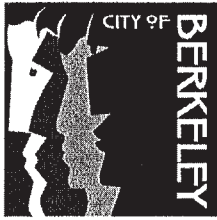
Communications to the Berkeley City Council are public record and will become part of the City’s electronic records, which are accessible through the City’s website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication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

Published: [Publication Date in Newspaper]

Pursuant to Berkeley Municipal Code section 2.12.051

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

\_\_\_\_\_  
Mark Numainville, City Clerk



Fair Campaign Practices Commission

PUBLIC HEARING  
February 4, 2020

To: Honorable Mayor and Members of the City Council  
 From: Fair Campaign Practices Commission  
 Submitted by: Dean Metzger, Chairperson, Fair Campaign Practices Commission  
 Subject: Amendments to the Berkeley Election Reform Act to prohibit  
 Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an ordinance amending the Berkeley Election Reform Act, Berkeley Municipal Code Chapter 2.12, to prohibit Officeholder Accounts (See Section 18531.62. Elected State Officeholder Bank Accounts, Regulations of the Fair Political Practices Commission).

SUMMARY

Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also a goal of the Fair Elections Act of 2016.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The proposed amendments to the Berkeley Election Reform Act (BERA) were adopted by the Fair Campaign Practices Commission (FCPC) at its regular meeting of November 21, 2019.

**Action:** M/S/C (Smith/Saver) to adopt the proposed amendments to BERA related to Officeholder Accounts.

**Vote:** Ayes: Metzger, Ching, Saver, Blome, McLean, Tsang, Smith; Noes: none; Abstain: none; Absent: O'Donnell (excused).

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the "double green light" process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

Amendments to the Berkeley Election Reform Act  
to prohibit Officeholder AccountsPUBLIC HEARING  
February 4, 2020BACKGROUND

The Fair Campaign Practices Commission has supported creating the circumstances in which the incumbent and challengers during an election play on as level a playing field as possible and reducing the influence of private campaign contributions. For instance, the Berkeley Fair Elections Act of 2016, which was passed by voters and recommended to Council by the Commission, included the following express purposes:

- Eliminate the danger of actual corruption of Berkeley officials caused by the private financing of campaigns.
- Help reduce the influence of private campaign contributions on Berkeley government.
- Reduce the impact of wealth as a determinant of whether a person becomes a candidate.

(Section 2.12.490(B)-(D).)

A recent inquiry to the Commission Secretary regarding the regulation of Officeholder Accounts resulted in a request from a Commissioner to have discussion of these accounts placed on the May 16, 2019 agenda for possible action. The following motion was made and passed at that meeting:

Motion to request staff work with Commissioner Smith to bring to a future meeting background information and a proposal to eliminate officeholder accounts (M/S/C: O'Donnell/Blome; Ayes: Blome, Ching, McLean, Metzger, O'Donnell, Saver, Smith, Tsui; Noes: None; Abstain: None; Absent: Harper (excused)).

**Definition of an Officeholder Account**

Under state law, an "officeholder account" refers to the funds held in a single bank account at a financial institution in the State of California separate from any other bank account held by the officeholder and that are used for "paying expenses associated with holding public office." Officeholder Account funds cannot be used to pay "campaign expenses." This definition is drawn from state law applicable to statewide elected officials: Government Code section 85316 (Attachment 2), and the accompanying regulation by the Fair Political Practices Commission (FPPC) codified at Title 2, Division 6, of the California Code of Regulations, Section 18531.62 (Attachment 3).

Contributions to or expenditures from an Officeholder Account are not subject to BERA's reporting requirements. (The FPPC still requires the reporting of activity relating to Officeholder Accounts, which is available to view on Berkeley's Public Access Portal.) If, however, a complaint is filed that an Officeholder Account is used for

Amendments to the Berkeley Election Reform Act  
to prohibit Officeholder AccountsPUBLIC HEARING  
February 4, 2020

campaign contributions or to pay "campaign expenses," BERA can be used to respond to the complaint. The legal arguments for these statements are contained in a memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert, dated December 28, 1999 and a December 9, 1991 memorandum by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, that is attached to the December 28, 1999 memo. (Attachment 4.) Because the BERA provisions relied on in these memoranda have not been amended, and because no other BERA provisions have been added to regulate officeholder accounts, the memoranda's conclusions remain valid and are still controlling guidance.

**Contributions to Officeholder Accounts**

Funds raised for Officeholder Accounts in Berkeley are not subject to any limitations, either from the FPPC or BERA. Neither is there a limit on the total amount the Officeholder Account fund may receive in contributions per year. Contributions to an elected official's Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.

**Expenditures from Officeholder Accounts**

Except for the restriction that Officeholder Account funds cannot be used for "campaign expenses," BERA does not restrict how funds from Officeholder Accounts can be used.

There are a number of permissible expenditures from Officeholder Accounts that could put an elected official in a favorable light with voters that are not available to a challenger for that office. A donation to a nonprofit organization, although technically not a "campaign expense," would be seen favorably by those receiving the funds as well as individuals favorably disposed to the nonprofit organization receiving the funds. An individual running against this incumbent would have to draw on their own resources to make contributions to nonprofit organizations.

As long as political campaigns are not included, newsletters mailed to constituents related to events, information, or an officeholder's position on matters before the Council are a permissible Officeholder Account expenditure. This keeps the incumbent's name in front of the voter in a way unavailable to a challenger unless they pay for a newsletter and its distribution from their own resources.

Expenditures from Officeholder Account funds for flowers and other expressions of condolences, congratulations, or appreciation, while technically not "campaign expenses," also increase the probability that the recipient will be favorably predisposed toward the elected official as a candidate for reelection or election to another office. Again, a challenger would have to draw on their own resources to express condolences, congratulations, or appreciation to their potential supporters.



Amendments to the Berkeley Election Reform Act  
to prohibit Officeholder Accounts

PUBLIC HEARING  
February 4, 2020

Further, officeholder accounts can be used to pay for a broad range of office expenses, such as meals, travel, parking tickets, or contributions to other candidates or political parties.<sup>1</sup> Eliminating officeholder accounts would reduce reliance on and the influence of private contributions for these expenditures.

### Recommendation

To make elections more equitable between challengers and incumbent and for the reasons given above, the Fair Campaign Practices Commission recommends prohibiting Officeholder Accounts.

Berkeley will not be the first to prohibit Officeholder Accounts. The San Jose Municipal Code was amended to prohibit officeholder accounts in January 2008. (Chapter 12.06 – ELECTIONS, San Jose, CA Code of Ordinances, p. 10)

#### Part 8 - OFFICEHOLDER ACCOUNTS

##### 12.06.810 - Officeholder account prohibited.

No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or an account established under the Political Reform Act, California Government Code Section 8100 et seq. as amended, for the solicitation or expenditure of officeholder funds. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities.

The following additions to BERA are proposed:

#### 2.12.157 Officeholder Account

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

#### 2.12.441 Officeholder account prohibited

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.

<sup>1</sup>Under state law applicable to state elected officials, officeholders may use campaign contributions for “expenses that are associated with holding office.” (Govt. Code, § 89510.) To qualify, expenditures must be “reasonably related to a legislative or governmental purpose.” (*Id.*, § 89512.) “Expenditures which confer a substantial personal benefit shall be directly related to a political, legislative, or governmental purpose.” (*Ibid.*)

Amendments to the Berkeley Election Reform Act  
to prohibit Officeholder Accounts

PUBLIC HEARING  
January 21, 2020

- C. Anyone holding an active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account, in accordance with FPPC guidelines.

ENVIRONMENTAL SUSTAINABILITY

There are no identified environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

This proposed change to BERA will help to level the playing field between challengers and the incumbent running for elective office.

ALTERNATIVE ACTIONS CONSIDERED

A Subcommittee was formed to consider the options of (1) amending the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts, (2) amending BERA to mitigate possible advantages incumbents with an Officeholder Accounts have over challengers, or (3) doing nothing with regard to Officeholder Accounts. The four members of the Subcommittee recommended unanimously to the full Commission to amend the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts.

CITY MANAGER

The City Manager takes no position on the content and recommendations of this report.

CONTACT PERSON

Dean Metzger, Chair, Fair Campaign Practices Commission. 981-6998

Attachments:

- 1: Proposed Ordinance
- 2: Government Code section 85316
- 3: Section 18531.62 (Elected State Officeholder Bank Accounts), Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations
- 4: Memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert (including attached memorandum signed by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, to the FCPC)

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

OFFICEHOLDER ACCOUNT PROHIBITED; AMENDING BERKELEY MUNICIPAL CODE  
CHAPTER 2.12

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

Section 1. That Berkeley Municipal Code section 2.12.157 is added to read as follows:

**BMC 2.12.157 Officeholder account**

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Berkeley Municipal Code section 2.12.441 is added to read as follows:

**BMC 2.12.441 Officeholder account prohibited**

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.
- C. This provision does not affect a candidate’s ability to establish a legal defense fund or the requirements for such a fund, as set forth in the Political Reform Act or by regulation.
- D. Any active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation

10/8/2019

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# California

## LEGISLATIVE INFORMATION

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Search Phrase: **GOVERNMENT CODE - GOV****TITLE 9. POLITICAL REFORM [81000 - 91014]** ( Title 9 added June 4, 1974, by initiative Proposition 9. )**CHAPTER 5. Limitations on Contributions [85100 - 85802]** ( Chapter 5 added June 7, 1988, by initiative Proposition 73. )**ARTICLE 3. Contribution Limitations [85300 - 85321]** ( Article 3 added June 7, 1988, by initiative Proposition 73. )

**85316.** (a) Except as provided in subdivision (b), a contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

(b) Notwithstanding subdivision (a), an elected state officer may accept contributions after the date of the election for the purpose of paying expenses associated with holding the office provided that the contributions are not expended for any contribution to any state or local committee. Contributions received pursuant to this subdivision shall be deposited into a bank account established solely for the purposes specified in this subdivision.

(1) No person shall make, and no elected state officer shall receive from a person, a contribution pursuant to this subdivision totaling more than the following amounts per calendar year:

(A) Three thousand dollars (\$3,000) in the case of an elected state officer of the Assembly or Senate.

(B) Five thousand dollars (\$5,000) in the case of a statewide elected state officer other than the Governor.

(C) Twenty thousand dollars (\$20,000) in the case of the Governor.

(2) No elected state officer shall receive contributions pursuant to paragraph (1) that, in the aggregate, total more than the following amounts per calendar year:

(A) Fifty thousand dollars (\$50,000) in the case of an elected state officer of the Assembly or Senate.

(B) One hundred thousand dollars (\$100,000) in the case of a statewide elected state officer other than the Governor.

(C) Two hundred thousand dollars (\$200,000) in the case of the Governor.

(3) Any contribution received pursuant to this subdivision shall be deemed to be a contribution to that candidate for election to any state office that he or she may seek during the term of office to which he or she is currently elected, including, but not limited to, reelection to the office he or she currently holds, and shall be subject to any applicable contribution limit provided in this title. If a contribution received pursuant to this subdivision exceeds the allowable contribution limit for the office sought, the candidate shall return the amount exceeding the limit to the contributor on a basis to be determined by the Commission. None of the expenditures made by elected state officers pursuant to this subdivision shall be subject to the voluntary expenditure limitations in Section 85400.

(4) The commission shall adjust the calendar year contribution limitations and aggregate contribution limitations set forth in this subdivision in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars (\$100).

(Amended by Stats. 2007, Ch. 130, Sec. 149. Effective January 1, 2008. Note: This section was added by Stats. 2000, Ch. 102, and approved in Prop. 34 on Nov. 7, 2000.)

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

**§ 18531.62. Elected State Officeholder Bank Accounts.**

(a) Application and Definitions. For purposes of Section 85316(b) and this regulation, the following definitions apply:

(1) "Officeholder" means an elected state officer.

(2) "Officeholder controlled committee" means a committee formed pursuant to subdivision (c) of this regulation.

(3) "Officeholder account" means the bank account established at a financial institution located in the State of California pursuant to Section 85316(b).

(4) "Officeholder funds" means money in the officeholder account.

(b) Establishing the Officeholder Account: For purposes of Section 85316(b), an officeholder shall maintain officeholder funds in a single bank account separate from any other bank account held by the officeholder.

(c) Establishing the Officeholder Controlled Committee, Reporting and Recordkeeping:

(1) Formation: The officeholder shall establish a controlled committee by filing a statement of organization pursuant to Section 84101 if the officeholder receives \$2,000 or more in officeholder contributions in a calendar year.

(2) Committee Name: The controlled committee name shall include the officeholder's last name, the office held, the year the officeholder was elected to the current term of office, and the words "Officeholder Account." The statement of organization shall include the name, account number, and address of the financial institution where the committee established the officeholder account.

(3) Filing Requirements: The controlled committee shall file campaign statements and reports pursuant to Chapters 4 and 5, except Sections 85200 and 85201, of Title 9 of the Government Code at the same times and in the same places as it otherwise would be required to do for any other controlled committee formed by the officeholder for election to state office.

(4) Required Recordkeeping and Audits. The officeholder and treasurer shall be subject to recordkeeping requirements under Section 84104. The officeholder account and officeholder controlled committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code. Any audit of the officeholder, or any of his or her controlled committees, under Section 90001 shall include all officeholder accounts and officeholder controlled committees maintained by the officeholder during the audit period as described in Regulation 18996(a)(1).

(d) Prohibitions:

(1) Officeholder funds may not be contributed or transferred to another state or local committee, including any other controlled committee of the officeholder, except as permitted in subdivisions (g) (2) and (g)(3).

(2) Officeholders may not use officeholder funds to pay "campaign expenses" as defined in Regulation 18525(a).

(3) The officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account, except as permitted in subdivision (g)(2) and (g)(3).

(e) Contributions to the Officeholder Account:

(1)(A) Required Notices: In addition to the requirements of Regulation 18523.1, a written solicitation for contributions to the officeholder account shall include the following: "For purposes of the Political Reform Act's contribution limits, a contribution to an officeholder

account is also considered to be a contribution to all campaign committees for future elective state office the officeholder seeks during his or her current term of office.”

(B) In addition to the requirements of subparagraph (A) above, an officeholder who files a statement of intention to be a candidate for any elective state office during the officeholder's term of office shall provide notice of this filing to every person that has made a contribution to his or her officeholder account. The notice shall contain the language in subparagraph (A) and be transmitted or mailed within 10 days of filing the statement of intention to be a candidate.

(2) Cumulation: A contribution to the officeholder account shall also be deemed a contribution to the officeholder's controlled committee for election to elective state office for the purposes of Section 85316(b)(3) only under all of the following circumstances:

(A) The contributor makes the contribution between the day the election was held for the term of office for which the officeholder account was established and the end of that term of office;

(B) The officeholder maintains the controlled committee, established for a future term of elective state office, at any time during the period covered in subparagraph (A).

(3) Cumulation and Primary and General Elections: A person's contributions to the officeholder account, when combined with contributions from the same person for a primary and general election to the elective state office may not exceed the contribution limits applicable to the primary and general election.

(4) Multiple Officeholder Accounts: When an officeholder maintains more than one officeholder account in the same calendar year, he or she may not receive the following contributions to any of those accounts during that calendar year:

(A) Contributions from a single contributor that, when cumulated for all the accounts, exceed the maximum amount the contributor could give to the officeholder account having the highest per person contribution limit under Section 85316(b)(1).

(B) Contributions from all contributors that, when cumulated for all the accounts, exceed the maximum amount in total contributions the officeholder could receive in the officeholder account having the highest aggregate contribution limit under Section 85316(b)(2).

(f) Contributions Over the Limits:

(1) An officeholder shall return to the contributor the portion of any contribution to his or her officeholder account that exceeds the limits of Section 85301, 85302 (after cumulation) or 85316 (either alone or after cumulation) by the earlier of 14 days of receipt or 14 days of the date the officeholder files a statement of intention to be a candidate for elective state office pursuant to Section 85200.

(2) A contributor to the officeholder account does not violate the contribution limits applying to the officeholder's election to a future elective state office as otherwise provided under Section 85316(b)(3) if, when he or she makes the contribution, the officeholder has not filed a statement of organization to establish a controlled committee for election to a future elective state office.

(g) Terminating Officeholder Accounts and Committees:

(1) The officeholder may not accept contributions after the officeholder's term of office ends or the date he or she leaves that office, whichever is earlier.

(2) The officeholder may redesignate the officeholder account as an officeholder controlled committee for a future term of the same office by amending the statement of



organization for the committee to reflect the redesignation for the future term of office prior to the date the officer's term of office ends.

(3) An officeholder may redesignate officeholder funds in the redesignated officeholder account as officeholder funds for the new term of office, subject to the limitations in subdivision

(e)(4).

(4) Once the officeholder's term of office ends or he or she leaves that office, whichever is earlier, the officeholder may only use his or her officeholder funds for the following purposes:

(A) Paying outstanding officeholder expenses.

(B) Repaying contributions to contributors to the officeholder account.

(C) Making a donation to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

(D) Paying for professional services reasonably required by the officeholder controlled committee to assist in the performance of its administrative functions.

