



Sophie Hahn
Councilmember District 5

SUPPLEMENTAL 2
September 13, 2021
ITEM #35

To: Honorable Mayor and Members of the City Council
From: Councilmember Sophie Hahn
Subject: Baseline Zoning Ordinance (BZO) Proposed Amendments (Item #35)

BACKGROUND

Phase 1 of the Baseline Zoning Ordinance (BZO) rewrite is a huge and long-anticipated project. The work done by Staff, the Consultants and the Commissions is both formidable - and excellent. A lengthy, wordy code, cobbled together over decades, has been transformed into a much more succinct and user-friendly document. I commend this important work.

Two of the substantive changes (reflected across more than one code section, but only two concepts) recommended by staff I believe do rise to the level of major policy changes, and propose that these be eliminated from the Phase 1 draft and referred for more robust review and consideration in Phase 2.

Eliminating these few elements from Phase 1 *does not* introduce deviations from the current Zoning Ordinance. On the contrary, the amendments proposed remove major policy changes and revert back to language and concepts that conform with the existing Ordinance.

I respectfully request that these limited proposed amendments, which bring a few elements of the Phase I draft back into conformance with the current Zoning Code, be accepted, and the changes be referred for consideration during Phase2.

RECOMMENDATIONS

Phase 1 of the BZO process is intended to “result in a newly written, newly formatted Zoning Ordinance that is easy to read, understand and administer,” and to provide “the opportunity to systematically review the regulations to identify code sections that could benefit from substantive changes *to be addressed in Phase 2.*”¹ [Emphasis added]

¹ [Staff Report](#), September 14, 2021 Council meeting

The Staff report and BZO webpage emphasize that Phase 1 is not intended to introduce substantive changes, which are to be addressed in Phase 2.

The BZO rewrites and reformats the Zoning Ordinance without making any substantive changes in regulations . . . Phase I is solely a reorganization and reformatting to make land use regulations easier to understand.²

The BZO . . . contains no major substantive policy changes. The second phase, yet to begin, will include substantive amendments intended to reduce the complexity of the City's zoning regulations and address the streamlining recommended in the referral.³

Etc.

However, some substantive changes from the existing code are included in the Phase I draft,⁴ many of which are outlined in the [Consent Changes Matrix](#). These changes were considered to “not contain any major policy changes” and therefore, while substantive, are proposed as part of Phase 1.

The BZO draft presented for review and Council adoption comprises almost 500 pages, and the existing code it is intended to replace is even longer. The [Style Guide](#) states that a footnoted and redlined draft will be provided for Council (and public) review,⁵ but unfortunately, this version was not able to be produced. While the [Zoning Ordinance Disposition](#) tables are somewhat helpful, comparison of new with existing code sections and language has been difficult to track.

The amendments to the Phase 1 draft, proposed and explained below, also include relevant code sections from the existing Zoning Ordinance and proposed BZO, for easy reference and comparison.

² [BZO Webpage](#)

³ [Staff Report](#), September 14, 2021 Council meeting

⁴ [BZO webpage - Consent Changes Matrix](#)

⁵ **Section 5** of the Style Guide [emphasis added]:

Showing Changes to the Existing Zoning Ordinance For chapters with significant reorganization and revision to the existing Zoning Ordinance, *we will show all changes with footnotes and will not use track changes*. For chapters with minimal changes, *we will show these changes in underline ~~strikethrough~~ text*. Footnote and track changes will be accepted and removed from the Draft Final BZO acted on by the Planning Commission and City Council at the adoptions hearings.

Proposed Amendments to new Section 23.104.020 (page 17) and new Section 23.402.040 (Page 368)

Major Substantive Policy Change:

There is a difference between “having the authority” to do something (as in, having permission) and being “The Authority.”

In the existing Ordinance, the Zoning Officer “has the authority” to interpret and enforce the ordinance, along with ZAB, Council, LPC and in some instances DRC, who have “powers” rather than just “the authority” to interpret and enforce. In the new proposed BZO, the Zoning Officer becomes “The” first/primary Authority on interpretation and application of the Ordinance, with ZAB and Council’s role becoming secondary - to modify or review the ZO’s interpretations.

I believe this change in roles among Council, ZAB and the ZO is a major substantive policy change that should be considered in Phase 2, in the context of a more robust analysis and discussion.

The following amendments to the proposed BZO revert language and placement *to mirror the existing Zoning Ordinance*:

Page 17

~~Section 23.104.020 – Authority~~

~~The Zoning Officer is responsible for interpreting the meaning and applicability of all provisions in the Zoning Ordinance. Zoning Officer interpretations are subject to review and modification by the Zoning Adjustments Board (ZAB) and City Council.~~

Page 368

23.402.040 - Zoning Officer

B. Responsibilities and ~~Powers~~ Duties.

1. The Zoning Officer:

- a. Acts as the Secretary to the Zoning Adjustments Board (ZAB) and the Design Review Committee (DRC);
- b. Determines if land uses, structures, and activities conform with the Zoning Ordinance;
- c. Serves as the review authority on applications as shown in Table 23.402-1: Review and Decision-Making Authority;
- d. Has the authority to interpret the meaning and applicability of the Zoning Ordinance;
- e. Enforces the Zoning Ordinance in accordance with Chapter 23.414-Nuisance Abatement
- f. ...
- g. ...
- h. ...

