



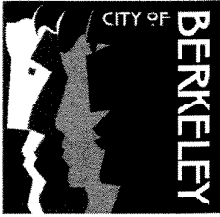
Office of the City Manager

## TO BE DELIVERED AGENDA MATERIAL

**Meeting Date:** July 19, 2005

**Item Number:** 43a

**Item Description:** 2615 Marin Avenue - Appeal ZAB Decision Use Permit #03-10000069




Office of the City Manager

ACTION CALENDAR

July 19, 2005

To: Honorable Mayor and  
Members of the City Council

From:  Philip Kamlarz, City Manager

Subject: 2615 Marin Avenue, Appeal of a Zoning Adjustments Board's Approval of a new single-family home.

RECOMMENDATION

Adopt a Resolution affirming the Zoning Adjustments Board (ZAB) approval of Use Permit #03-10000069, to construct a single-family dwelling, and dismissing the appeal.

SUMMARY

On remand from the City Council after a prior appeal, the Zoning Adjustments Board approved a modified application for a Use Permit to construct a single-family dwelling after finding that the project, as modified, would not have an unreasonable impact to sunlight, air, and views, on April 28, 2005. On May 19, 2005, Daphne Kalmar and Georg Kalmar owners of 2635 Marin Avenue; Kimberley G. Kline and Stephen "Hopper" Branam of 893 Keeler Avenue; Mathew P. White of 2633 Marin Avenue; and Arvalea Nelson of 875 Keeler Avenue separately appealed the ZAB's decision. Staff is recommending that the Council affirm the ZAB's decision because no new substantive issues have been raised that were not considered by the ZAB, and the ZAB acted correctly.

FISCAL IMPACTS OF RECOMMENDATION

None

BACKGROUND

Project Description: The applicant proposes to construct a three-story building with two living levels over a garage on a 5,755 square foot lot. The revised building would have a flat roof for the third story portion of the house and a gable roof at the rear, and an average height of about twenty-five-feet and a maximum height of about 26-feet, nine-inches. The project requires approval of a Use Permit under BMC Section 23D.16.030, *Uses and Required Permits*. The project would conform to the development standards of the R-1- Single-Family Residential and the Hillside Overlay Districts.

The purposes of the R-1 Zoning District are generally:

- To recognize and protect the existing pattern of low-density, single-family residential development,

- To make detached housing accommodations available with a relatively large amount of usable open space and,
- To protect properties from unreasonable obstruction of light and air.

The purposes of the Hillside Overlay District are generally:

- To implement the General Plan's policies regarding hillside development;
- To protect the character of Berkeley's hill districts;
- To give reasonable protection to views yet allow appropriate development of all property; and
- Allow modifications in yard and height requirements when justified because of the special aspects of the Hillside District area.

On July 8, 2004 the ZAB first considered the application for a Use Permit to construct a single-family home. It had a public hearing on July 22, 2004 and continued the matter.

On August 26, 2004, the ZAB reviewed a revised design. The discussion focused on accommodating the applicant's development goals while balancing the view impacts to the two existing uphill neighbors (2633 and 2635 Marin Avenue). The Board concluded that, as modified, the project would not have an unreasonable impact to sunlight, air, and views and approved the project.

On January 18, 2005 the City Council remanded the matter to the ZAB after it had been appealed by several of the project's adjacent residential neighbors. The City Council was concerned about the view impacts of this project on the two uphill neighbors and, according to the Council's resolution, it wished the ZAB to consider "a more appropriate placement of the square footage on the first and second floors by either setting the structure further back on the lot or eliminating the third floor in order to protect the views of pre-existing neighboring homes." The Council's remand resolution directed the Zoning Adjustments Board "to hold a new public hearing to review a different project to reconsider the location and configuration of the proposed building at 2615 Marin."

On March 24, 2005 the ZAB previewed a potential revision to the project. On this date, the applicant and neighbors testified, and presented photomontages and pictures of the applicant's story-pole installation. The Board commented on the potential building envelope. Its comments focused on balancing the views available to upslope neighbors as well as the applicant. Some members noted the loss of a view was a zoning detriment and others said that it was inappropriate to leave only "the pickings" of views to the last lots developed. Members spoke of various ways to reduce the buildings impacts including: reducing the top floor's floor-to-ceiling height to eight-feet; digging the building down into the site one- to three-feet; and reducing the top story's length by eight-feet.

At the April 14, 2005 meeting, the ZAB received revised, but incomplete, project drawings; with no Staff analysis. No action was taken at that meeting and the matter was continued.