(5) The officeholder shall terminate the officeholder controlled committee within 90 days of the date the officer's term of office ends or he or she leaves that office, whichever is earlier. The Executive Director may for good cause extend the termination date or permit the candidate to reopen the account.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 84104, 85316 and 90000-90007, Government Code.

**HISTORY**

1. New section filed 7-3-2007; operative 8-2-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2007, No. 27). For prior history, see Register 2007, No. 26.

2. Change without regulatory effect amending section filed 3-22-2016; operative 4-21-2016 pursuant to 2 CCR 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2016, No. 13).



Office of the  
City Attorney

**DATE:** December 28, 1999

**TO:** BARBARA GILBERT,  
Aide to Mayor Shirley Dean

**FROM:** MANUELA ALBUQUERQUE, City Attorney *MA*  
By: CAMILLE COUREY, Deputy City Attorney

**SUBJECT:** APPLICATION OF BERKELEY ELECTION REFORM ACT TO OFFICEHOLDER ACCOUNTS

**ISSUE:**

Does the Berkeley Election Reform Act (BERA) govern officeholder accounts?

**CONCLUSION:**

No. The BERA does not govern true officeholder accounts per se. However, the mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under the BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable local laws.

**ANALYSIS:**

Sarah Reynoso, former secretary and staff counsel to the Fair Campaign Practices Commission (FCPC), issued an opinion to the FCPC dated December 2, 1991, a copy of which is attached, stating that the BERA's contribution limit does not apply to contributions made to an officeholder account. The opinion reasons that the BERA's contribution limit applies only to "contributions" as defined in the BERA, i.e., which are made directly or indirectly in support of or in opposition to the nomination or election of one or more candidates to elective office. (See Berkeley Municipal Code (BMC) § 2.12.100.) Contributions to a true officeholder account are not made for the purpose of nominating or electing a candidate to office, but rather for the use of an officeholder in carrying out the duties of his or her office. Therefore, the contribution limit of the BERA is inapplicable to officeholder accounts.<sup>1</sup> For similar reasons, the BERA does not

<sup>1</sup> However, the opinion also provided that contributions to officeholder accounts still had to be reported on campaign statements because the State Fair Political Practices Commission (FPPC) Regulations broadly defined contributions as any contribution for "political purposes." Since officeholder expenses are for political purposes, they must be reported to the State.

Barbara Gilbert  
Re: Application of Berkeley Election Reform Act To Officeholder Accounts  
December 28, 1999  
Page 2

apply to true officeholder accounts.

The BERA requires the filing of statements to report the amounts received and expended in municipal elections. (See BMC §§ 2.12.015, 2.12.030 through 2.12.050) Specifically, a "campaign statement" required to be filed under the BERA is an itemized report which provides the information required by Sections 2.12.245 through 2.12.325 of the BERA. (BMC § 2.12.080.) Sections 2.12.245 through 2.12.325 govern the reporting of contributions and expenditures. "Contributions" and "expenditures" are defined by the BERA as any amounts received or expended, respectively, in aid of or in opposition to the nomination or election of one or more candidates to elective office. (See BMC §§ 2.12.100 and 2.12.130.) Contributions to or expenditures from a true officeholder account are not subject to the BERA's reporting requirements because they are made for the purpose of carrying out the duties of elective office, and not for the purpose of aiding or opposing the nomination or election of one or more candidates to elective office.<sup>2</sup> Therefore, the BERA does not apply to true officeholder accounts.

However, the fact that an account may be designated as an officeholder account will not shield it from scrutiny under the BERA if the officeholder account is, in fact, being used for the receipt of contributions or the making of expenditures in aid of the nomination or election of a candidate for local elective office. Nor will BERA requirements, such as the \$250 contribution limit or the prohibition against contributions from businesses to candidates, be held inapplicable if contributions made initially to an officeholder account are transferred subsequently to a campaign account. Where the actions taken with respect to an officeholder account implicate campaign contributions and expenditures in municipal elections, the officeholder account will be scrutinized under the BERA and other applicable local law.

#### Attachment

cc: Fair Campaign Practices Commission  
Sherry Kelly, City Clerk

City Attorney Opinions Index: H.E.I. and H.L.G.

CCM

PAUSERS\BBL2\ofthldr.mam.doc

<sup>2</sup> Again, however, the State FPPC still requires the reporting of activity relating to an officeholder account. (See footnote 1.)

## CITY OF BERKELEY

DATE: December 9, 1991

Memorandum

TO: FCPC COMMISSIONERS

FROM: Sarah Reynoso,  Secretary & Staff CounselSUBJECT: APPLICABILITY OF BERA'S CONTRIBUTION LIMIT TO FUNDS RAISED FOR OFFICEHOLDER EXPENSESBACKGROUND AND ISSUE

I received the attached letter from Richard N. Lerner, treasurer of Friends of Ioni Hancock Committee ("Committee"), regarding the applicability of BERA's (Berkeley Election Reform Act) \$250 contribution limit to funds raised to cover officeholder expenses. The Committee would like to raise money to cover activities by the Mayor for which the City has not allocated funds, for example, distribution of a newsletter and international travel to visit Berkeley Sister Cities.

Thus, the issue presented to the Commission is as follows: Is BERA's \$250 contribution limit applicable to funds raised for officeholder expenses?

CONCLUSION

No. The BERA's contribution limitation is only applicable to money raised "in aid of or in opposition to the nomination or election" of a candidate. Since the Committee intends to raise these funds for activities unrelated to the nomination or election of the Mayor, they are not subject to the BERA's \$250 contribution limitation. However, such funds must be reported as contributions under the State Political Reform Act and their expenditure itemized on the disclosure forms.

ANALYSIS

The BERA prohibits candidates for elective office from soliciting or accepting a contribution of more than \$250 from any one contributor. (BERA section 2.12.415.) Thus, funds which fall within BERA's definition of a contribution, are subject to the \$250 limit. In order to determine whether funds raised for officeholder expenses are subject to the contribution limitation, BERA's definition of contribution must be reviewed.

The BERA defines contribution, in part, as follows:

"Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or

FCPC COMMISSIONERS  
December 9, 1991  
Page 2

in opposition to the nomination or election of one or more candidates . . . . (Emphasis added.)

Thus, the plain language of the BERA requires that a contribution be solicited for purposes related to the nomination or election of a candidate for office to be subject to its contribution limitation. Since the Committee intends to raise funds for purposes unrelated to the Mayor's nomination or election for elective office, such funds do not fall within the BERA's definition and are therefore not subject to its \$250 limitation.

However, because the state Political Reform Act defines contribution to include any funds raised for political purposes, funds raised for officeholder expenses are considered contributions and must be reported on campaign disclosure forms.<sup>1/</sup> (Government Code section 82015.) Additionally, since the court's ruling in SEIU v. FPPC invalidated the state's \$1,000 contribution limit, funds raised for officeholder expenses are not subject to any limitation.

As a final precaution, the Committee should be advised that the FPPC has issued regulations concerning officeholder expenses and it should review them with respect to their interaction with the BERA.

Attachment

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<sup>1/</sup>I spoke with the FPPC's legal staff and confirmed that funds raised for officeholder expenses must be reported as contributions on the campaign disclosure forms.

**NOTICE OF PUBLIC HEARING  
BERKELEY CITY COUNCIL**

**AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT**

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the prohibition of officeholder accounts.

The hearing will be held on, February 4, 2020, at 4:00 p.m. in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City's website at [www.CityofBerkeley.info](http://www.CityofBerkeley.info) as of **January 30, 2020**.

For further information, please contact Samuel Harvey, Commission Secretary at 981-6998.

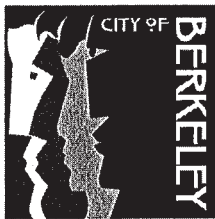
Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

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

**Published:** January 24, 2020 – The Berkeley Voice  
Pursuant to Berkeley Municipal Code Section 2.12.051

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I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on January 30, 2020.

Mark Numainville, City Clerk



[First Last name]
Councilmember District [District No.]

SUPPLEMENTAL REVISED AGENDA MATERIAL for Supplemental Packet 2

Meeting Date: February 4, 2020

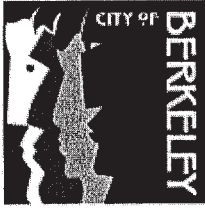
Item Number: 2

Item Description: Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

Submitted by: Councilmember Hahn

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.

**SOPHIE HAHN**

Berkeley City Council, District 5
 2180 Milvia Street, 5th Floor
 Berkeley, CA 94704
 (510) 981-7150
 shahn@cityofberkeley.info

ACTION CALENDAR

February 4, 2020

To: Honorable Mayor and Members of the City Council
 From: Vice Mayor Sophie Hahn
 Subject: Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.

Officeholder accounts are accounts an elected official can open, and raise funds for, to pay for expenses related to the office they hold.¹ They are not campaign accounts, and cannot be used for campaign purposes. The types of expenses Officeholder Accounts can be used for include research, conferences, events attended in the performance of government duties, printed newsletters, office supplies, travel related to official duties, etc. Cities can place limits on Officeholder Accounts, as Oakland has done.² Officeholder Accounts must be registered as official "Committees" and adhere to strict public reporting requirements, like campaign accounts. They provide full transparency to the public about sources and uses of funds.

The FCPC bases its recommendation to prohibit Officeholder Accounts on arguments about "equity" and potential "corruption" in elections. The report refers repeatedly to "challengers" and "incumbents," suggesting that Officeholder Accounts are vehicles for unfairness in the election context.

I believe that the FCPC's recommendations reflect a misunderstanding of the purpose and uses of Officeholder Accounts, equating them with campaign accounts and suggesting that they create an imbalance between community members who apparently have already decided to run against an incumbent (so-called "challengers") and elected officials who are presumed to be

¹ <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter5/18531.62.pdf>

² <http://www2.oaklandnet.com/w/OAK052051>

always running for office. The recommendations do not take into account some important framing: the question of what funds are otherwise available to pay for Officeholder-type expenses for Officeholders or members of the public. Contrary to the conclusions of the FCPC, I believe Officeholder accounts are an important vehicle to redress a significant disadvantage for elected officials, whose ability to exercise free speech in the community and participate in conferences and events related to their profession is constrained by virtue of holding public office, as compared to community members, whose speech rights are unrestricted in any manner whatsoever, and who can raise money to use for whatever purposes they desire.

Outlawing Officeholder Accounts is also posited as a means to create equity between more and less wealthy Officeholders, on the theory that less affluent Officeholders will have less access to fundraising for Officeholder Accounts than more affluent Officeholders. Because there are no prohibition on using personal funds for many of the purposes for which Officeholder Account funds can be used, prohibiting Officeholder Accounts I believe has the opposite effect; it leaves more affluent Officeholders with the ability to pay for Officeholder expenses from personal funds, without providing an avenue for less affluent Officeholders, who may not have available personal funds, to raise money from their supporters to pay for such Officeholder expenses.

The question of whether Officeholder Accounts should be allowed in Berkeley plays out in the context of a number of rules and realities that are important to framing any analysis.

First, by State Law, elected officials are prohibited from using public funds for a variety of communications that many constituents nevertheless expect. For example, an elected official may not use public funds to send a mailing announcing municipal information to constituents, "such as a newsletter or brochure, [] delivered, by any means [] to a person's residence, place of employment or business, or post office box."³ Nor may an elected official mail an item using public funds that features a reference to the elected official affiliated with their public position.⁴ Note that Electronic newsletters are not covered by these rules, and can and do include all of these features, even if the newsletter service is paid for by the public entity. That said, while technically not required, many elected officials prefer to use email newsletter distribution services (Constant Contact, MailChimp, Nationbuilder, etc.) paid for with personal (or "Officeholder") funds, to operate in the spirit of the original rules against using public funds for communications that include a photo of, or references to, the elected official.

Without the ability to raise funds for an Officeholder Account, for an elected official to send a paper newsletter to constituents or to use an email newsletter service that is not paid for with public funds, they must use personal funds. A printed newsletter mailed to 5-6,000 households (a typical number of households in a Berkeley City Council District) can easily cost \$5,000+, and an electronic mail service subscription typically costs \$10 (for the most basic service) to \$45 per month, a cost of \$120.00 to over \$500 per year - in personal funds.

³ <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>

⁴ <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>

Second, Berkeley City Councilmembers and the Mayor of Berkeley are not paid enough for there to be any reasonable expectation that personal funds should be used for these types of expenses.⁵ For many Councilmembers and/or the Mayor, work hours are full time - or more - and there is no other source of income.

Finally, and most importantly, local elected officials are restricted from accepting money or gifts. An elected official cannot under any circumstances raise money to pay for Officeholder expenses such as printed communications, email newsletter services, travel and admission to industry conferences for which the elected official is not an official delegate (e.g., conferences on City Planning, Green Cities, Municipal Finance, etc.), and other expenses related to holding office that are not covered by public funds. Again, without the possibility of an Officeholder Account, an elected official generally must use personal funds for these expenses, allowing more affluent elected officials to participate while placing a hardship or in some cases a prohibition on the ability of less affluent elected officials to undertake these Officeholder-type activities - which support expected communications with constituents and participation in industry activities that improve the elected official's effectiveness.

The elected official's inability to raise funds from others must be contrasted with the ability of a community member - a potential "challenger" who has not yet declared themselves to be an actual candidate - or perhaps a neighborhood association, business or corporation (Chevron, for example) - to engage in similar activities. Nothing restricts any community member or organization from using their own funds - or funds obtained from anyone - a wealthy friend, a corporation, a local business, a community organization or their neighbors - for any purpose whatsoever.

Someone who doesn't like the job an elected official is doing could raise money from family or connections anywhere in the community - or the world - and mail a letter to every person in the District or City criticizing the elected official, or buy up every billboard or banner ad on Facebook or Berkeleyside to broadcast their point of view. By contrast, the elected official, without access to an Officeholder Account, could only use personal funds to "speak" with their own printed letter, billboard or advertisement. Community members (including future "challengers") can also attend any and all conferences they want, engage in travel to visit interesting cities and projects that might inform their thoughts on how a city should be run, and pay for those things with money raised from friends, colleagues, businesses, corporations, foreign governments - *anyone*. They are private citizens with full first amendment rights and have no limitations, no reporting requirements, no requirements of transparency or accountability whatsoever.

The imbalance is significant. Outside of the campaign setting, where all declared candidates can raise funds and must abide by the same rules of spending and communications, *elected officials cannot raise money for any expenses whatsoever, from any source, while community*

⁵ Councilmembers receive annual compensation of approximately \$36,000, while the Mayor receives annual compensation of approximately \$55,000.⁵

members, including organizations and private companies, can raise as much money as they want from any sources, and use that money for anything they choose.

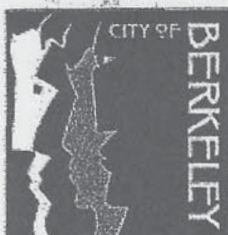
Without the ability to establish and fund an Officeholder Account, the only option an elected official has is to use personal funds, which exacerbates the potential imbalance between elected officials with more and less personal funds to spend. Elected officials work within a highly regulated system, which can limit their ability to “speak” and engage in other activities members of the public are able to undertake without restriction. Officeholder Accounts restore some flexibility by allowing elected officials to raise money for expenses related to holding office, so long as the sources and uses of those funds is made transparent.

By allowing Officeholder Accounts and regulating them, Berkeley can place limits on amounts that can be raised, and on the individuals/entities from whom funds can be accepted, similar (or identical) to the limits Berkeley places on sources of campaign funds. Similarly, Berkeley can restrict uses of funds beyond the State’s restrictions, to ensure funds are not used for things like family members’ travel, as is currently allowed by the State. Oakland has taken this approach, and has a set of Officeholder Account regulations that provide a good starting point for Berkeley to consider.⁶

I respectfully ask for a vote to send the question of potential allowance for, and regulation of, Officeholder Accounts to the Agenda and Rules Committee for further consideration.

CONTACT: Sophie Hahn, District 5: (510) 981-7150

⁶ <http://www2.oaklandnet.com/w/OAK052051>



Fair Campaign Practices Commission

Date: February 12, 2020
To: FAIR CAMPAIGN PRACTICES COMMISSION
From: Dean Metzger, Commission Chair
Subject: Council discussion and action with regards to the Officeholder Accounts FCPC proposal.

At the Special City Council meeting of Tuesday February 4, 2020, the City Council had a lengthy discussion about their D13 accounts, and the lack of discretionary funds Council Members have to spend. They then decided not to approve the FCPC recommendation to prohibit Officeholder Accounts.

To remedy this concern the FCPC should request from the City Manager the amount each Council Member receives in their D13 accounts and after some discussion make a recommendation to Council. If the D13 account is large enough to allow Council members to make the expenditures they feel will keep their constituents informed of their activities, travel to local meetings, provide transportation expenses and meals - there would be no need for Officeholders Accounts.

A search of the City's Budget documents did not reveal the amounts allocated to the Council D13 accounts. Once the information is available the FCPC can make its recommendations to City Council.

