

Rashi Kesarwani
Councilmember, District 1

SUPPLEMENTAL AGENDA MATERIAL for Supplemental Packet 2

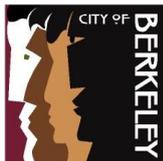
Meeting Date: October 3, 2023

Item Number: 10

Item Description: Amendments to Title 23 Relating to Accessory Dwelling Units (ADUs) and Repeal of Chapter 12.99 to Conform to State Law and Respond to Guidance from the California Department of Housing and Community Development

Submitted by: Councilmember Rashi Kesarwani

This supplemental material makes recommendations for the Hillside Overlay District in response to guidance provided by the state's Housing and Community Development Department to Planning Director Klein on Sept. 26, 2023 and addresses policy alternatives proposed by staff.



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Councilmember, District 1

ACTION CALENDAR

October 3, 2023

TO: Honorable Mayor and Members of the City Council

FROM: Councilmember Rashi Kesarwani (Author) and Councilmembers Mark Humbert and Terry Taplin (Co-Sponsors)

SUBJECT: Supplemental 2 Accessory Dwelling Unit (ADU) Recommendations for the Hillside Overlay District and Policy Alternatives

RECOMMENDATION

On Sept. 26, 2023, Planning Director Klein received e-mailed guidance from the California Department of Housing and Community Development (HCD) that states:

*It has been brought to our attention that Berkeley is looking to adopt a new accessory dwelling unit (ADU) ordinance at the upcoming City Council meeting set for October 3, 2023. The Department of Housing and Community Development (HCD) has seen a copy of the proposed ordinance and wanted to alert the City that there are provisions in the ordinance, such as the **provisions in Table 23.322.1 for required off-street parking, which if passed, would be in violation of State ADU Law.** Pursuant to Government Code § 65852.2, subdivision (d)(1)(A) “The local agency shall not impose any parking standards for an accessory dwelling unit....[w]here the accessory dwelling unit is located within one-half mile walking distance of public transit.” “**Public transit**” is defined as a location, including, but not limited to, a bus stop or train station, where the public may access buses, trains, subways, and other forms of transportation that charge set fares, run on fixed routes, and are available to the public (Gov. Code § 65852.2 subd. (j)(11). It appears that the proposed version of the ordinance is relying on the definition from Section 21155 of the Public Resources Code, however this is only applicable to Government Code § 65852.2, subdivision (c)(2)(D)(ii) and the height requirements as described in that subdivision.*

Please be advised that if the City passes the Ordinance as it is proposed, it will be in violation of State ADU Laws and when HCD formally reviews the ordinance,

a new findings letter will be issued asking that the violations be corrected with the adoption of a new ordinance.

Please note that, pursuant to Government Code section 65852.2, subdivision (h)(3)(A), if the City's Ordinance fails to comply with State ADU Law, HCD may also notify the Attorney General that the City is in violation. HCD is happy to provide technical assistance or discuss this matter with the City to ensure compliance with State ADU Law (emphasis added).

Given the guidance received by HCD, recommend adoption of the Accessory Dwelling Unit (ADU) Ordinance as proposed by staff in Supplemental 2 material for the Oct. 3, 2023 Council meeting. To ensure the intent to follow state ADU law as it relates to the definition of public transit is clear, make the following change to Table 23.322-1: "ADU within Hillside Overlay: 1 per ADU unless the parcel satisfies the criteria in subdivision (d) of Government Code Section 65862.2 and subdivision (j)(11) of Government Code Section 65852.2." The specification of subdivision (j)(11) of Government Code Section 65852.2 may be added by staff as appropriate throughout the ordinance in order to ensure clarity on the legally-allowable definition of public transit that may be used for the purposes of the ADU Ordinance.

Building on Council discussion and Councilmember Rashi Kesarwani's substitute motion at the Sept. 19, 2023 meeting, further recommend the following:

- Accept Policy Alternative 1. Additional prescriptive standards for New Construction ADUs within the front setback (Section 8 of the Recommended Draft Ordinance)
- Reject Policy Alternative 2. Converted ADUs: Maintain time limit based on when the accessory building or structure was created (Section 8 of Recommended Draft Ordinance)
- Accept Policy Alternative 3. Keep Neighbor Noticing Procedures as-is except removing noticing to owner(s) of subject property (Section 8 of Recommended Draft Ordinance)
- Adopt a uniform 20-foot height standard citywide as proposed by Councilmember Rigel Robinson. Berkeley Fire Chief Sprague's assessment during the Sept. 19, 2023 Council discussion was that additional height up to 20 feet would "not make a significant difference" in terms of firefighting. Significantly, allowing a homeowner to build up instead of out can increase structure separation distance (SSD) relative to a one-story structure of equal square footage. This represents a clear safety benefit in the event of a fire, as explained in the City of Berkeley Fire Department report "Re: Wildfire Risk Associated with Additional Density in the Very High Fire Danger Severity

Zone.”¹ The report notes that SSD is a key metric in mitigating fire risk in wildland-urban interface areas.