On April 28, 2005 the ZAB considered submittals from the applicant that included building heights (relative to a City of Berkeley survey monument), a survey of a previous installation of story poles (vertical values only), and a survey of the recently installed story poles (both vertical and horizontal values). Based on this information—more accurate than previously available—Planning Staff presented a calculation of the potential view impacts of the proposed project to the uphill neighbors. After receiving testimony from the applicant and the project's neighbors, the ZAB approved the project with a condition to reduce the building one-foot in height. Another condition required future additions to be subject to a use permit.

Neighborhood Setting: This is a mostly developed and established residential neighborhood of two- and three-story single-family homes in the Berkeley Hills. Marin Avenue is fairly steep with about a 25% grade adjacent to the site.

The Appeals: The appellants, Mr. and Mrs. Kalmar, own 2635 Marin Avenue, located two lots east of the subject site. Their appeal concerns a substantial loss of views from their property and the potential for an underground creek or culvert being located on the front portion of the project's lot. They ask that the proposed dwelling's third-floor be lowered four-feet eight-inches, and that the second floor be setback to 45-feet [from the front property line], a change that would eliminate the deck proposed for the second-story's roof.

The appellants, Ms. Kline and Mr. Branam, own and occupy 893 Keeler Avenue, located immediately west of the subject property. Their appeal concerns are that: the project is located on the least stable portion of the subject lot; the site's poor geotechnical conditions combined with the presence of underground water make construction at the southern end of the lot more unstable; the project will invade the privacy of the appellant's bedroom; and shadowing impacts. Their appeal letter also supports the view impact argument of the other appellants at 2633 and 2635 Marin. In addition to making the same requests as the previous appellants regarding the building's height and location, they ask that a shadow study be prepared, that a hydrologist investigate the source of the site's underground water, and that a geotechnical engineer be required to observe grading and drainage aspects of construction. To accomplish their requests they ask that the Council set the matter for a public hearing.

The appellant, Mathew White, owns and resides at 2633 Marin Avenue immediately east of the subject site. His appeal is based upon the ZAB's failure to take the Council's direction, as mentioned above, regarding preserving the views of the existing neighbors and the project's impacts. He notes that any relocation of the third floor north on the lot would further compromise his views, but he does endorse the request to reduce the building's height.

The appellant Arvalea Nelson owns and resides at 875 Keeler. Dr. Nelson's appeal is based upon objections to the project's impacts to privacy and shadowing, the need for risk studies regarding flooding and landslides, and siting the house near a landslide boundary.

The following discussion includes the issues raised in all the appeals. Each issue is followed by a staff response.

1. Loss of views: The four appellants, in part, either based their appeal on the project's impacts to their views or they supported the appeals of the other neighbors on this point. The two uphill neighbors, whose views could be impacted by the project (2633 and 2635 Marin), ask that the building's roof elevation be lowered by four-feet, eight-inches (below that approved by the ZAB) to an elevation of 944-feet<sup>1</sup>.

Further, the appellant at 2635 Marin (Kalmar) asks that the building's second-story be moved northerly, essentially to align with the third-floor, thus to eliminate the third-floor rooftop deck. This would remove the possibility of a future addition within the area of the deck. The other uphill neighbor at 2633 Marin (White) states that moving the house's third-story any further back on the site would compromise his views of the Bay Bridge, Treasure Island, the Berkeley Marina, and San Francisco Bay.

Response: The project's potential impact on the neighbors' views is the central issue of the appeal and the concerns are largely unchanged from the previous appeal of this case. What has changed is the accuracy of the information available to the ZAB to make the decision in this case. For the recent reviews, a licensed land surveyor mapped the height and locations of the story poles, erected to outline the proposed building. ZAB considered Staff's calculation of the affect of the project on specific protected views, which was based upon the story pole survey and a survey of the height and location of the deck at 2635 Marin prepared for the Kalmars. In addition, ZAB had photographs that were taken by Staff from 2635 Marin's deck of the project's story poles to further assess the potential impact on views to 2635 Marin. Based upon this information ZAB approved, a condition to lower the proposed project's roof height by one-foot or to the 948.8-foot elevation (at this reduced height, Staff had advised the ZAB, a seated, female adult of average height could see the westerly half of San Francisco Bay and beyond to the Golden Gate). Also, a condition (#23) would require any future additions to the project that could encroach into the neighbors' views only be allowed with additional Use Permits. The ZAB had revised this condition particularly to control the future infill addition of the third-floor deck.