Attachments:

1. Mayor and City Council Financial Summary
2. Draft request to City Manager for budget details of the Mayor and each individual Council Member

MAYOR AND CITY COUNCIL FINA

	FY 2015 Actual	FY 2016 Actual	FY 2017 Adopted	FY 2018 Proposed	FY 2019 Proposed
EXPENDITURES					
By Type:					
Salaries and Benefits	1,660,661	1,760,619	1,723,617	1,833,734	1,880,031
Services and Materials	36,942	43,407	113,526	113,526	113,526
Capital Outlay	1,953	7,674			
Internal Services	89,100	81,181	81,181	81,181	81,181
Indirect Cost Transfer					
	<u>1,788,656</u>	<u>1,892,881</u>	<u>1,918,324</u>	<u>2,028,441</u>	<u>2,074,738</u>
By Division:					
Mayor's Office	515,095	558,137	584,877	554,389	566,917
Council Offices	1,273,561	1,334,744	1,333,447	1,474,052	1,507,821
Exiting Officials					
	<u>1,788,656</u>	<u>1,892,881</u>	<u>1,918,324</u>	<u>2,028,441</u>	<u>2,074,738</u>
By Fund:					
General Fund	1,788,656	1,892,881	1,918,324	2,028,441	2,074,738
	<u>1,788,656</u>	<u>1,892,881</u>	<u>1,918,324</u>	<u>2,028,441</u>	<u>2,074,738</u>

General Fund FTE	12.00	12.00	12.00	12.00	12.00
Total FTE	12.00	12.00	12.00	12.00	12.00

DRAFT

DRAFT

DRAFT

Date: February 20, 2020

To: Dee Williams-Riley
City Manager

From: Fair Campaign Practices Commission

Subject: Request for budget details of the Mayor and each individual Council Member.

At the Special Council meeting of Tuesday, February 4, 2020 the Council heard and took action on the FCPC recommendation to amend the Berkeley Municipal Code to prohibit Officeholder Accounts. The Council discussion went to great lengths about why they needed the Officeholder Account before declining to approve the FCPC recommendation.

The FCPC needs to understand why the Council took the action it did.

To help the Commission determine if any further action on its part would be helpful, the Commission requests that your office provide the FCPC with the detailed budgets of the Mayor and each Council Member. The Commission has the budget summaries of the Mayor and City Council but it is of little use for the discussion.

Please provide the requested information in time for the FCPC meeting on March 19, 2020.

Thank you,

Fair Campaign Practices Commission



Fair Campaign Practices Commission
Open Government Commission

ACTION CALENDAR
January 26, 2021

To: Honorable Mayor and Members of the City Council

From: Brad Smith, Chair, Fair Campaign Practices and Open Government Commissions

Submitted by: Samuel Harvey, Secretary, Fair Campaign Practices and Open Government Commissions

Subject: Amendments to the Berkeley Election Reform Act (BERA) and Change to City Council Expenditure and Reimbursement Policies (Resolution 67,992-N.S.)

RECOMMENDATION

Form a joint subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to (1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts and (2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

Officeholder accounts are not expressly regulated by BERA. However, under existing law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and may trigger various local and state legal requirements.

Donations to nonprofit organizations from Councilmember's discretionary council budgets (D-13 accounts) are allowed by the authority of City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.).

Action: Motion to submit report to City Council recommending creation of a subcommittee of members of the Council, FCPC and OGC to (1) prepare an ordinance prohibiting or regulating officeholder accounts and (2) prepare a change in City Council Expenditure and Reimbursement policies

Vote: M/S/C: Blome/Metzger; Ayes: O'Donnell, Ching, Blome, Tsang, Smith; Noes: Metzger, Sheahan; Abstain: none; Absent: McLean.

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the "double green light" process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

Changes to the City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) can be made by a majority vote of the Council.

BACKGROUND

Officeholder Accounts

During 2019, the Fair Campaign Practices Commission (FCPC) discussed whether there is a need to amend the law relating to these accounts. These accounts are not expressly regulated by BERA, but under current law, if funds for officeholder accounts are used for campaign purposes, this may implicate campaign financing law and trigger various local and state legal requirements. A 1999 legal opinion from the City Attorney stated: "[t]he mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable laws."

In the course of its review of the issue of officeholder accounts, the FCPC considered three options:

- (1) leaving the law on officeholder accounts unchanged;
- (2) prohibiting officeholder accounts entirely (an approach used by the City of San Jose), or
- (3) authorizing officeholder accounts but limiting their use and imposing various restrictions and requirements on them (an approach used by the City of Oakland).

The Commission referred the issue of officeholder accounts to a subcommittee, which met several times in the fall of 2019 and considered the options. The subcommittee unanimously recommended prohibiting officeholder accounts entirely. At its regular meeting on November 21, 2019 the Commission voted without opposition to recommend amendments to the BERA that would prohibit officeholder accounts.

The Commission's proposal was presented to the City Council at a February 4, 2020 special meeting. (Report to the Council, with Attachments, is attached.) The FCPC report summarized its proposal: "Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also the goal of the Fair Elections Act of 2016." (Report, page 1.)

At the February 4, 2020 meeting, the Council had a lengthy discussion about their D- 13 accounts and the lack of discretionary funds that members have to spend. They also decided not to approve the FCPC recommendation to prohibit officeholder accounts. The City Council referred the issues relating to officeholder and D-13 accounts to its Agenda and Rules Committee for further consideration.

Proposed Changes to City Council Expenditure and Reimbursement Policies

At the April 23, 2020 meeting of the Open Government Committee (OGC), a motion to direct staff to develop a proposal recommending Council change City policy to remove councilmember names from donations to nonprofit organizations from D- 13 accounts was approved unanimously.

Donations to nonprofit organizations from the Councilmember’s discretionary council budget (D-13 accounts) puts that elected official in a favorable light with Berkeley citizens at no cost to the Councilmember, an option not available to a challenger for that office. A look at the Consent Calendar of City Council Meeting Agendas will often contain one or more items from one or more Councilmembers making a donation to a nonprofit organization “from the discretionary council budget” of the Councilmember. This line item (“Services and Materials”) from the General Fund was increased from \$50,938 in FY 2017 to \$113,526 in FY 2018 (approximately \$40,000 for the Mayor, the balance evenly divided among the Councilmembers; see Attachment – Council Office Budget Summaries). While not technically a “campaign contribution,” those individuals in the organization as well as individuals favorably disposed to the nonprofit organization receiving the funds would certainly see it favorably. A person running against this incumbent would have to draw on their own resources to match a Councilmember’s contribution from public funds and without the public notice of the contribution the Councilmember receives.

In addition to favoring incumbents, the use of public moneys for contributions to nonprofit organizations from the discretionary council budgets of individual Council members is arguably improper and certainly bad optics. The commissioners of the OGC have no argument with contributions being made to nonprofit organizations from the City of Berkeley, but believe they should be made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley, not from individual Council members. Perhaps a nonprofit fund could be set up from which the donations could be made from recommendations made to one of the Council’s Policy Commissions. This would free funds for other purposes now being directed to nonprofit organizations from individual Councilmember’s D-13 accounts.

Proposed Action:

At this stage, the Council has referred both the issues relating to officeholder accounts and those relating to D-13 accounts to its Agenda and Rules Committee for further consideration. At a special meeting on March 9, 2020, that Committee agreed to work collaboratively with the FCPC and OGC on matters relating to officeholder accounts and D-13 accounts. This collaborative work with the Council was included in the FCPC and OGC 2020-2021 workplans, which were approved on May 21, 2020.

Consistent with the prior actions of the Council and the FCPC/OGC, the Commissions recommend the establishment of a subcommittee of members of the City Council and members of the Fair Campaign Practices and Open Government Commissions to:

(1) prepare an ordinance amending the Berkeley Election Reform Act (BMC Chapter 2.12) to prohibit or regulate officeholder accounts, and

(2) prepare a change in City Council Expenditure and Reimbursement policies (Resolution 67,992-N.S.) to have donations to nonprofit organizations made in the name of the entire Berkeley City Council on behalf of the citizens of Berkeley rather than from individual Council members.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

The “double green light” process requires that the FCPC adopt an amendment by a two-thirds vote, and that the City Council hold a public hearing and also adopt an amendment by a two-thirds vote. Evidence to date suggests there are differences of perspective regarding this matter between the City Council and the FCPC regarding the D-13 accounts. It would seem to be a rational step to discuss and come to agreement and possibly compromise prior to the “double green light” process.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

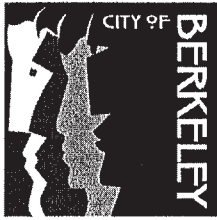
CONTACT PERSON

Brad Smith, Chair, Fair Campaign Practices and Open Government Commissions, (510) 981-6998

Samuel Harvey, Commission Secretary, Fair Campaign Practices and Open Government Commissions, (510) 981-6998

Attachments:

1. FCPC February 4, 2020 report to Council and attachments
2. Mayor and City Council Financial Summary



Fair Campaign Practices Commission

PUBLIC HEARING
February 4, 2020

To: Honorable Mayor and Members of the City Council
From: Fair Campaign Practices Commission
Submitted by: Dean Metzger, Chairperson, Fair Campaign Practices Commission
Subject: Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

Conduct a public hearing and upon conclusion, adopt first reading of an ordinance amending the Berkeley Election Reform Act, Berkeley Municipal Code Chapter 2.12, to prohibit Officeholder Accounts (See Section 18531.62. Elected State Officeholder Bank Accounts, Regulations of the Fair Political Practices Commission).

SUMMARY

Contributions to and expenditures from Officeholder Accounts provide an unfair advantage to incumbents. They also increase the reliance on private campaign contributions and risk increasing the perception of corruption. Amending the Berkeley Election Reform Act to prohibit Officeholder Accounts will help to level the playing field in municipal elections, which was also a goal of the Fair Elections Act of 2016.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

The proposed amendments to the Berkeley Election Reform Act (BERA) were adopted by the Fair Campaign Practices Commission (FCPC) at its regular meeting of November 21, 2019.

Action: M/S/C (Smith/Saver) to adopt the proposed amendments to BERA related to Officeholder Accounts.

Vote: Ayes: Metzger, Ching, Saver, Blome, McLean, Tsang, Smith; Noes: none; Abstain: none; Absent: O'Donnell (excused).

Pursuant to Berkeley Municipal Code Section 2.12.051, BERA may be amended by the "double green light" process. This process requires that the FCPC adopt the amendments by a two-thirds vote, and the City Council hold a public hearing and adopt the amendments by a two-thirds vote.

Amendments to the Berkeley Election Reform Act
to prohibit Officeholder Accounts

PUBLIC HEARING
February 4, 2020

BACKGROUND

The Fair Campaign Practices Commission has supported creating the circumstances in which the incumbent and challengers during an election play on as level a playing field as possible and reducing the influence of private campaign contributions. For instance, the Berkeley Fair Elections Act of 2016, which was passed by voters and recommended to Council by the Commission, included the following express purposes:

- Eliminate the danger of actual corruption of Berkeley officials caused by the private financing of campaigns.
- Help reduce the influence of private campaign contributions on Berkeley government.
- Reduce the impact of wealth as a determinant of whether a person becomes a candidate.

(Section 2.12.490(B)-(D).)

A recent inquiry to the Commission Secretary regarding the regulation of Officeholder Accounts resulted in a request from a Commissioner to have discussion of these accounts placed on the May 16, 2019 agenda for possible action. The following motion was made and passed at that meeting:

Motion to request staff work with Commissioner Smith to bring to a future meeting background information and a proposal to eliminate officeholder accounts (M/S/C: O'Donnell/Blome; Ayes: Blome, Ching, McLean, Metzger, O'Donnell, Saver, Smith, Tsui; Noes: None; Abstain: None; Absent: Harper (excused)).

Definition of an Officeholder Account

Under state law, an "officeholder account" refers to the funds held in a single bank account at a financial institution in the State of California separate from any other bank account held by the officeholder and that are used for "paying expenses associated with holding public office." Officeholder Account funds cannot be used to pay "campaign expenses." This definition is drawn from state law applicable to statewide elected officials: Government Code section 85316 (Attachment 2), and the accompanying regulation by the Fair Political Practices Commission (FPPC) codified at Title 2, Division 6, of the California Code of Regulations, Section 18531.62 (Attachment 3).

Contributions to or expenditures from an Officeholder Account are not subject to BERA's reporting requirements. (The FPPC still requires the reporting of activity relating to Officeholder Accounts, which is available to view on Berkeley's Public Access Portal.) If, however, a complaint is filed that an Officeholder Account is used for

Amendments to the Berkeley Election Reform Act
to prohibit Officeholder Accounts

PUBLIC HEARING
February 4, 2020

campaign contributions or to pay "campaign expenses," BERA can be used to respond to the complaint. The legal arguments for these statements are contained in a memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert, dated December 28, 1999 and a December 9, 1991 memorandum by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, that is attached to the December 28, 1999 memo. (Attachment 4.) Because the BERA provisions relied on in these memoranda have not been amended, and because no other BERA provisions have been added to regulate officeholder accounts, the memoranda's conclusions remain valid and are still controlling guidance.

Contributions to Officeholder Accounts

Funds raised for Officeholder Accounts in Berkeley are not subject to any limitations, either from the FPPC or BERA. Neither is there a limit on the total amount the Officeholder Account fund may receive in contributions per year. Contributions to an elected official's Officeholder Account may put that contributor in a more favorable light with the elected official than might otherwise be the case.

Expenditures from Officeholder Accounts

Except for the restriction that Officeholder Account funds cannot be used for "campaign expenses," BERA does not restrict how funds from Officeholder Accounts can be used.

There are a number of permissible expenditures from Officeholder Accounts that could put an elected official in a favorable light with voters that are not available to a challenger for that office. A donation to a nonprofit organization, although technically not a "campaign expense," would be seen favorably by those receiving the funds as well as individuals favorably disposed to the nonprofit organization receiving the funds. An individual running against this incumbent would have to draw on their own resources to make contributions to nonprofit organizations.

As long as political campaigns are not included, newsletters mailed to constituents related to events, information, or an officeholder's position on matters before the Council are a permissible Officeholder Account expenditure. This keeps the incumbent's name in front of the voter in a way unavailable to a challenger unless they pay for a newsletter and its distribution from their own resources.

Expenditures from Officeholder Account funds for flowers and other expressions of condolences, congratulations, or appreciation, while technically not "campaign expenses," also increase the probability that the recipient will be favorably predisposed toward the elected official as a candidate for reelection or election to another office. Again, a challenger would have to draw on their own resources to express condolences, congratulations, or appreciation to their potential supporters.

Amendments to the Berkeley Election Reform Act
to prohibit Officeholder Accounts

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February 4, 2020

Further, officeholder accounts can be used to pay for a broad range of office expenses, such as meals, travel, parking tickets, or contributions to other candidates or political parties.¹ Eliminating officeholder accounts would reduce reliance on and the influence of private contributions for these expenditures.

Recommendation

To make elections more equitable between challengers and incumbent and for the reasons given above, the Fair Campaign Practices Commission recommends prohibiting Officeholder Accounts.

Berkeley will not be the first to prohibit Officeholder Accounts. The San Jose Municipal Code was amended to prohibit officeholder accounts in January 2008. (Chapter 12.06 – ELECTIONS, San Jose, CA Code of Ordinances, p. 10)

Part 8 - OFFICEHOLDER ACCOUNTS

12.06.810 - Officeholder account prohibited.

No city officeholder, or any person or committee on behalf of a city officeholder may establish an officeholder account or an account established under the Political Reform Act, California Government Code Section 8100 et seq. as amended, for the solicitation or expenditure of officeholder funds. Nothing in this section shall prohibit an officeholder from spending personal funds on official or related business activities.

The following additions to BERA are proposed:

2.12.157 Officeholder Account

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

2.12.441 Officeholder account prohibited

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.

¹ Under state law applicable to state elected officials, officeholders may use campaign contributions for “expenses that are associated with holding office.” (Govt. Code, § 89510.) To qualify, expenditures must be “reasonably related to a legislative or governmental purpose.” (*Id.*, § 89512.) “Expenditures which confer a substantial personal benefit shall be directly related to a political, legislative, or governmental purpose.” (*Ibid.*)

Amendments to the Berkeley Election Reform Act
to prohibit Officeholder Accounts

PUBLIC HEARING
January 21, 2020

- C. Anyone holding an active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account, in accordance with FPPC guidelines.

ENVIRONMENTAL SUSTAINABILITY

There are no identified environmental effects related to the recommendation in this report.

RATIONALE FOR RECOMMENDATION

This proposed change to BERA will help to level the playing field between challengers and the incumbent running for elective office.

ALTERNATIVE ACTIONS CONSIDERED

A Subcommittee was formed to consider the options of (1) amending the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts, (2) amending BERA to mitigate possible advantages incumbents with an Officeholder Accounts have over challengers, or (3) doing nothing with regard to Officeholder Accounts. The four members of the Subcommittee recommended unanimously to the full Commission to amend the Berkeley Elections Reform Act, BMC Chapter 2.12, to prohibit Officeholder Accounts.

CITY MANAGER

The City Manager takes no position on the content and recommendations of this report.