RATIONALE FOR RECOMMENDATION

A Uniform 20-Foot Height Standard Citywide Provides Significant Benefits:

- ***Does Not Present Any Obstacle to Firefighting in Hills and Could Increase Structure Separation Distance (SSD) Relative to a One-Story Structure of Equal Square Footage.*** At the Sept. 19, 2023 meeting, Councilmember Rigel Robison asked Berkeley Fire Chief Sprague whether a 20-foot structure would create any problems in the Fire Department’s ability to access a fire. Fire Chief Sprague responded, “Off the top of my head, **I can’t think of any significant reason why a difference in height of a couple feet would make a significant difference.** Yes, we would be concerned about being able to access the roof with ground ladders. Assuming the ADU is to the rear of the main structure, we would have access to a 20-foot roof with the ground ladders we currently bear” (emphasis added). Significantly, allowing a homeowner to build up instead of out can increase SSD relative to a one-story structure of equal square footage. The Fire Chief’s report *Re: Wildfire Risk Associated with Additional Density in the Very High Fire Danger Severity Zone* notes the following: “...the **Berkeley Fire Department recommends preserving every additional foot of SSD possible**, as the more space between structures, the less likely structure-to-structure ignition will occur. Additional space also provides more access for firefighters to perform offensive or defensive firefighting activities such as deploying hoselines or cooling vertical and horizontal structural surfaces with water and foam/retardant” (emphasis added).
- ***New Structures in High-Risk Fire Zones Must Follow Stringent 2008 California Fire Code (Chapter 7A), Making Them More Likely to Survive Fire.*** In 2008, California adopted a mandatory building code for new homes built in wildfire-prone areas. New ADUs in the hills are subject to this more stringent code, and are much more fire resistant than older homes. The 2008 California Fire Code (Chapter 7A) applies to all high-risk fire zones and requires fire-resistant roofs and siding, defensible space, and many other safeguards. According to a Cal Fire analysis of structures that survived the 2019 Camp Fire in Paradise, California:
 - 51 percent of 350 homes built after 2008 were undamaged; and

¹ Sprague, David. “Re: Wildfire Risk Associated with Additional Density in the Very High Fire Danger Severity Zone,” Item #10 Regular Council Meeting on Oct. 3, 2023, <https://berkeleyca.gov/sites/default/files/documents/2023-10-03%20Item%2010%20Amendments%20to%20Title%2023%20Relating%20to%20Accessory%20Dwelling%20Units%20%28ADUs%29.pdf>, Sept. 13, 2023

- Only 18 percent of 12,100 homes built prior to 2008 were untouched.² Similarly, in Irvine, California, a fire running through a master-planned subdivision destroyed no homes; all of the homes were built after 2008 to the new California Fire Code for high fire risk areas. The new fire code was one of several factors that protected the new subdivision.³
- **Promotes Fairness for all Homeowners Citywide.** Given that Fire Chief Sprague said on Sept. 19, 2022 that 20 feet would not increase fire risk, there is no rational basis for denying residents of the hills the same height standard available to residents in the flats. A 20-foot height standard allows greater flexibility to preserve open yard space.
- **Reduces Administrative Complexity for Planning Staff.** Uniform standards citywide make it easier for our Planning staff to review ADU permit applications efficiently, reduces the risk of administrative errors, and thereby enhances customer service.

Reject Policy Alternative 2. Converted ADUs: Maintain time limit based on when the accessory building or structure was created (Section 23.306.030 Development Standards). A time limit of three years for a homeowner to submit an ADU application for a legally established accessory building or accessory structure violates language in the HCD ADU Handbook, which explicitly states: “**A local agency should not set limits based on when the structure was created**, and the structure must meet standards for health and safety” (emphasis added).⁴ Further, an arbitrary time limit of three years places an unreasonable burden on a homeowner who may be in immediate need of the additional living space or rental income associated with an ADU.

The proposed ordinance language is adequate:

3. Accessory Building or Accessory Structure Conversion. An ADU converted from a legally established accessory building or accessory structure is allowed to maintain non-conformity to the same location and dimensions of the existing accessory building or accessory structure, provided that the ADU meets fire and safety standards set forth in the California Building Standards Code adopted in BMC Title 19. Any physical additions to the existing

² *The Sacramento Bee*, “How a building code change could be a pivotal moment in California’s wildfire”, April 11, 2019 from Cal Fire Data and Butte County property records.

³ Serna, Joseph. “Irvine fire was a recipe for disaster. It became a rare victory for firefighters in grim year,” *The Los Angeles Times*, Oct. 30, 2020.

⁴ California Department of Housing and Community Development, Accessory Dwelling Unit Handbook, <https://www.hcd.ca.gov/sites/default/files/2022-07/ADUHandbookUpdate.pdf>, Updated July 2022, p. 2

accessory building or accessory structure shall comply with the development standards in Table 23.306-2 ADU Development Standards.

CONTACT PERSON

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