In past decisions and pursuant to Zoning Ordinance language<sup>2</sup>, the ZAB has not sought to protect unhindered views for neighbors but rather to protect neighbors against an unreasonable loss of views. Based upon the information provided, the ZAB approved a finding that *"the project as revised would reduce a portion of the views of the two neighboring upslope properties at 2633 and 2635 Marin Avenue but they should retain a significant portion of the existing views including the Golden Gate Bridge."*

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<sup>1</sup> This elevation is based upon the City of Berkeley's datum that is roughly equivalent to the height above sea-level.

<sup>2</sup> E.G. "To deny a Use Permit for a major residential addition the Zoning Officer or Board must find ... the addition would *unreasonably obstruct*... views." BMC Section 23D.16.090, Findings.

However, it should be noted that the appellants' request to lower the project's height (i.e. reducing the building's height by four-feet, eight-inches) could be met by constructing retaining walls on the upslope side of the proposed project site.

2. Several appellants state that the ZAB did not consider or comply with the Council's remand "that the views of the uphill neighbors must be preserved," [White] or that "the ZAB didn't consider the conditions given it by the City Council, in which the directive to protect the pre-existing views is of key importance," [Nelson] or that "the ZAB never considered the Council Resolution to explore placing the house at any other location or configuration on the lot, or to have the applicant eliminate the third story, or to lower the third story so that it doesn't block the uphill neighbor's preexisting views." [Kline / Branam]

Response: Staff believes that the ZAB did comply with the Council's resolution. As stated at the ZAB hearing, the portion of the Council's resolution that was binding on the ZAB was its motion that directed the ZAB "to hold a new public hearing to review a different project to reconsider the location and configuration of the proposed building located at 2615 Marin Avenue;" the section that the appellants cite was from the non-binding whereas clause mentioned above "to consider a more appropriate placement of ... the first and second floors... to protect the views of pre-existing neighboring homes." The ZAB implemented the resolution's direction. For example, at the first meeting on remand, ZAB members discussed various ways to reduce the buildings impacts: reducing the top floor's floor-to-ceiling height to eight-feet, digging the building down into the site one- to three-feet, and reducing the top story's length by eight-feet. The applicant then revised the project; the principal change being movement of the third-story element back from the front of the building, at the building's front a rooftop deck was proposed at the third floor level, and the roof form was changed from a gable to a flat roof.

3. The appellants object to the building's location at the front of the lot, because this is closer to the edge of a landslide boundary. They believe that this location, as opposed to further back on the site away from the boundary, would create additional soils problems for surrounding lots that are experiencing cracks in their buildings. Shifting the house to the north would, according to an appellant, decrease the likelihood of future land shift problems.

Response: The neighbors concerns are not reflected in the project's geotechnical study. The southern portion of the property is located within an earthquake-induced landslide zone as mapped by the State Geological Survey. However, the physical indications of landslide displacement observed by the peer review geotechnical engineer, retained by the City, were located along the Southside of Marin Avenue, across the street from the project. Also, the City's peer review engineer found that the geotechnical report submitted by the applicant meet's the State's criteria for project approval. Further, the author of the applicant's geotechnical report wrote that the site is suitable for the construction of the proposed residence from a geotechnical standpoint with the proviso that the report's recommendation be incorporated in the project's design and construction. This proviso is implemented as a

Use Permit condition (#13). The appellants raised these points at previous meetings. When the ZAB found the project would not be detrimental or injurious, the record before it included the project's Negative Declaration; this determined that the project's impacts would have either less-than-significant or a less-than-significant-with-mitigation impacts as to the project possibly causing landslides, erosion, or being located on geologically unstable soils.

4. Appellants cite the need for an investigation of runoff from the site before the project is allowed to get a permit. The appellants believe that the surface runoff is evidence of "an under ground creek, a culvert, a spring, or ground water." The appellants associate the presence of the ground water with the geologic stability of the front portion of the project site [Kline / Branam and Nelson] and the potential for flooding [Nelson].

As a secondary request, the appellants asked that a geotechnical engineer observe the project construction involving earthwork, foundations, and drainage.

Response: The ZAB approved the project finding that it would not be injurious to property and improvements of the adjacent properties. Further, the Board approved the project's Negative Declaration, which determined that the project would not "expose people or structures to a significant risk of loss, injury or death involving flooding..." And, as mentioned above, the Negative Declaration also determined that the project as mitigated would not cause significant adverse impacts to geotechnical aspects of the project. While the neighbor's correspondence to the ZAB raised these issues they were not discussed in the hearings.