CONTACT PERSON

Dean Metzger, Chair, Fair Campaign Practices Commission. 981-6998

Attachments:

- 1: Proposed Ordinance
- 2: Government Code section 85316
- 3: Section 18531.62 (Elected State Officeholder Bank Accounts), Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations
- 4: Memorandum signed by City Attorney Manuela Albuquerque to Aide to Mayor Shirley Dean, Barbara Gilbert (including attached memorandum signed by Secretary and Staff Counsel to the FCPC, Sarah Reynoso, to the FCPC)

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

OFFICEHOLDER ACCOUNT PROHIBITED; AMENDING BERKELEY MUNICIPAL CODE
CHAPTER 2.12

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

Section 1. That Berkeley Municipal Code section 2.12.157 is added to read as follows:

BMC 2.12.157 Officeholder account

“Officeholder Account” means any bank account maintained by an elected officer or by any person or committee on behalf of an elected officer, and whose funds are used for expenses associated with holding office and not for direct campaign purposes.

Section 2. That Berkeley Municipal Code section 2.12.441 is added to read as follows:

BMC 2.12.441 Officeholder account prohibited

- A. No elected officer, or any person or committee on behalf of an elected officer, may establish an officeholder account.
- B. No elected officer, or any person or committee on behalf of an elected officer, may use contributions, as defined in 2.12.100, for expenses associated with holding office.
- C. This provision does not affect a candidate’s ability to establish a legal defense fund or the requirements for such a fund, as set forth in the Political Reform Act or by regulation.
- D. Any active Officeholder Account on the date this change to BERA is adopted on a second reading by the City Council has one year from that date to terminate their Officeholder Account.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation



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GOVERNMENT CODE - GOV

TITLE 9. POLITICAL REFORM [81000 - 91014] (Title 9 added June 4, 1974, by initiative Proposition 9.)

CHAPTER 5. Limitations on Contributions [85100 - 85802] (Chapter 5 added June 7, 1988, by initiative Proposition 73.)

ARTICLE 3. Contribution Limitations [85300 - 85321] (Article 3 added June 7, 1988, by initiative Proposition 73.)

85316. (a) Except as provided in subdivision (b), a contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

(b) Notwithstanding subdivision (a), an elected state officer may accept contributions after the date of the election for the purpose of paying expenses associated with holding the office provided that the contributions are not expended for any contribution to any state or local committee. Contributions received pursuant to this subdivision shall be deposited into a bank account established solely for the purposes specified in this subdivision.

(1) No person shall make, and no elected state officer shall receive from a person, a contribution pursuant to this subdivision totaling more than the following amounts per calendar year:

- (A) Three thousand dollars (\$3,000) in the case of an elected state officer of the Assembly or Senate.
- (B) Five thousand dollars (\$5,000) in the case of a statewide elected state officer other than the Governor.
- (C) Twenty thousand dollars (\$20,000) in the case of the Governor.

(2) No elected state officer shall receive contributions pursuant to paragraph (1) that, in the aggregate, total more than the following amounts per calendar year:

- (A) Fifty thousand dollars (\$50,000) in the case of an elected state officer of the Assembly or Senate.
- (B) One hundred thousand dollars (\$100,000) in the case of a statewide elected state officer other than the Governor.
- (C) Two hundred thousand dollars (\$200,000) in the case of the Governor.

(3) Any contribution received pursuant to this subdivision shall be deemed to be a contribution to that candidate for election to any state office that he or she may seek during the term of office to which he or she is currently elected, including, but not limited to, reelection to the office he or she currently holds, and shall be subject to any applicable contribution limit provided in this title. If a contribution received pursuant to this subdivision exceeds the allowable contribution limit for the office sought, the candidate shall return the amount exceeding the limit to the contributor on a basis to be determined by the Commission. None of the expenditures made by elected state officers pursuant to this subdivision shall be subject to the voluntary expenditure limitations in Section 85400.

(4) The commission shall adjust the calendar year contribution limitations and aggregate contribution limitations set forth in this subdivision in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments shall be rounded to the nearest one hundred dollars (\$100).

(Amended by Stats. 2007, Ch. 130, Sec. 149. Effective January 1, 2008. Note: This section was added by Stats. 2000, Ch. 102, and approved in Prop. 34 on Nov. 7, 2000.)

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18531.62. Elected State Officeholder Bank Accounts.

(a) Application and Definitions. For purposes of Section 85316(b) and this regulation, the following definitions apply:

(1) "Officeholder" means an elected state officer.

(2) "Officeholder controlled committee" means a committee formed pursuant to subdivision (c) of this regulation.

(3) "Officeholder account" means the bank account established at a financial institution located in the State of California pursuant to Section 85316(b).

(4) "Officeholder funds" means money in the officeholder account.

(b) Establishing the Officeholder Account: For purposes of Section 85316(b), an officeholder shall maintain officeholder funds in a single bank account separate from any other bank account held by the officeholder.

(c) Establishing the Officeholder Controlled Committee, Reporting and Recordkeeping:

(1) Formation: The officeholder shall establish a controlled committee by filing a statement of organization pursuant to Section 84101 if the officeholder receives \$2,000 or more in officeholder contributions in a calendar year.

(2) Committee Name: The controlled committee name shall include the officeholder's last name, the office held, the year the officeholder was elected to the current term of office, and the words "Officeholder Account." The statement of organization shall include the name, account number, and address of the financial institution where the committee established the officeholder account.

(3) Filing Requirements: The controlled committee shall file campaign statements and reports pursuant to Chapters 4 and 5, except Sections 85200 and 85201, of Title 9 of the Government Code at the same times and in the same places as it otherwise would be required to do for any other controlled committee formed by the officeholder for election to state office.

(4) Required Recordkeeping and Audits. The officeholder and treasurer shall be subject to recordkeeping requirements under Section 84104. The officeholder account and officeholder controlled committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code. Any audit of the officeholder, or any of his or her controlled committees, under Section 90001 shall include all officeholder accounts and officeholder controlled committees maintained by the officeholder during the audit period as described in Regulation 18996(a)(1).

(d) Prohibitions:

(1) Officeholder funds may not be contributed or transferred to another state or local committee, including any other controlled committee of the officeholder, except as permitted in subdivisions (g) (2) and (g)(3).

(2) Officeholders may not use officeholder funds to pay "campaign expenses" as defined in Regulation 18525(a).

(3) The officeholder may not transfer or contribute funds from any other committee he or she controls to the officeholder account, except as permitted in subdivision (g)(2) and (g)(3).

(e) Contributions to the Officeholder Account:

(1)(A) Required Notices: In addition to the requirements of Regulation 18523.1, a written solicitation for contributions to the officeholder account shall include the following: "For purposes of the Political Reform Act's contribution limits, a contribution to an officeholder

account is also considered to be a contribution to all campaign committees for future elective state office the officeholder seeks during his or her current term of office."

(B) In addition to the requirements of subparagraph (A) above, an officeholder who files a statement of intention to be a candidate for any elective state office during the officeholder's term of office shall provide notice of this filing to every person that has made a contribution to his or her officeholder account. The notice shall contain the language in subparagraph (A) and be transmitted or mailed within 10 days of filing the statement of intention to be a candidate.

(2) Cumulation: A contribution to the officeholder account shall also be deemed a contribution to the officeholder's controlled committee for election to elective state office for the purposes of Section 85316(b)(3) only under all of the following circumstances:

(A) The contributor makes the contribution between the day the election was held for the term of office for which the officeholder account was established and the end of that term of office;

(B) The officeholder maintains the controlled committee, established for a future term of elective state office, at any time during the period covered in subparagraph (A).

(3) Cumulation and Primary and General Elections: A person's contributions to the officeholder account, when combined with contributions from the same person for a primary and general election to the elective state office may not exceed the contribution limits applicable to the primary and general election.

(4) Multiple Officeholder Accounts: When an officeholder maintains more than one officeholder account in the same calendar year, he or she may not receive the following contributions to any of those accounts during that calendar year:

(A) Contributions from a single contributor that, when cumulated for all the accounts, exceed the maximum amount the contributor could give to the officeholder account having the highest per person contribution limit under Section 85316(b)(1).

(B) Contributions from all contributors that, when cumulated for all the accounts, exceed the maximum amount in total contributions the officeholder could receive in the officeholder account having the highest aggregate contribution limit under Section 85316(b)(2).

(f) Contributions Over the Limits:

(1) An officeholder shall return to the contributor the portion of any contribution to his or her officeholder account that exceeds the limits of Section 85301, 85302 (after cumulation) or 85316 (either alone or after cumulation) by the earlier of 14 days of receipt or 14 days of the date the officeholder files a statement of intention to be a candidate for elective state office pursuant to Section 85200.

(2) A contributor to the officeholder account does not violate the contribution limits applying to the officeholder's election to a future elective state office as otherwise provided under Section 85316(b)(3) if, when he or she makes the contribution, the officeholder has not filed a statement of organization to establish a controlled committee for election to a future elective state office.

(g) Terminating Officeholder Accounts and Committees:

(1) The officeholder may not accept contributions after the officeholder's term of office ends or the date he or she leaves that office, whichever is earlier.

(2) The officeholder may redesignate the officeholder account as an officeholder controlled committee for a future term of the same office by amending the statement of

organization for the committee to reflect the redesignation for the future term of office prior to the date the officer's term of office ends.

(3) An officeholder may redesignate officeholder funds in the redesignated officeholder account as officeholder funds for the new term of office, subject to the limitations in subdivision

(e)(4).

(4) Once the officeholder's term of office ends or he or she leaves that office, whichever is earlier, the officeholder may only use his or her officeholder funds for the following purposes:

(A) Paying outstanding officeholder expenses.

(B) Repaying contributions to contributors to the officeholder account.

(C) Making a donation to a bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, if no substantial part of the proceeds will have a material financial effect on the officeholder, a member of his or her immediate family, or his or her committee treasurer.

(D) Paying for professional services reasonably required by the officeholder controlled committee to assist in the performance of its administrative functions.

(5) The officeholder shall terminate the officeholder controlled committee within 90 days of the date the officer's term of office ends or he or she leaves that office, whichever is earlier. The Executive Director may for good cause extend the termination date or permit the candidate to reopen the account.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 84104, 85316 and 90000-90007, Government Code.

HISTORY

1. New section filed 7-3-2007; operative 8-2-2007. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2007, No. 27). For prior history, see Register 2007, No. 26.

2. Change without regulatory effect amending section filed 3-22-2016; operative 4-21-2016 pursuant to 2 CCR 18312(e). Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements and not subject to procedural or substantive review by OAL) (Register 2016, No. 13).



Office of the City Attorney

DATE: December 28, 1999

TO: BARBARA GILBERT,
Aide to Mayor Shirley Dean

FROM: MANUELA ALBUQUERQUE, City Attorney *MA*
By: CAMILLE COUREY, Deputy City Attorney

SUBJECT: APPLICATION OF BERKELEY ELECTION REFORM ACT TO OFFICEHOLDER ACCOUNTS

ISSUE:

Does the Berkeley Election Reform Act (BERA) govern officeholder accounts?

CONCLUSION:

No. The BERA does not govern true officeholder accounts per se. However, the mere fact that an account may be designated an officeholder account does not insulate it from scrutiny under the BERA or other applicable local law if the officeholder account is not used strictly for officeholder purposes or if some action taken with respect to the officeholder account implicates campaign contributions and expenditures or other applicable local laws.

ANALYSIS:

Sarah Reynoso, former secretary and staff counsel to the Fair Campaign Practices Commission (FCPC), issued an opinion to the FCPC dated December 2, 1991, a copy of which is attached, stating that the BERA's contribution limit does not apply to contributions made to an officeholder account. The opinion reasons that the BERA's contribution limit applies only to "contributions" as defined in the BERA, i.e., which are made directly or indirectly in support of or in opposition to the nomination or election of one or more candidates to elective office. (See Berkeley Municipal Code (BMC) § 2.12.100.) Contributions to a true officeholder account are not made for the purpose of nominating or electing a candidate to office, but rather for the use of an officeholder in carrying out the duties of his or her office. Therefore, the contribution limit of the BERA is inapplicable to officeholder accounts.¹ For similar reasons, the BERA does not

¹ However, the opinion also provided that contributions to officeholder accounts still had to be reported on campaign statements because the State Fair Political Practices Commission (SFPPC) Regulations broadly defined contributions as any contribution for "political purposes." Since officeholder expenses are for political purposes, they must be reported to the State.

Barbara Gilbert

Re: Application of Berkeley Election Reform Act To Officeholder Accounts

December 28, 1999

Page 2

apply to true officeholder accounts.

The BERA requires the filing of statements to report the amounts received and expended in municipal elections. (See BMC §§ 2.12.015, 2.12.030 through 2.12.050) Specifically, a "campaign statement" required to be filed under the BERA is an itemized report which provides the information required by Sections 2.12.245 through 2.12.325 of the BERA. (BMC § 2.12.080.) Sections 2.12.245 through 2.12.325 govern the reporting of contributions and expenditures. "Contributions" and "expenditures" are defined by the BERA as any amounts received or expended, respectively, in aid of or in opposition to the nomination or election of one or more candidates to elective office. (See BMC §§ 2.12.100 and 2.12.130.) Contributions to or expenditures from a true officeholder account are not subject to the BERA's reporting requirements because they are made for the purpose of carrying out the duties of elective office, and not for the purpose of aiding or opposing the nomination or election of one or more candidates to elective office.² Therefore, the BERA does not apply to true officeholder accounts.

However, the fact that an account may be designated as an officeholder account will not shield it from scrutiny under the BERA if the officeholder account is, in fact, being used for the receipt of contributions or the making of expenditures in aid of the nomination or election of a candidate for local elective office. Nor will BERA requirements, such as the \$250 contribution limit or the prohibition against contributions from businesses to candidates, be held inapplicable if contributions made initially to an officeholder account are transferred subsequently to a campaign account. Where the actions taken with respect to an officeholder account implicate campaign contributions and expenditures in municipal elections, the officeholder account will be scrutinized under the BERA and other applicable local law.

Attachment

cc: Fair Campaign Practices Commission
Sherry Kelly, City Clerk

City Attorney Opinions Index: H.E.I. and H.L.G.

CCM

PAUSERS\BBL2\ofhldr.mem.doc

² Again, however, the State FPPC still requires the reporting of activity relating to an officeholder account. (See footnote 1.)

CITY OF BERKELEY

DATE: December 9, 1991 Memorandum

TO: FCPC COMMISSIONERS

FROM: Sarah Reynoso, Secretary & Staff Counsel

SUBJECT: APPLICABILITY OF BERA'S CONTRIBUTION LIMIT TO FUNDS RAISED FOR OFFICEHOLDER EXPENSES

BACKGROUND AND ISSUE

I received the attached letter from Richard N. Lerner, treasurer of Friends of Ioni Hancock Committee ("Committee"), regarding the applicability of BERA's (Berkeley Election Reform Act) \$250 contribution limit to funds raised to cover officeholder expenses. The Committee would like to raise money to cover activities by the Mayor for which the City has not allocated funds, for example, distribution of a newsletter and international travel to visit Berkeley Sister Cities.

Thus, the issue presented to the Commission is as follows: Is BERA's \$250 contribution limit applicable to funds raised for officeholder expenses?

CONCLUSION

No. The BERA's contribution limitation is only applicable to money raised "in aid of or in opposition to the nomination or election" of a candidate. Since the Committee intends to raise these funds for activities unrelated to the nomination or election of the Mayor, they are not subject to the BERA's \$250 contribution limitation. However, such funds must be reported as contributions under the State Political Reform Act and their expenditure itemized on the disclosure forms.

ANALYSIS

The BERA prohibits candidates for elective office from soliciting or accepting a contribution of more than \$250 from any one contributor. (BERA section 2.12.415.) Thus, funds which fall within BERA's definition of a contribution, are subject to the \$250 limit. In order to determine whether funds raised for officeholder expenses are subject to the contribution limitation, BERA's definition of contribution must be reviewed.

The BERA defines contribution, in part, as follows:

"Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or

FCPC COMMISSIONERS
December 9, 1991
Page 2

in opposition to the nomination or election of one or more candidates (Emphasis added.)

Thus, the plain language of the BERA requires that a contribution be solicited for purposes related to the nomination or election of a candidate for office to be subject to its contribution limitation. Since the Committee intends to raise funds for purposes unrelated to the Mayor's nomination or election for elective office, such funds do not fall within the BERA's definition and are therefore not subject to its \$250 limitation.

However, because the state Political Reform Act defines contribution to include any funds raised for political purposes, funds raised for officeholder expenses are considered contributions and must be reported on campaign disclosure forms.^{1/} (Government Code section 82015.) Additionally, since the court's ruling in SEIU v. FPPC invalidated the state's \$1,000 contribution limit, funds raised for officeholder expenses are not subject to any limitation.

As a final precaution, the Committee should be advised that the FPPC has issued regulations concerning officeholder expenses and it should review them with respect to their interaction with the BERA.

Attachment

^{1/}I spoke with the FPPC's legal staff and confirmed that funds raised for officeholder expenses must be reported as contributions on the campaign disclosure forms.

**NOTICE OF PUBLIC HEARING
BERKELEY CITY COUNCIL**

AMENDMENTS TO THE BERKELEY ELECTION REFORM ACT

The Fair Campaign Practices Commission is proposing amendments to the Berkeley Election Reform Act related to the prohibition of officeholder accounts.

The hearing will be held on, February 4, 2020, at 4:00 p.m. in the School District Board Room, 1231 Addison Street.