References

Existing Zoning Ordinance:

Sub-Title 23A - ORDINANCE APPLICABILITY

Chapter [23A.08](#) - INTERPRETATION AND CONSTRUCTION OF ORDINANCE

Section on “Authority” - does not exist - the existing ordinance is SILENT on the question of who interprets the ordinance

Sub-Title 23B - ORDINANCE ADMINISTRATION

Chapter 23B.12

Section [23B.12.020](#) Responsibilities and Powers of the Zoning Officer

- Compare with -

Proposed BZO:

DIVISION 1 - GENERAL PROVISIONS

23.104 - Interpreting the Zoning Ordinance

23.104.020 - Authority (page 17) See below for an entirely new “Authority” being created in the BZO

DIVISION 4 - PERMITS AND ADMINISTRATION

23.402 - Administrative Responsibility

Section 23.402.040 - Zoning Officer (page 368)

Discussion:

In the existing Zoning Ordinance, the Zoning Officer (ZO) “has the authority” to “Interpret and enforce this Ordinance, subject to the review by the Board and Council.” This authority is included as one bullet point in a list of seven things the Zoning Office “has the authority” to do. That list is housed within a Chapter describing the Zoning Officer and their “responsibilities and duties.” The Chapter shows up *after* Chapters describing the “responsibilities and powers” of the Zoning Board (ZAB) and Design Review Committee (DRC), and elaboration of the role of the LPC (which is in 3 - Board, Commissions and Committees). This *authority*, which is part of a *responsibility* or *duty* of the ZO, and is not a *power* such as those held by ZAB and DRC, is neither prominent in the ZO’s responsibilities and duties, nor is it phrased or placed in the Zoning Ordinance in such a manner as to suggest that the ZO is “The Authority” on interpretation and enforcement of the Ordinance.

In the newly proposed BZO, an entirely new Section - **Authority** - is introduced in a Title named INTERPRETING THE ZONING ORDINANCE. It states that “The Zoning Officer is responsible for interpreting the meaning and applicability of all provisions of the Zoning Ordinance,” “subject to review and modification by the Zoning Adjustments Board (ZAB) and City Council.”

This Section - **Authority** - is entirely new to the BZO. It doesn’t parallel anything in the existing Ordinance’s Chapter on interpretation, and by its prominent placement in the BZO, and enhanced wording, the Zoning Officer becomes the first and primary authority - “The Authority” - on interpretation and enforcement of the Ordinance.

The proposed BZO includes a list of “Responsibilities and Powers” of the Zoning Officer. In the existing Zoning Ordinance, these are “Responsibilities and Duties.” The bullet point about interpretation of the meaning and applicability of the Zoning Ordinance is the proposed BZO states that the Zoning Officer “Interprets the meaning and applicability of the Zoning Ordinance.” In the existing Zoning Ordinance, the Zoning Officer “has the authority to Interpret and enforce this Ordinance, subject to the review by the Board and Council.” The small changes in wording confer significantly greater agency to the ZO that the current Ordinance provides, and together with the creation of a new “Authority” earlier in the BZO, constitute a major substantive change.

These sets of changes in the placement, prominence, and wording of sections relating to the ZO’s “authority” and powers are significant, and I believe best considered as part of Phase 2. The amendments offered revert the BZO to mirror the current Zoning Ordinance.

[continued on next page]

Proposed Amendments to new Section 23.402.020 (page 365), new Table 23.402-1 (Page 366-367) and new Section 23.402.030

Major Substantive Policy Change

Presenting reports and background materials and possibly recommended actions to a Commission or to the City Council is not the same as being a body/entity statutorily empowered by the Zoning Code to make “official” Recommendations.

In both the existing and proposed Zoning Ordinances, the Zoning Officer (or Planning and Development Department) is the official Secretary to the ZAB, LPC and DRC, and supports the City Council when land use appeals are before the Council. However, the proposed BZO equates the role of briefing and potentially offering recommended actions to the bodies for which the ZO/Planning Department serves as Secretary with a statutorily provided, official role as a “Recommender,” on the same level as when the ZAB or another elected or appointed body makes and official, statutorily required Recommendation to another body.

These two roles, being a Commission Secretary providing reports and recommended actions and being an official, statutorily required “Recommender” are very different, and introducing the ZO as a Recommender I believe is a major substantive change to the Zoning Code which should be considered in Phase 2.

The following amendments to the proposed BZO revert language and placement *to more closely track the existing Zoning Ordinance and the role of ZAB/DRC/LPC/PC Secretary in the proposed BZO*:

Page 365

23.402.020 - Review and Decision-Making Authority

B. Meaning of Notations. Authority roles as noted in Table 23.402-1 mean the following:

1. “Present” means the authority prepares and presents a report and, where appropriate, provides a recommended action to the decision-making authority.
2. “Recommend” means

[etc. - the rest remains the same, just renumbered]

Page 366-367

TABLE 23.402-1: Review and Decision-Making Authority

On the following lines of the Table, in the vertical column for “Planning and Development Department,” the word “**Recommend**” is deleted and substituted with the word “**Present**”

Permits|
Use Permits
Master Use Permits

Design Review

Design Review

Flexibility and Relief

Variances

Modifications to Development Standards in West Berkeley

Page 368

23.402.030 - Planning and Development Department

The Planning and Development Department:

- A. **Makes recommendations or prepares and presents a report and, where appropriate, a recommended action** on requested permits and approvals as shown in Table 23.402-1: Review and Decision-Making Authority

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