A copy of the agenda material for this hearing will be available on the City's website at www.CityofBerkeley.info as of **January 30, 2020**.

For further information, please contact Samuel Harvey, Commission Secretary at 981-6998.

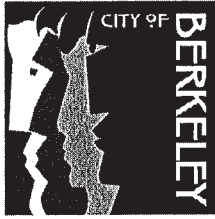
Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

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

Published: January 24, 2020 – The Berkeley Voice
Pursuant to Berkeley Municipal Code Section 2.12.051

~~~~~  
I hereby certify that the Notice for this Public Hearing of the Berkeley City Council was posted at the display case located near the walkway in front of the Maudelle Shirek Building, 2134 Martin Luther King Jr. Way, as well as on the City's website, on January 30, 2020.

\_\_\_\_\_  
Mark Numainville, City Clerk



[First Last name]  
Councilmember District [District No.]

## **SUPPLEMENTAL REVISED AGENDA MATERIAL for Supplemental Packet 2**

**Meeting Date:** February 4, 2020

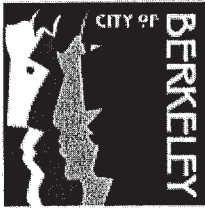
**Item Number:** 2

**Item Description:** Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

**Submitted by:** Councilmember Hahn

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.



**SOPHIE HAHN**

Berkeley City Council, District 5  
2180 Milvia Street, 5th Floor  
Berkeley, CA 94704  
(510) 981-7150  
shahn@cityofberkeley.info

ACTION CALENDAR

February 4, 2020

To: Honorable Mayor and Members of the City Council  
From: Vice Mayor Sophie Hahn  
Subject: Statement on Item 2 - Amendments to the Berkeley Election Reform Act to prohibit Officeholder Accounts; Amending BMC Chapter 2.12

RECOMMENDATION

This item seeks to outlaw Officeholder Accounts in Berkeley. I would like to offer an alternative: to allow Officeholder Accounts but establish regulations to limit them in ways that reflect Berkeley's limitations on campaign donations and consider narrowing the uses for which Officeholder Account funds can be used.

The action I advocate for Council to take is to refer a discussion of Officeholder accounts to the Agenda and Rules Committee, to consider a reasonable set of limitations and rules for such accounts and bring back recommendations to the full Council, for the Council to consider referring to the Fair Campaign Practices Committee.

Officeholder accounts are accounts an elected official can open, and raise funds for, to pay for expenses related to the office they hold.<sup>1</sup> They are not campaign accounts, and cannot be used for campaign purposes. The types of expenses Officeholder Accounts can be used for include research, conferences, events attended in the performance of government duties, printed newsletters, office supplies, travel related to official duties, etc. Cities can place limits on Officeholder Accounts, as Oakland has done.<sup>2</sup> Officeholder Accounts must be registered as official "Committees" and adhere to strict public reporting requirements, like campaign accounts. They provide full transparency to the public about sources and uses of funds.

The FCPC bases its recommendation to prohibit Officeholder Accounts on arguments about "equity" and potential "corruption" in elections. The report refers repeatedly to "challengers" and "incumbents," suggesting that Officeholder Accounts are vehicles for unfairness in the election context.

I believe that the FCPC's recommendations reflect a misunderstanding of the purpose and uses of Officeholder Accounts, equating them with campaign accounts and suggesting that they create an imbalance between community members who apparently have already decided to run against an incumbent (so-called "challengers") and elected officials who are presumed to be

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<sup>1</sup> <http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/Index/Chapter5/18531.62.pdf>

<sup>2</sup> <http://www2.oaklandnet.com/w/OAK052051>

always running for office. The recommendations do not take into account some important framing: the question of what funds are otherwise available to pay for Officeholder-type expenses for Officeholders or members of the public. Contrary to the conclusions of the FCPC, I believe Officeholder accounts are an important vehicle to redress a significant disadvantage for elected officials, whose ability to exercise free speech in the community and participate in conferences and events related to their profession is constrained by virtue of holding public office, as compared to community members, whose speech rights are unrestricted in any manner whatsoever, and who can raise money to use for whatever purposes they desire.

Outlawing Officeholder Accounts is also posited as a means to create equity between more and less wealthy Officeholders, on the theory that less affluent Officeholders will have less access to fundraising for Officeholder Accounts than more affluent Officeholders. Because there are no prohibition on using personal funds for many of the purposes for which Officeholder Account funds can be used, prohibiting Officeholder Accounts I believe has the opposite effect; it leaves more affluent Officeholders with the ability to pay for Officeholder expenses from personal funds, without providing an avenue for less affluent Officeholders, who may not have available personal funds, to raise money from their supporters to pay for such Officeholder expenses.

The question of whether Officeholder Accounts should be allowed in Berkeley plays out in the context of a number of rules and realities that are important to framing any analysis.

First, by State Law, elected officials are prohibited from using public funds for a variety of communications that many constituents nevertheless expect. For example, an elected official may not use public funds to send a mailing announcing municipal information to constituents, "such as a newsletter or brochure, [ ] delivered, by any means [ ] to a person's residence, place of employment or business, or post office box."<sup>3</sup> Nor may an elected official mail an item using public funds that features a reference to the elected official affiliated with their public position.<sup>4</sup> Note that Electronic newsletters are not covered by these rules, and can and do include all of these features, even if the newsletter service is paid for by the public entity. That said, while technically not required, many elected officials prefer to use email newsletter distribution services (Constant Contact, MailChimp, Nationbuilder, etc.) paid for with personal (or "Officeholder") funds, to operate in the spirit of the original rules against using public funds for communications that include a photo of, or references to, the elected official.

Without the ability to raise funds for an Officeholder Account, for an elected official to send a paper newsletter to constituents or to use an email newsletter service that is not paid for with public funds, they must use personal funds. A printed newsletter mailed to 5-6,000 households (a typical number of households in a Berkeley City Council District) can easily cost \$5,000+, and an electronic mail service subscription typically costs \$10 (for the most basic service) to \$45 per month, a cost of \$120.00 to over \$500 per year - in personal funds.

<sup>3</sup> <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>

<sup>4</sup> <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/communications-sent-using-public-funds/campaign-related-communications.html>



Second, Berkeley City Councilmembers and the Mayor of Berkeley are not paid enough for there to be any reasonable expectation that personal funds should be used for these types of expenses.<sup>5</sup> For many Councilmembers and/or the Mayor, work hours are full time - or more - and there is no other source of income.

Finally, and most importantly, local elected officials are restricted from accepting money or gifts. An elected official cannot under any circumstances raise money to pay for Officeholder expenses such as printed communications, email newsletter services, travel and admission to industry conferences for which the elected official is not an official delegate (e.g., conferences on City Planning, Green Cities, Municipal Finance, etc.), and other expenses related to holding office that are not covered by public funds. Again, without the possibility of an Officeholder Account, an elected official generally must use personal funds for these expenses, allowing more affluent elected officials to participate while placing a hardship or in some cases a prohibition on the ability of less affluent elected officials to undertake these Officeholder-type activities - which support expected communications with constituents and participation in industry activities that improve the elected official's effectiveness.

The elected official's inability to raise funds from others must be contrasted with the ability of a community member - a potential "challenger" who has not yet declared themselves to be an actual candidate - or perhaps a neighborhood association, business or corporation (Chevron, for example) - to engage in similar activities. Nothing restricts any community member or organization from using their own funds - or funds obtained from anyone - a wealthy friend, a corporation, a local business, a community organization or their neighbors - for any purpose whatsoever.

Someone who doesn't like the job an elected official is doing could raise money from family or connections anywhere in the community - or the world - and mail a letter to every person in the District or City criticizing the elected official, or buy up every billboard or banner ad on Facebook or Berkeleyside to broadcast their point of view. By contrast, the elected official, without access to an Officeholder Account, could only use personal funds to "speak" with their own printed letter, billboard or advertisement. Community members (including future "challengers") can also attend any and all conferences they want, engage in travel to visit interesting cities and projects that might inform their thoughts on how a city should be run, and pay for those things with money raised from friends, colleagues, businesses, corporations, foreign governments - *anyone*. They are private citizens with full first amendment rights and have no limitations, no reporting requirements, no requirements of transparency or accountability whatsoever.

The imbalance is significant. Outside of the campaign setting, where all declared candidates can raise funds and must abide by the same rules of spending and communications, *elected officials cannot raise money for any expenses whatsoever, from any source, while community*

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<sup>5</sup> Councilmembers receive annual compensation of approximately \$36,000, while the Mayor receives annual compensation of approximately \$55,000.<sup>5</sup>

*members, including organizations and private companies, can raise as much money as they want from any sources, and use that money for anything they choose.*

Without the ability to establish and fund an Officeholder Account, the only option an elected official has is to use personal funds, which exacerbates the potential imbalance between elected officials with more and less personal funds to spend. Elected officials work within a highly regulated system, which can limit their ability to “speak” and engage in other activities members of the public are able to undertake without restriction. Officeholder Accounts restore some flexibility by allowing elected officials to raise money for expenses related to holding office, so long as the sources and uses of those funds is made transparent.

By allowing Officeholder Accounts and regulating them, Berkeley can place limits on amounts that can be raised, and on the individuals/entities from whom funds can be accepted, similar (or identical) to the limits Berkeley places on sources of campaign funds. Similarly, Berkeley can restrict uses of funds beyond the State’s restrictions, to ensure funds are not used for things like family members’ travel, as is currently allowed by the State. Oakland has taken this approach, and has a set of Officeholder Account regulations that provide a good starting point for Berkeley to consider.<sup>6</sup>

I respectfully ask for a vote to send the question of potential allowance for, and regulation of, Officeholder Accounts to the Agenda and Rules Committee for further consideration.

CONTACT: Sophie Hahn, District 5: (510) 981-7150

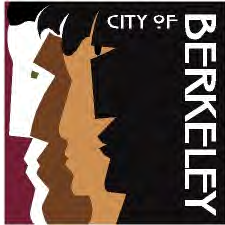
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<sup>6</sup> <http://www2.oaklandnet.com/w/OAK052051>

**MAYOR AND CITY COUNCIL FINANCIAL SUMMARY**

|                         | FY 2015<br>Actual | FY 2016<br>Actual | FY 2017<br>Adopted | FY 2018<br>Proposed | FY 2019<br>Proposed |
|-------------------------|-------------------|-------------------|--------------------|---------------------|---------------------|
| <b>EXPENDITURES</b>     |                   |                   |                    |                     |                     |
| <b>By Type:</b>         |                   |                   |                    |                     |                     |
| Salaries and Benefits   | 1,660,661         | 1,760,619         | 1,723,617          | 1,833,734           | 1,880,031           |
| Services and Materials  | 36,942            | 43,407            | 113,526            | 113,526             | 113,526             |
| Capital Outlay          | 1,953             | 7,674             |                    |                     |                     |
| Internal Services       | 89,100            | 81,181            | 81,181             | 81,181              | 81,181              |
| Indirect Cost Transfer  |                   |                   |                    |                     |                     |
|                         | <u>1,788,656</u>  | <u>1,892,881</u>  | <u>1,918,324</u>   | <u>2,028,441</u>    | <u>2,074,738</u>    |
| <b>By Division:</b>     |                   |                   |                    |                     |                     |
| Mayor's Office          | 515,095           | 558,137           | 584,877            | 554,389             | 566,917             |
| Council Offices         | 1,273,561         | 1,334,744         | 1,333,447          | 1,474,052           | 1,507,821           |
| Exiting Officials       |                   |                   |                    |                     |                     |
|                         | <u>1,788,656</u>  | <u>1,892,881</u>  | <u>1,918,324</u>   | <u>2,028,441</u>    | <u>2,074,738</u>    |
| <b>By Fund:</b>         |                   |                   |                    |                     |                     |
| General Fund            | 1,788,656         | 1,892,881         | 1,918,324          | 2,028,441           | 2,074,738           |
|                         | <u>1,788,656</u>  | <u>1,892,881</u>  | <u>1,918,324</u>   | <u>2,028,441</u>    | <u>2,074,738</u>    |
| <b>General Fund FTE</b> | 12.00             | 12.00             | 12.00              | 12.00               | 12.00               |
| <b>Total FTE</b>        | 12.00             | 12.00             | 12.00              | 12.00               | 12.00               |





Kate Harrison  
Councilmember District 4

## SUPPLEMENTAL 3 AGENDA MATERIAL

**Meeting Date:** October 26, 2021

**Item Number:** 38

**Item Description:** Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

**Supplemental/Revision Submitted By:** Councilmember Harrison

**“Good of the City” Analysis:**

*The analysis below must demonstrate how accepting this supplement/revision is for the “good of the City” and outweighs the lack of time for citizen review or evaluation by the Council.*

- Amended the recommendation to specify that the pilot program is contingent on restoration of the suspended Line 80.
- Clarified that City funding will be limited to covering fares on Sundays; no City funding will be used to restore bus service.

This supplemental is for the “good of the City” because questions have been raised about AC Transit’s commitment to restore service to Berkeley. The item has been updated to specify that the pilot program is contingent on AC Transit restoring service.

***Consideration of supplemental or revised agenda material is subject to approval by a two-thirds vote of the City Council. (BMC 2.06.070)***

A minimum of **42 copies** must be submitted to the City Clerk for distribution at the Council meeting. This completed cover page must accompany every copy.

Copies of the supplemental/revised agenda material may be delivered to the City Clerk Department by 12:00 p.m. the day of the meeting. Copies that are ready after 12:00 p.m. must be delivered directly to the City Clerk at Council Chambers prior to the start of the meeting.

Supplements or Revisions submitted pursuant to BMC § 2.06.070 may only be revisions of the original report included in the Agenda Packet.



Kate Harrison  
Councilmember District 4

CONSENT CALENDAR  
October 26, 2021

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison (Author) and Councilmember Bartlett (Co-sponsor)  
Subject: Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

RECOMMENDATION

Refer to the November 2021 budget process approximately \$500,000 in General Fund Revenue toward fully subsidizing AC Transit fares originating from Berkeley on Sundays for at least one calendar year and [possible-contingent on](#) restoration of the suspended Line 80 serving some of Berkeley's lowest income neighborhoods.

CURRENT SITUATION, EFFECTS, AND RATIONALE FOR RECOMMENDATION

Reliable and low-cost shared mobility is necessary to reach the city's equity and climate goals. Fundamental social interactions and services, including but not limited to education, healthcare, commerce, socializing, recreation, and entertainment, require the conveyance of humans from one location to another. Berkeley is equipped with a robust, relatively low-cost, low-carbon, and unionized public bus transit system (AC Transit), connecting to many urban hubs through a larger system of regional public transit infrastructure. AC Transit also provides Berkeley with a ready-made means of accelerating its carbon emissions reduction strategy through mode shifting away from passenger vehicles. Even when powered by diesel, bus trips are significantly less carbon-intensive than gasoline-powered passenger vehicles; even greater climate benefits will be realized as zero-emission busses come on line.

The City has an opportunity to increase use of busses, particularly amongst those that do not commonly ride the bus, by working with AC Transit leadership to pilot fareless Sunday bus trips originating in Berkeley, and thereby encouraging new riders to become familiar with the bus system. Berkeley fully subsidizes passenger vehicle parking on Sundays and transit should not be placed at a disadvantage.

This proposal follows AC Transit's successful promotion of the American Rescue Plan Act (ARPA) funded 'Fare-Free Fridays' program during September 2021, and would support public transportation and local businesses which have faced steep declines in utilization and patrons amidst the COVID-19 pandemic. Both East Bay residents and AC

Transit workers have suffered immensely due to pandemic-related service cuts and related uncertainty regarding dependability and scheduling. The details of the program are part of ongoing discussions and coordination with Alameda-Contra Costa Transit District (AC Transit) staff and leadership. Thanks to the leadership of AC Transit Board Director Jovanka Beckles, the AC Transit Board of Directors are set to preliminarily consider a resolution in support of the concept of municipally funded transit trips, including the Berkeley Free AC Transit Pilot proposal, at its October 13, 2021 Board of Directors meeting (see attachment).

The staff report prepared by Michael A. Hursh, AC Transit General Manager, and Chris Andrichak, Chief Financial Officer, at the request of Director Beckles states:

“Staff is in support of this resolution and the closer partnerships it could bring with the cities in the District’s service area...[t]he main advantage to approving the resolution is that it could encourage Berkeley or other cities to fund transit programs, which would increase ridership and benefit the District... [i]n general, the concept of municipally funded transit trips should be financially positive for the District, with the specific impacts depending on how any program is structured.”<sup>1</sup>

In response to the pandemic, AC Transit also indefinitely suspended Berkeley’s critical Line 80 during the pandemic which ran along Ashby Avenue, Sixth Street and Pierce Street. Restoration of this line is a critical matter of equity as it served some of Berkeley’s lowest-income and diverse populations in an area that is not easily BART accessible. In April 2021, the Berkeley City Council sent the AC Transit board a letter, sponsored by Councilmembers Taplin, Bartlett and Harrison urging the Board to restore the line.<sup>2</sup> The line also connects seniors to the South Berkeley Senior Center, the Berkeley Pines Care Center, Ashby BART, and the Alta Bates Medical Center. In June, AC Transit agreed to pilot a Line 79 which would restore service on Ashby, but would not run along Sixth Street.<sup>3</sup> It is therefore critical that as part of any discussion or funding of a Sunday Free AC Transit Pilot, the City should continue working with AC Transit ~~and potentially provide resources as appropriate~~ to facilitate the expeditious restoration of service along Sixth Street.

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The federal government has empowered Berkeley to transfer ARPA funds to local agencies such as AC Transit. It is in the public interest for the City of Berkeley to support AC Transit and the Berkeley community by exploring and funding increased accessibility and utilization of public transit amidst the COVID-19 pandemic and the climate emergency through a year-long pilot of free Sunday bus rides [and possible contingent on the](#) restoration of Line 80.

## BACKGROUND

According to data from the National Transit Database, monthly public transit ridership is 65% lower than before the pandemic.<sup>6</sup> Because of the COVID-19 pandemic, public transit has been forced to reduce its hours and accessibility, and many people shifted to driving personal vehicles as their main mode of transportation. Even as schools and businesses begin to reopen following increased vaccination and masking policies, public transit ridership remains extremely low.

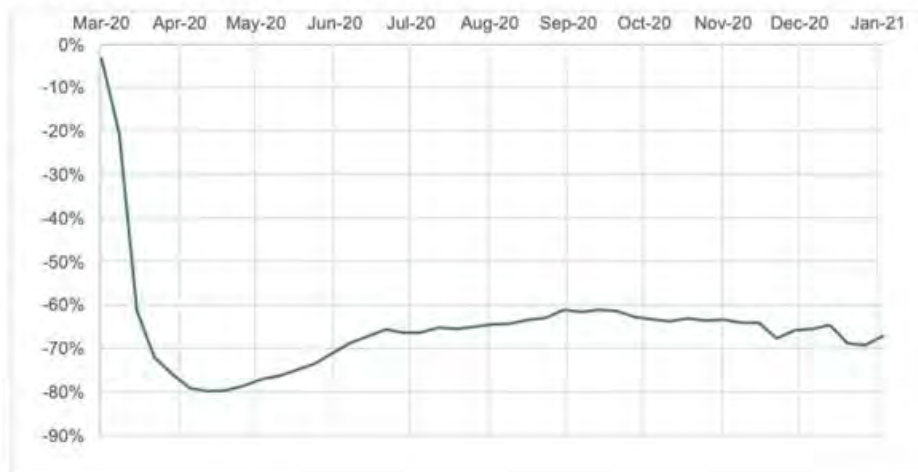
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Figure 2 Public Transit Ridership Losses and Projections



Source: APTA Ridership Trends Dashboard powered by Transit, January 2021.<sup>7</sup>

More generally, transit ridership in the U.S. has been steadily declining since 2014.<sup>8</sup> The COVID crisis both demands and provides an opportunity for bringing the community back to public transport systems. Implementing free public transit on Sundays can help change the trajectory of Berkeley's ridership levels.

A pilot free transit program will have a positive environmental impact. We are facing a grave climate emergency, requiring municipalities to rapidly transition to a zero-carbon economy by 2030.<sup>9</sup> Berkeley has struggled to rein in its transportation emissions, which as of 2018 accounted for 59% of greenhouse gas emissions and only fell 6% below 2000 levels.<sup>10</sup>

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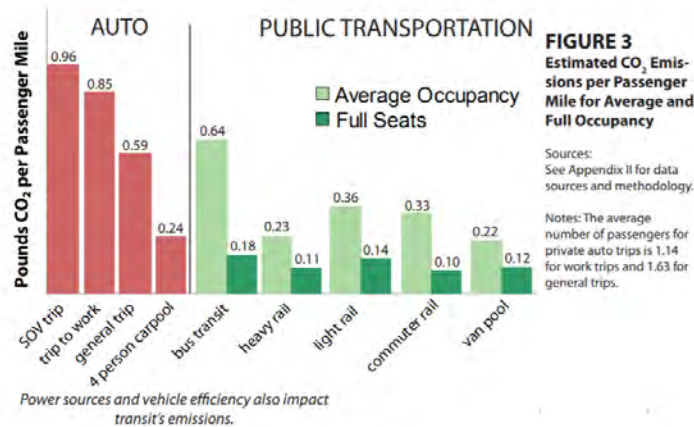
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<sup>10</sup> 2020 Climate Action Plan and Resilience Update, Office of Energy and Sustainability, July 21, 2020, [https://www.cityofberkeley.info/Clerk/City\\_Council/2020/07\\_Jul/Documents/2020-07-21\\_Special\\_Item\\_05\\_Climate\\_Action\\_Plan\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-21_Special_Item_05_Climate_Action_Plan_pdf.aspx).

completes its Zero Emissions Bus Rollout Plan by 2040 with 100 percent of all transit new bus purchases being zero emissions by 2029.<sup>11</sup> According to national data from 2010, a single occupancy vehicle trip generates 0.96 pounds of carbon dioxide per passenger mile whereas a bus generates only 0.18 when fully occupied and 0.64 at average occupancy, representing a 33 to 81% decrease in carbon intensity per mile.<sup>12</sup>



Source: Public Transportation's Role in Responding to Climate Change, 2010.<sup>13</sup>

Scientists and researchers have warned that recovery and “stimulus” funds distributed by governments in the wake of the COVID-19 pandemic must be expended on climate mitigation efforts in order to meet the extremely small carbon budgets agreed to as part of the 2015 Paris Agreement to limit global warming to “well below” 2 degrees.<sup>14</sup>

Across the nation cities are taking action through the implementation of free transit systems. The goal of these transit services is affordable mobility for all, whether through free bus systems, shuttles, railways, etc. In particular the establishment of pilot programs and COVID-19 recovery efforts across the country have demonstrated the need for a push to free public transit. In March 2021, Connecticut Governor Ned Lamont directed CTtransit to provide free, statewide bus service to the public every weekend in order to combat the

<sup>11</sup> Zero-Emissions Bus Rollout Plan, AC Transit, Version 1, 2021, [https://www.actransit.org/sites/default/files/2021-03/AC%20Transit%20ZEB%20Rollout%20Plan\\_06102020.pdf](https://www.actransit.org/sites/default/files/2021-03/AC%20Transit%20ZEB%20Rollout%20Plan_06102020.pdf).

<sup>12</sup> Public Transportation's Role in Responding to Climate Change, U.S. Dept. of Transportation, January 2010, <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/PublicTransportationsRoleInRespondingToClimateChange2010.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> H. Damon Matthews, and Kasia Tokarska, “New Research Suggests 1.5C Climate Target Will Be out of Reach without Greener COVID-19 Recovery Plans.” *The Conversation*, 10 Aug. 2021, [theconversation.com/new-research-suggests-1-5c-climate-target-will-be-out-of-reach-without-greener-covid-19-recovery-plans-151527](https://theconversation.com/new-research-suggests-1-5c-climate-target-will-be-out-of-reach-without-greener-covid-19-recovery-plans-151527).

economic losses incurred during the ongoing pandemic.<sup>15</sup> Similarly, thanks to the leadership of grassroots movements and Supervisor Dean Preston, during the pandemic the San Francisco Mayor agreed to adopt free transit for youth under 19 years old across MUNI for a minimum of one year.<sup>16</sup> Programs such as this aim to not only boost ridership but also to increase the accessibility of transportation to youth, low-income commuters, and seniors with disabilities. Before the pandemic, Lawrence Massachusetts launched a two-year free bus transit pilot program daily on its three primary bus routes in September 2019 and saw an impressive 24% increase in ridership. Other cities have seen an increase as high as 60%. Similar experiments are underway in Kansas City, Olympia Washington, and Boston. According to the New York Times, 100 cities worldwide provide free public transit.<sup>17</sup>

According to a Health Affairs study, certain groups, including “women, young adults (those ages 25–29), Black workers, and low-income workers,” disproportionately rely on public transportation for commuting and mobility, and public transportation has clear benefits for public health and health equity. At the same time “[l]ack of access to public transportation can disproportionately harm older people and people with disabilities... [and] can also contribute to existing racial and economic disparities by decreasing mobility and forcing individuals to depend on costly car ownership.”<sup>18</sup>

Currently, U.C. Berkeley students and Berkeley City employees enjoy unlimited AC Transit EasyPasses, incentivizing ridership on public transit.

Notably, the City of Berkeley does not charge for parking on Sundays, which encourages use of single-occupancy vehicles. Offering free public transit within Berkeley on Sundays can stimulate positive and COVID-safe social interactions by providing access to local businesses, open space and other public venues. It is also good for the economy. Figure ES-2 suggests that transport policies which make alternative modes of transportation such as public transit more accessible strongly correlate with enhanced commercial activity.<sup>19</sup>

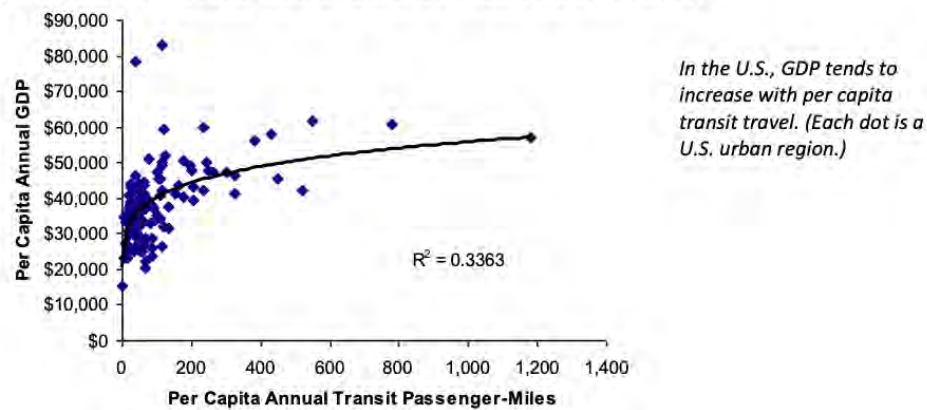
<sup>15</sup> “Governor Lamont Implements Free Weekend Bus Service During Summer Months in Connecticut as Part of Ongoing COVID-19 Recovery Efforts”, State of Connecticut, March 2021 <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/03-2021/Governor-Lamont-Implements-Free-Weekend-Bus-Service-During-Summer-Months>

<sup>16</sup> Mayor London Breed and Supervisor Myrna Melgar Announce Expansion of Free Muni for All Youth Program, Monday, July 12, 2021, <https://sfmayor.org/article/mayor-london-breed-and-supervisor-myrna-melgar-announce-expansion-free-muni-all-youth>.

<sup>17</sup> Barry, Ellen, and Greta Rybus, “Should Public Transit Be Free? More Cities Say, Why Not?” The New York Times, The New York Times, 14 Jan. 2020, [www.nytimes.com/2020/01/14/us/free-public-transit.html](http://www.nytimes.com/2020/01/14/us/free-public-transit.html).

<sup>18</sup> Public Transportation in the US: A Driver of Health and Equity, Wendy Heaps, Erin Abramsohn, Elizabeth Skillen, July 29, 2021, <https://www.healthaffairs.org/doi/10.1377/hpb20210630.810356/full/>.

<sup>19</sup> In a study conducted by the American Public Transport Association, researchers examined three cities: Silicon Beach, CA; Austin, TX; and Durham, NC, to analyze the impact of increased public

**Figure ES-2 Per Capita GDP and Transit Ridership (VTPI 2009)**

Source: "Evaluating Transportation Economic Development Impacts", 2018 <sup>20</sup>

The City also receives sales and business license revenue from such commerce. However, consistent with its climate goals, the City's aim in expanding transit *must not* be to increase economic growth for growth's sake, but to enhance community access to the provision of basic human needs.

Supporting AC Transit operations also means supporting an "essential" and unionized transit workforce as well as the local maintenance and local manufacturing/assembly of busses.

Ahead of submission of this item, Councilmember Harrison's office and AC Transit have discussed some potential preliminary logistical and fiscal aspects of launching such a pilot program, as well as discussed strategies to prioritize increasing transit ridership. Fortunately, AC Transit received significant funding from the Coronavirus Aid, Relief, and Economic Security (CARES) and ARPA to help stabilize massive fare losses, but ultimately these funds are temporary.

Meanwhile, the City of Berkeley has received approximately \$66 million over two years from the American Rescue Plan Act. It must expend these funds no later than

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transportation on local economic growth. The study found that "public transportation investments will yield a 2 to 1 return while helping to generate income for local businesses, its workers and their neighborhoods" APTA also stated that "87% of trips on transit directly benefit the local economy".

"Public Transportation Supports Knowledge and Innovation Districts", American Public Transportation Association <https://www.apta.com/research-technical-resources/research-reports/public-transit-knowledge/>; "2021 PUBLIC TRANSPORTATION FACT BOOK", American Public Transportation Association, 2021

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<sup>20</sup> "Evaluating Transportation Economic Development Impacts", Victoria Transport Policy Institute, 2018 [https://vtpi.org/econ\\_dev.pdf](https://vtpi.org/econ_dev.pdf)

December, 2024. Section 603(c)(3) of the American Rescue Plan Act allows local governments to transfer funds to other agencies such as AC Transit to assist with the recovery from the COVID-19 pandemic and to improve equity measures including access to transportation:

“TRANSFER AUTHORITY. — A metropolitan city... receiving a payment from funds made available under this section may transfer funds to ... a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government.”<sup>21</sup>

The City of Berkeley is considered a metropolitan city and AC Transit likely qualifies as a special-purpose unit of local government.<sup>22</sup> Alternatively, the Council could fund the program through excess equity. While the Transportation Network Company tax may provide funding in subsequent years, the Council has already indicated support in this first year for using these funds for priority protected bikeways and quick-build transit projects.<sup>23</sup> AC Transit leadership has repeatedly expressed the significance of Berkeley’s interest in funding such quick-build improvements.

It is in the public interest to allocate General Funds towards the AC Transit pilot program in order to boost ridership rates, expand access to local goods and services, and to reduce transportation-based carbon emissions. This item proposes an allocation of \$500,000 to support this program and to support possible increased demand resulting from COVID-19 recovery efforts or demand stimulated as a result of this pilot. Implementation of any Berkeley pilot would be subject to approval by the AC Transit Board.

A successful pilot initiative could inspire potential subsequent efforts to expand free transit on a more permanent and frequent basis and thereby further reduce emissions and expand mobility equity.

## ATTACHMENTS

### 1. AC Transit Board Staff Report No. 21-473

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<sup>21</sup> American Rescue Plan Act, U.S. Congress, January 3, 2021, <https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319enr.pdf>.

<sup>22</sup> 41 CFR § 105-50.001-4 Special-purpose unit of local government. Special-purpose unit of local government means any special district, public-purpose corporation, or other strictly limited-purpose political subdivision of a State, but shall not include a school district.

<sup>23</sup> Budget Referral: Allocate Transportation Network Companies User’s Tax Proceeds and other General Fund Revenues to Support Tier 1 Protected Bicycle Lanes, Crossings, Demonstration Paving Projects, and/or Quick-build Public Transit Projects Under the Street Repair Program, Councilmember Harrison, March 9, 2021, [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-09\\_Supp\\_1\\_Reports\\_Item\\_21\\_Rev\\_Harrison\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-09_Supp_1_Reports_Item_21_Rev_Harrison_pdf.aspx).

Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

CONSENT CALENDAR  
October 12, 2021

2. AC Transit Board of Directors Resolution 21-040

FINANCIAL IMPLICATIONS

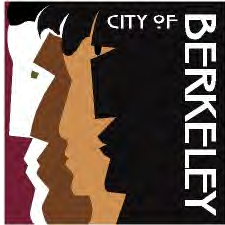
The item would have a net \$500,000 impact on the General Fund.

ENVIRONMENTAL SUSTAINABILITY

Reducing carbon emissions at an emergency and equitable pace is a necessary step to meet the goals of the Climate Action Plan and Climate Emergency Declaration.

CONTACT PERSON

Councilmember Kate Harrison, Council District 4, 510-981-7140



Kate Harrison  
Councilmember District 4

## REVISED AGENDA MATERIAL for Supplemental Packet 2

**Meeting Date:** October 12, 2021

**Item Number:** 33

**Item Description:** Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

**Submitted by:** Councilmember Harrison

The budget referral has been updated to:

- Add Councilmember Bartlett as a cosponsor.
- Consider potential restoration of Line 80 service, serving some of Berkeley's lowest income neighborhoods, in consultation with the AC Transit Board and staff;
- Provide updates based on feedback from Berkeley's AC Transit Board Directors, Amalgamated Transit Union 192 transit workers, and note that the AC Transit Board will hold a preliminary discussion about the concept of a Berkeley Free Transit Pilot at its October 13, 2021 Board of Directors meeting;
- Attach AC Transit Board Staff Report No. 21-473 and AC Transit Board of Directors Resolution 21-040;
- Consider the benefits of such a pilot with respect to expanding usage of the Clipper Card system.



Kate Harrison  
Councilmember District 4

CONSENT CALENDAR  
October 12, 2021

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison (Author) and Councilmember Bartlett (Co-sponsor)  
Subject: Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

RECOMMENDATION

Refer to the November 2021 budget process approximately \$500,000 in General Fund Revenue toward fully subsidizing AC Transit fares originating from Berkeley on Sundays for at least one calendar year and possible restoration of the suspended Line 80 serving some of Berkeley's lowest income neighborhoods.

CURRENT SITUATION, EFFECTS, AND RATIONALE FOR RECOMMENDATION

Reliable and low-cost shared mobility is necessary to reach the city's equity and climate goals. Fundamental social interactions and services, including but not limited to education, healthcare, commerce, socializing, recreation, and entertainment, require the conveyance of humans from one location to another. Berkeley is equipped with a robust, relatively low-cost, low-carbon, and unionized public bus transit system (AC Transit), connecting to many urban hubs through a larger system of regional public transit infrastructure. AC Transit also provides Berkeley with a ready-made means of accelerating its carbon emissions reduction strategy through mode shifting away from passenger vehicles. Even when powered by diesel, bus trips are significantly less carbon-intensive than gasoline-powered passenger vehicles; even greater climate benefits will be realized as zero-emission busses come on line.

The City has an opportunity to increase use of busses, particularly amongst those that do not commonly ride the bus, by working with AC Transit leadership to pilot fareless Sunday bus trips originating in Berkeley, and thereby encouraging new riders to become familiar with the bus system. Berkeley fully subsidizes passenger vehicle parking on Sundays and transit should not be placed at a disadvantage.

This proposal follows AC Transit's successful promotion of the American Rescue Plan Act (ARPA) funded 'Fare-Free Fridays' program during September 2021, and would support public transportation and local businesses which have faced steep declines in utilization and patrons amidst the COVID-19 pandemic. Both East Bay residents and AC



Transit workers have suffered immensely due to pandemic-related service cuts and related uncertainty regarding dependability and scheduling. The details of the program are part of ongoing discussions and coordination with Alameda-Contra Costa Transit District (AC Transit) staff and leadership. Thanks to the leadership of AC Transit Board Director Jovanka Beckles, the AC Transit Board of Directors are set to preliminarily consider a resolution in support of the concept of municipally funded transit trips, including the Berkeley Free AC Transit Pilot proposal, at its October 13, 2021 Board of Directors meeting (see attachment).

The staff report prepared by Michael A. Hursh, AC Transit General Manager, and Chris Andrichak, Chief Financial Officer, at the request of Director Beckles states:

“Staff is in support of this resolution and the closer partnerships it could bring with the cities in the District’s service area...[t]he main advantage to approving the resolution is that it could encourage Berkeley or other cities to fund transit programs, which would increase ridership and benefit the District... [i]n general, the concept of municipally funded transit trips should be financially positive for the District, with the specific impacts depending on how any program is structured.”<sup>1</sup>

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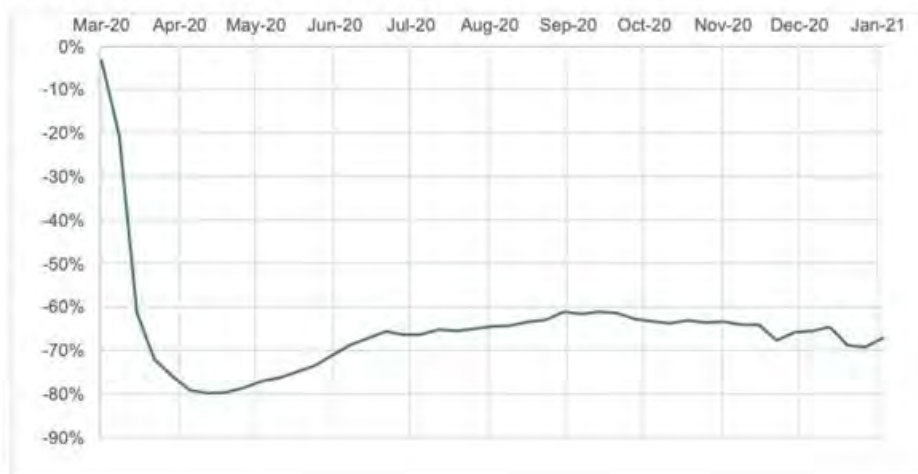
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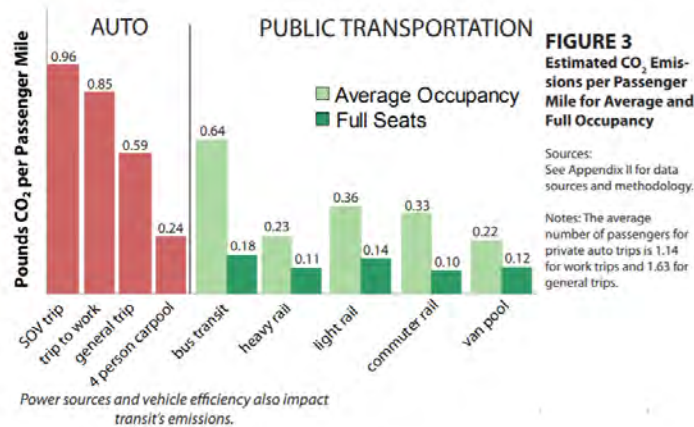
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<sup>10</sup> 2020 Climate Action Plan and Resilience Update, Office of Energy and Sustainability, July 21, 2020, [https://www.cityofberkeley.info/Clerk/City\\_Council/2020/07\\_Jul/Documents/2020-07-21\\_Special\\_Item\\_05\\_Climate\\_Action\\_Plan\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2020/07_Jul/Documents/2020-07-21_Special_Item_05_Climate_Action_Plan_pdf.aspx).

completes its Zero Emissions Bus Rollout Plan by 2040 with 100 percent of all transit new bus purchases being zero emissions by 2029.<sup>11</sup> According to national data from 2010, a single occupancy vehicle trip generates 0.96 pounds of carbon dioxide per passenger mile whereas a bus generates only 0.18 when fully occupied and 0.64 at average occupancy, representing a 33 to 81% decrease in carbon intensity per mile.<sup>12</sup>



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Scientists and researchers have warned that recovery and “stimulus” funds distributed by governments in the wake of the COVID-19 pandemic must be expended on climate mitigation efforts in order to meet the extremely small carbon budgets agreed to as part of the 2015 Paris Agreement to limit global warming to “well below” 2 degrees.<sup>14</sup>

Across the nation cities are taking action through the implementation of free transit systems. The goal of these transit services is affordable mobility for all, whether through free bus systems, shuttles, railways, etc. In particular the establishment of pilot programs and COVID-19 recovery efforts across the country have demonstrated the need for a push to free public transit. In March 2021, Connecticut Governor Ned Lamont directed CTtransit to provide free, statewide bus service to the public every weekend in order to combat the

<sup>11</sup> Zero-Emissions Bus Rollout Plan, AC Transit, Version 1, 2021, [https://www.actransit.org/sites/default/files/2021-03/AC%20Transit%20ZEB%20Rollout%20Plan\\_06102020.pdf](https://www.actransit.org/sites/default/files/2021-03/AC%20Transit%20ZEB%20Rollout%20Plan_06102020.pdf).

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economic losses incurred during the ongoing pandemic.<sup>15</sup> Similarly, thanks to the leadership of grassroots movements and Supervisor Dean Preston, during the pandemic the San Francisco Mayor agreed to adopt free transit for youth under 19 years old across MUNI for a minimum of one year.<sup>16</sup> Programs such as this aim to not only boost ridership but also to increase the accessibility of transportation to youth, low-income commuters, and seniors with disabilities. Before the pandemic, Lawrence Massachusetts launched a two-year free bus transit pilot program daily on its three primary bus routes in September 2019 and saw an impressive 24% increase in ridership. Other cities have seen an increase as high as 60%. Similar experiments are underway in Kansas City, Olympia Washington, and Boston. According to the New York Times, 100 cities worldwide provide free public transit.<sup>17</sup>

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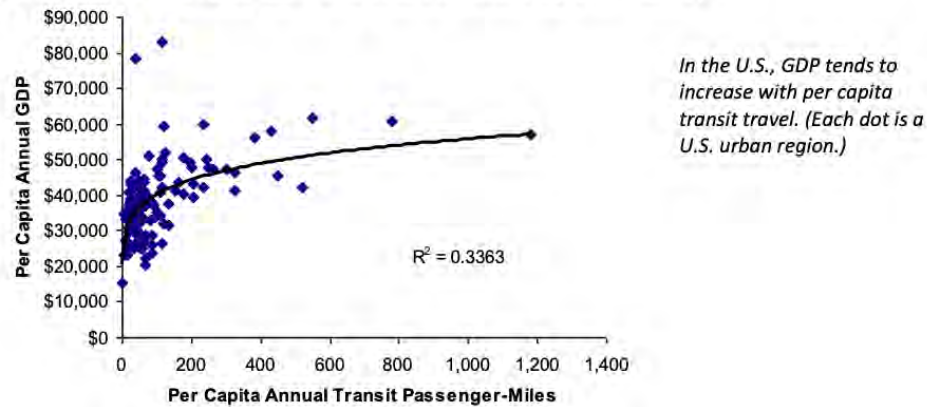
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<sup>16</sup> Mayor London Breed and Supervisor Myrna Melgar Announce Expansion of Free Muni for All Youth Program, Monday, July 12, 2021, <https://sfmayor.org/article/mayor-london-breed-and-supervisor-myrna-melgar-announce-expansion-free-muni-all-youth>.

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<sup>18</sup> Public Transportation in the US: A Driver of Health and Equity, Wendy Heaps, Erin Abramsohn, Elizabeth Skillen, July 29, 2021, <https://www.healthaffairs.org/doi/10.1377/hpb20210630.810356/full/>.

<sup>19</sup> In a study conducted by the American Public Transport Association, researchers examined three cities: Silicon Beach, CA; Austin, TX; and Durham, NC, to analyze the impact of increased public

**Figure ES-2 Per Capita GDP and Transit Ridership (VTPI 2009)**

Source: "Evaluating Transportation Economic Development Impacts", 2018 <sup>20</sup>

The City also receives sales and business license revenue from such commerce. However, consistent with its climate goals, the City's aim in expanding transit *must not* be to increase economic growth for growth's sake, but to enhance community access to the provision of basic human needs.

Supporting AC Transit operations also means supporting an "essential" and unionized transit workforce as well as the local maintenance and local manufacturing/assembly of busses.

Ahead of submission of this item, Councilmember Harrison's office and AC Transit have discussed some potential preliminary logistical and fiscal aspects of launching such a pilot program, as well as discussed strategies to prioritize increasing transit ridership. Fortunately, AC Transit received significant funding from the Coronavirus Aid, Relief, and Economic Security (CARES) and ARPA to help stabilize massive fare losses, but ultimately these funds are temporary.

Meanwhile, the City of Berkeley has received approximately \$66 million over two years from the American Rescue Plan Act. It must expend these funds no later than

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transportation on local economic growth. The study found that "public transportation investments will yield a 2 to 1 return while helping to generate income for local businesses, its workers and their neighborhoods" APTA also stated that "87% of trips on transit directly benefit the local economy".

"Public Transportation Supports Knowledge and Innovation Districts", American Public Transportation Association <https://www.apta.com/research-technical-resources/research-reports/public-transit-knowledge/>; "2021 PUBLIC TRANSPORTATION FACT BOOK", American Public Transportation Association, 2021

<https://www.apta.com/wp-content/uploads/APTA-2021-Fact-Book.pdf>.

<sup>20</sup> "Evaluating Transportation Economic Development Impacts", Victoria Transport Policy Institute, 2018 [https://vtpi.org/econ\\_dev.pdf](https://vtpi.org/econ_dev.pdf)

December, 2024. Section 603(c)(3) of the American Rescue Plan Act allows local governments to transfer funds to other agencies such as AC Transit to assist with the recovery from the COVID-19 pandemic and to improve equity measures including access to transportation:

“TRANSFER AUTHORITY. — A metropolitan city... receiving a payment from funds made available under this section may transfer funds to ... a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government.”<sup>21</sup>

The City of Berkeley is considered a metropolitan city and AC Transit likely qualifies as a special-purpose unit of local government.<sup>22</sup> Alternatively, the Council could fund the program through excess equity. While the Transportation Network Company tax may provide funding in subsequent years, the Council has already indicated support in this first year for using these funds for priority protected bikeways and quick-build transit projects.<sup>23</sup> AC Transit leadership has repeatedly expressed the significance of Berkeley’s interest in funding such quick-build improvements.

It is in the public interest to allocate General Funds towards the AC Transit pilot program in order to boost ridership rates, expand access to local goods and services, and to reduce transportation-based carbon emissions. This item proposes an allocation of \$500,000 to support this program and to support possible increased demand resulting from COVID-19 recovery efforts or demand stimulated as a result of this pilot. Implementation of any Berkeley pilot would be subject to approval by the AC Transit Board.

A successful pilot initiative could inspire potential subsequent efforts to expand free transit on a more permanent and frequent basis and thereby further reduce emissions and expand mobility equity.

## ATTACHMENTS

### 1. AC Transit Board Staff Report No. 21-473

<sup>21</sup> American Rescue Plan Act, U.S. Congress, January 3, 2021, <https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319enr.pdf>.

<sup>22</sup> 41 CFR § 105-50.001-4 Special-purpose unit of local government. Special-purpose unit of local government means any special district, public-purpose corporation, or other strictly limited-purpose political subdivision of a State, but shall not include a school district.

<sup>23</sup> Budget Referral: Allocate Transportation Network Companies User’s Tax Proceeds and other General Fund Revenues to Support Tier 1 Protected Bicycle Lanes, Crossings, Demonstration Paving Projects, and/or Quick-build Public Transit Projects Under the Street Repair Program, Councilmember Harrison, March 9, 2021, [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-09\\_Supp\\_1\\_Reports\\_Item\\_21\\_Rev\\_Harrison\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-09_Supp_1_Reports_Item_21_Rev_Harrison_pdf.aspx).

Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

CONSENT CALENDAR  
October 12, 2021

2. AC Transit Board of Directors Resolution 21-040

FINANCIAL IMPLICATIONS

The item would have a net \$500,000 impact on the General Fund.

ENVIRONMENTAL SUSTAINABILITY

Reducing carbon emissions at an emergency and equitable pace is a necessary step to meet the goals of the Climate Action Plan and Climate Emergency Declaration.

CONTACT PERSON

Councilmember Kate Harrison, Council District 4, 510-981-7140



## ALAMEDA-CONTRA COSTA TRANSIT DISTRICT



## STAFF REPORT

MEETING DATE: 10/13/2021

Staff Report No. 21-473

TO: AC Transit Board of Directors  
 FROM: Michael A. Hursh, General Manager  
 SUBJECT: Support of Municipally Funded Transit Trips

## ACTION ITEM

**RECOMMENDED ACTION(S):**

Consider adoption of Resolution 21-040 in Support of the Concept of Municipally Funded Transit Trips [Requested by Director Beckles - 9/22/2021].

**STRATEGIC IMPORTANCE:**

Goal - Financial Stability and Resiliency  
 Initiative - Financial Efficiency and Revenue Maximization

Municipally funded transit trips would provide the District with guaranteed fare revenue and encourage more ridership.

**BUDGETARY/FISCAL IMPACT:**

There is no fiscal impact from approving the attached resolution.

**BACKGROUND/RATIONALE:**

The District implemented fare-free Fridays in September as part of a larger group of regional fare discount promotions to encourage riders to return to transit. This program spurred a discussion initiated by Berkeley Councilmember Kate Harrison to assess if AC Transit could implement something similar for the City of Berkeley with funding to backfill fare losses coming from the City. Initial discussions have focused on fare-free Sundays to match or counter the free parking available in Berkeley. Councilmember Harrison has since proposed adding \$500,000 to the City's budget to fund this effort.

At the September 22, 2021 Board meeting, Director Beckles requested an agenda item with a resolution in support of Berkeley's efforts. The attached resolution from Director Beckles is more general and supports municipally funded transit trips in general along with Berkeley's efforts. Staff is in support of this resolution and the closer partnerships it could bring with the cities in the District's service area.

In general, the concept of municipally funded transit trips should be financially positive for the District, with the specific impacts depending on how any program is structured. The municipally funded free or discount rides encourage more ridership, and AC Transit gets funded either up front if a pass model is used, or

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**MEETING DATE:** 10/13/2021**Staff Report No.** 21-473

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reimbursed for trips if a per-trip model is used. In addition, any program would incentivize ridership.

**ADVANTAGES/DISADVANTAGES:**

The main advantage to approving the resolution is that it could encourage Berkeley or other cities to fund transit programs, which would increase ridership and benefit the District.

Though there are no disadvantages staff can identify, additional fare revenue from fare-free programs does not fully fund increased service coverage or frequency. Much of the revenue generated from such programs would transfer the cost of fares from the user to the municipality, and fare revenue is only a small portion of AC Transit's operating revenues.

**ALTERNATIVES ANALYSIS:**

There were no alternatives considered to the resolution.

**PRIOR RELEVANT BOARD ACTION/POLICIES:**

Board Policy 333 - Fare Policy Goals and Methodology

**ATTACHMENTS:**

1. Resolution 21-040

**Prepared by:**

Chris Andrichak, Chief Financial Officer

**Approved/Reviewed by:**

Chris Andrichak, Chief Financial Officer

Beverly Greene, Executive Director of External Affairs, Marketing & Communications

Robert del Rosario, Director of Service Development and Planning

Jill A. Sprague, General Counsel

**ALAMEDA-CONTRA COSTA TRANSIT DISTRICT  
RESOLUTION NO. 21-040****A RESOLUTION SUPPORT OF THE CONCEPT OF MUNICIPALLY FUNDED TRANSIT TRIPS**

**WHEREAS**, reliable and low-cost public transportation is a fundamental human need and supports climate, economic, health, mobility, and racial equity; and

**WHEREAS**, public bus-based transportation is significantly less carbon intensive per mile than single occupancy internal combustion vehicles and even greater climate benefits will be realized as zero-emission buses come online as part of the Alameda-Contra Costa Transit District's ("District") Zero Emissions Bus Rollout Plan; and

**WHEREAS**, the District provides municipalities within the region with a vital means of meeting their climate, economic, health, mobility, and racial equity goals and obligations; and

**WHEREAS**, in recent years some municipalities across the country have successfully funded pilot programs in partnership with local transit agencies to provide free transit trips on a system, citywide, or route-based basis; and

**WHEREAS**, as a result of such pilot programs, some agencies have seen significant increases in demand for public transit; and

**WHEREAS**, the District and local municipalities have a shared interest in safely restoring public transit ridership levels following sharp reductions resulting from the COVID-19 pandemic; and

**WHEREAS**, in September 2021, the District successfully conducted a monthlong Fare-Free Fridays program across its service area, including paratransit services; and

**WHEREAS**, representatives of the City of Berkeley are exploring and have begun preliminary discussions with the District about whether and how a broader free transit pilot on a given day of the week could operate; and

**WHEREAS**, like other municipalities, the City of Berkeley has received funding from the American Rescue Plan Act that could support such free transit pilot programs; and

**WHEREAS**, in order for interested municipalities to consider funding potential pilot programs, they need to adopt budget allocations on defined timelines; and

**WHEREAS**, budget allocations occur twice annually in the City of Berkeley, once in November and once in June, and a proposal to consider funding from the November budget process has been drafted; and

**WHEREAS**, a funding allocation for a pilot by the City of Berkeley or any other municipality does not in any way commit the District to approve any particular free transit pilot program or other modification of service, but may facilitate staff coordination between municipalities and

the District that could lead to the further evaluation and potential approval of such programs by the District Board.

**NOW THEREFORE**, the Board of Directors of the Alameda-Contra Costa Transit District does resolve as follows:

**Section 1.** To generally support the concept of municipally funded free transit pilots or other programs.

**Section 2.** The establishment of any such program shall be ultimately subject to operational and administrative evaluation and approval by the Board of Directors.

**Section 3.** This resolution shall become effective immediately upon its passage by four affirmative votes of the Board of Directors.

**PASSED AND ADOPTED** this 13th day of October 2021.

\_\_\_\_\_  
Elsa Ortiz, President

Attest:

\_\_\_\_\_  
Linda A. Nemeroff, District Secretary

I, Linda A. Nemeroff, District Secretary for the Alameda-Contra Costa Transit District, do hereby certify that the foregoing Resolution was passed and adopted at a regular meeting of the Board of Directors held on the 13th day of October, 2021, by the following roll call vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

\_\_\_\_\_  
Linda A. Nemeroff, District Secretary

Approved as to Form and Content:

\_\_\_\_\_  
Jill A. Sprague, General Counsel



Kate Harrison  
Councilmember District 4

ACTION CALENDAR

November 9, 2021

*(Continued from October 26, 2021)*

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison (Author) and Councilmember Bartlett (Co-Sponsor)  
Subject: Budget Referral: Allocate General Fund Revenues to Support Pilot Program Offering Free AC Transit on Sundays in Berkeley

RECOMMENDATION

Refer to the November 2021 budget process approximately \$500,000 in General Fund Revenue toward fully subsidizing AC Transit fares originating from Berkeley on Sundays for at least one calendar year.

CURRENT SITUATION, EFFECTS, AND RATIONALE FOR RECOMMENDATION

Reliable and low-cost shared mobility is necessary to reach the city's equity and climate goals. Fundamental social interactions and services, including but not limited to education, healthcare, commerce, socializing, recreation, and entertainment, require the conveyance of humans from one location to another. Berkeley is equipped with a robust, relatively low-cost, low-carbon, and unionized public bus transit system (AC Transit), connecting to many urban hubs through a larger system of regional public transit infrastructure. AC Transit also provides Berkeley with a ready-made means of accelerating its carbon emissions reduction strategy through mode shifting away from passenger vehicles. Even when powered by diesel, bus trips are significantly less carbon-intensive than gasoline-powered passenger vehicles; even greater climate benefits will be realized as zero-emission busses come on line.

The City has an opportunity to increase use of busses, particularly amongst those that do not commonly ride the bus, by working with AC Transit leadership to pilot fareless Sunday bus trips originating in Berkeley. Berkeley fully subsidizes passenger vehicle parking on Sundays and transit should not be placed at a disadvantage.

This proposal follows AC Transit's successful promotion of the American Rescue Plan Act (ARPA) funded 'Fare-Free Fridays' program during September 2021, and would support public transportation and local businesses which have faced steep declines in utilization and patrons amidst the COVID-19 pandemic. The details of the program are

part of ongoing discussions and coordination with Alameda-Contra Costa Transit District (AC Transit) staff and leadership.

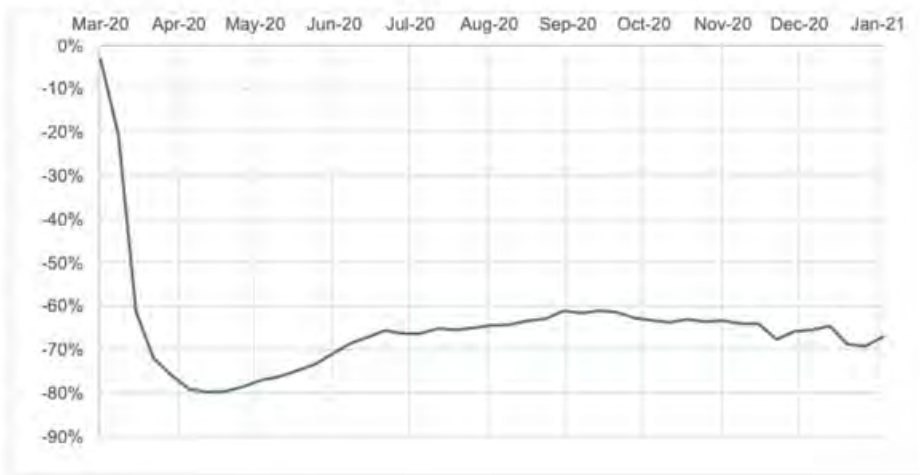
AC Transit busses reduce air pollution, frequent key urban locations, are relatively accessible to disabled persons, observe COVID-19 safety protocols, support commerce, and are outfitted with bicycle storage.

The federal government has empowered Berkeley to transfer ARPA funds to local agencies such as AC Transit. It is in the public interest for the City of Berkeley to support AC Transit and the Berkeley community by exploring and funding increased accessibility and utilization of public transit amidst the COVID-19 pandemic and the climate emergency through a year-long pilot of free Sunday bus rides.

**BACKGROUND**

According to data from the National Transit Database, monthly public transit ridership is 65% lower than before the pandemic.<sup>1</sup> Because of the COVID-19 pandemic, public transit has been forced to reduce its hours and accessibility, and many people shifted to driving personal vehicles as their main mode of transportation. Even as schools and businesses begin to reopen following increased vaccination and masking policies, public transit ridership remains extremely low.

Figure 2 Public Transit Ridership Losses and Projections



Source: APTA Ridership Trends Dashboard powered by Transit, January 2021.<sup>2</sup>

<sup>1</sup>“The Impact of the COVID-19 Pandemic on Public Transit Funding Needs in the U.S.” Evidence-Based Practice (EBP), January 2021, <https://www.apta.com/research-technical-resources/research-reports/the-impact-of-the-covid-19-pandemic-on-public-transit-funding-needs-in-the-u-s/>.

<sup>2</sup> <https://transitapp.com/APTA>.

More generally, transit ridership in the U.S. has been steadily declining since 2014.<sup>3</sup> The COVID crisis both demands and provides an opportunity for bringing the community back to public transport systems. Implementing free public transit on Sundays can help change the trajectory of Berkeley's ridership levels.

A pilot free transit program will have a positive environmental impact. We are facing a grave climate emergency, requiring municipalities to rapidly transition to a zero-carbon economy by 2030.<sup>4</sup> Berkeley has struggled to rein in its transportation emissions, which as of 2018 accounted for 59% of greenhouse gas emissions and only fell 6% below 2000 levels.<sup>5</sup>

Even when powered by diesel fuel, public bus transit trips are significantly less carbon intensive than passenger vehicle miles, and will continue to fall each year as AC Transit completes its Zero Emissions Bus Rollout Plan by 2040 with 100 percent of all transit new bus purchases being zero emissions by 2029.<sup>6</sup> According to national data from 2010, a single occupancy vehicle trip generates 0.96 pounds of carbon dioxide per passenger mile whereas a bus generates only 0.18 when fully occupied and 0.64 at average occupancy, representing a 33 to 81% decrease in carbon intensity per mile.<sup>7</sup>

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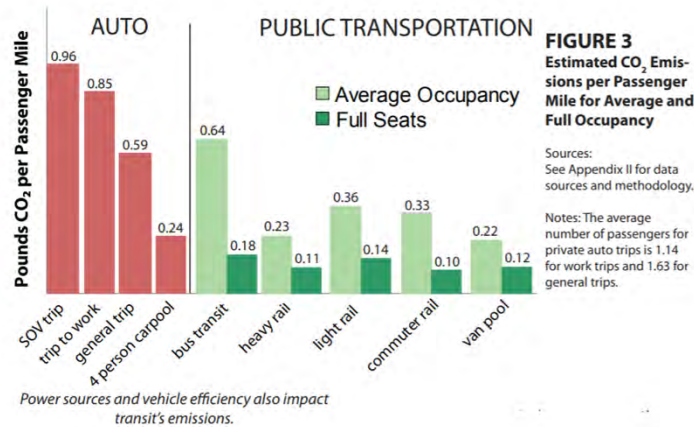
<sup>3</sup> National Academies of Sciences, Engineering, and Medicine 2020. Analysis of Recent Public Transit Ridership Trends. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25635>.

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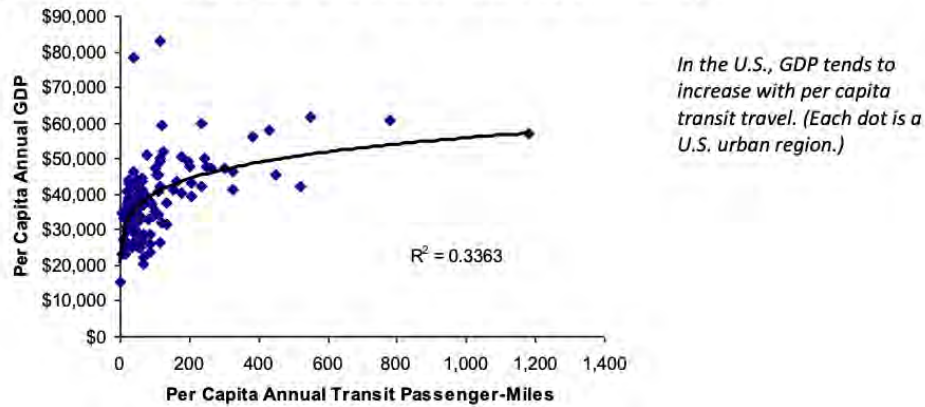
<sup>12</sup> Barry, Ellen, and Greta Rybus, “Should Public Transit Be Free? More Cities Say, Why Not?” The New York Times, The New York Times, 14 Jan. 2020, [www.nytimes.com/2020/01/14/us/free-public-transit.html](http://www.nytimes.com/2020/01/14/us/free-public-transit.html).

<sup>13</sup> Public Transportation in the US: A Driver of Health and Equity, Wendy Heaps, Erin Abramsohn, Elizabeth Skillen, July 29, 2021, <https://www.healthaffairs.org/doi/10.1377/hpb20210630.810356/full/>.

<sup>14</sup> In a study conducted by the American Public Transport Association, researchers examined three cities: Silicon Beach, CA; Austin, TX; and Durham, NC, to analyze the impact of increased public transportation on local economic growth. The study found that “public transportation investments will yield a 2 to 1 return while helping to generate income for local businesses, its workers and their neighborhoods” APTA also stated that “87% of trips on transit directly benefit the local economy”. “Public Transportation Supports Knowledge and Innovation Districts”, American Public Transportation Association <https://www.apta.com/research-technical-resources/research-reports/public-transit-knowledge/>; “2021 PUBLIC TRANSPORTATION FACT BOOK”, American Public Transportation Association, 2021

<https://www.apta.com/wp-content/uploads/APTA-2021-Fact-Book.pdf>.

**Figure ES-2 Per Capita GDP and Transit Ridership (VTPI 2009)**



Source: "Evaluating Transportation Economic Development Impacts", 2018 <sup>15</sup>

The City also receives sales and business license revenue from such commerce. However, consistent with its climate goals, the City's aim in expanding transit *must not* be to increase economic growth for growth's sake, but to enhance community access to the provision of basic human needs.

Supporting AC Transit operations also means supporting an "essential" and unionized transit workforce as well as the local maintenance and local manufacturing/assembly of busses.

Ahead of submission of this item, Councilmember Harrison's office and AC Transit have discussed some potential preliminary logistical and fiscal aspects of launching such a pilot program, as well as discussed strategies to prioritize increasing transit ridership. Fortunately, AC Transit received significant funding from the Coronavirus Aid, Relief, and Economic Security (CARES) and ARPA to help stabilize massive fare losses, but ultimately these funds are temporary.

Meanwhile, the City of Berkeley has received approximately \$66 million over two years from the American Rescue Plan Act. It must expend these funds no later than December, 2024. Section 603(c)(3) of the American Rescue Plan Act allows local governments to transfer funds to other agencies such as AC Transit to assist with the recovery from the COVID-19 pandemic and to improve equity measures including access to transportation:

"TRANSFER AUTHORITY. — A metropolitan city... receiving a payment from funds made available under this section may transfer funds to ... a public benefit corporation involved in

<sup>15</sup> "Evaluating Transportation Economic Development Impacts", Victoria Transport Policy Institute, 2018 [https://vtpi.org/econ\\_dev.pdf](https://vtpi.org/econ_dev.pdf)

the transportation of passengers or cargo, or a special-purpose unit of State or local government.”<sup>16</sup>

The City of Berkeley is considered a metropolitan city and AC Transit likely qualifies as a special-purpose unit of local government.<sup>17</sup> Alternatively, the Council could fund the program through excess equity. While the Transportation Network Company tax may provide funding in subsequent years, the Council has already indicated support in this first year for using these funds for priority protected bikeways and quick-build transit projects.<sup>18</sup> AC Transit leadership has repeatedly expressed the significance of Berkeley’s interest in funding such quick-build improvements.

It is in the public interest to allocate General Funds towards the AC Transit pilot program in order to boost ridership rates, expand access to local goods and services, and to reduce transportation-based carbon emissions. This item proposes an allocation of \$500,000 to support this program and to support possible increased demand resulting from COVID-19 recovery efforts or demand stimulated as a result of this pilot. Implementation of any Berkeley pilot would be subject to approval by the AC Transit Board.

A successful pilot initiative could inspire potential subsequent efforts to expand free transit on a more permanent and frequent basis and thereby further reduce emissions and expand mobility equity.

#### FINANCIAL IMPLICATIONS

The item would have a net \$500,000 impact on the General Fund.

#### ENVIRONMENTAL SUSTAINABILITY

Reducing carbon emissions at an emergency and equitable pace is a necessary step to meet the goals of the Climate Action Plan and Climate Emergency Declaration.

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<sup>16</sup> American Rescue Plan Act, U.S. Congress, January 3, 2021, <https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319enr.pdf>.

<sup>17</sup> 41 CFR § 105-50.001-4 Special-purpose unit of local government. Special-purpose unit of local government means any special district, public-purpose corporation, or other strictly limited-purpose political subdivision of a State, but shall not include a school district.

<sup>18</sup> Budget Referral: Allocate Transportation Network Companies User’s Tax Proceeds and other General Fund Revenues to Support Tier 1 Protected Bicycle Lanes, Crossings, Demonstration Paving Projects, and/or Quick-build Public Transit Projects Under the Street Repair Program, Councilmember Harrison, March 9, 2021, [https://www.cityofberkeley.info/Clerk/City\\_Council/2021/03\\_Mar/Documents/2021-03-09\\_Supp\\_1\\_Reports\\_Item\\_21\\_Rev\\_Harrison\\_pdf.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2021/03_Mar/Documents/2021-03-09_Supp_1_Reports_Item_21_Rev_Harrison_pdf.aspx).

Budget Referral: Allocate General Fund Revenues to Support Pilot  
Program Offering Free AC Transit on Sundays in Berkeley

ACTION CALENDAR  
October 12, 2021

CONTACT PERSON

Councilmember Kate Harrison, Council District 4, 510-981-7140



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