In preparation for this report Planning Staff consulted with the Public Works Staff that an appellant had contacted by regarding the water running from the property. The Public Works Staff member reported that he had visited the subject site and had not found any topography that would suggest a creek course.<sup>3</sup> He had observed some water running from the site and concluded that the source was possibly some upwelling of subsurface water, but that a good part of the water was likely runoff from the lot as well as contributions from the uphill neighbors. Another Public Works Staff member replied that they had no problems with the project.

Planning Staff notes that a structure on the site, with a requirement (condition #15) that the storm water be controlled in a fashion approved by the City Engineer, will reduce the amount of runoff soaking into the ground and thereby reduce the amount of runoff flowing uncontrolled from the site. Also, as noted in a letter from the project soils engineer "the development of the lot would be expected to result in a net decrease in natural surface runoff, as well as subsurface infiltration and flow from the subject lot toward the neighboring downslope properties"<sup>4</sup>

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<sup>3</sup> Public Works Staff assume that suggestion that the site runoff might come from "underground creek" was made in a work order submitted by a Public Work's field maintenance crew.

<sup>4</sup> Letter to Rena Rickels from James R. Lott dated July 8, 2004

Regarding the request for the presence of a geotechnical engineer during the early stages of construction, note that condition #14 requires “a qualified soils engineering professional to oversee and insure compliance with the recommendations of the geotechnical study and best engineering practices regarding the drilling, pouring or placement of piers and construction of retaining walls.”

5. Privacy: The two westerly neighbors, 893 and 875 Keeler, cited concerns about the project’s impacts on their privacy. They noted that, from any floor, one could look into the kitchen of 893 Keeler and that the new deck would have a direct view into their bedroom. The owner at 875 Keeler states that from the project, someone would be able to peer into their bedrooms and bathroom.

Response: The ZAB found that the project, as conditioned, would not cause unreasonable detriment to neighbors. In an urban setting and particularly in the hills area, a project overlooking its neighbor is the norm and such a relationship is not generally considered a significant loss of privacy. A finding of significant loss of privacy is usually reserved for cases where a dwelling would have a direct line of sight into the interior of an immediately adjacent neighbor’s house, and here this is not the case.

The ZAB determined that the project would not cause a significant privacy impact to the interiors of the adjacent units. First, the subject and neighboring buildings are about 20- to 25-feet apart. Second, observers on the second-floor of the subject property would be approximately 15-feet above the Keeler street properties and would only have a downward oblique view of the neighbor’s interior spaces at a 25 to 30-degree angle. Observers on the proposed deck would have an even more restricted view.

6. Shadowing: The project would cause considerable morning shadowing of 875 and 893 Keeler.

Response: The ZAB determined that the project, as conditioned, would not cause unreasonable loss of sunlight. The Board based this finding on the evidence before it that noted that the project would cause minor shadowing on these properties; it was estimated that in the summer the project would shadow these properties from sunrise until about 9:15 a.m. Sliding the third story northward would reduce the duration of shadowing on these properties.

Environmental Status: A negative declaration was prepared and adopted by the ZAB.

#### RATIONALE FOR RECOMMENDATION

This area of the City, and upper Marin Avenue in particular, is a particularly steeply sloping area of the hills. This is a built out single-family neighborhood with a number of structures on adjacent lots that have varying amounts of views to the Bay. In these cases the ZAB is forced to

balance a multitude of issues, including that of views, in an effort to allow appropriate residential development on the hillside. The appellants have not presented any new facts which were not previously considered by the ZAB or which demonstrate that the proposed project would cause a significant detriment. Therefore, the Staff recommends that the City Council affirm the ZAB's approval of this permit and dismiss the appeal.

ALTERNATIVE ACTIONS CONSIDERED

Section 23B.32.060 of the Zoning Ordinance of the City of Berkeley provides that an appeal from a decision by the ZAB may be disposed by any of the following three Council actions:

1. **Affirm ZAB Decision:** If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer do not warrant further hearing, the Council shall affirm the decision of the ZAB and dismiss the appeal, in which case the application is approved.
2. **Set for Public Hearing:** If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant further hearing, the Council shall set the matter for a public hearing;
3. **Remand to ZAB:** If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant reconsideration of the application by the ZAB or if the applicant has submitted revisions to the application, the Council shall remand the matter to the ZAB to reconsider the application, in which case it shall specify whether or not the ZAB shall hold a new public hearing, and shall identify those issues which the ZAB is directed to reconsider. (Council must specify issues that the ZAB is directed to investigate and reconsider. A new decision may be appealed in the normal manner unless otherwise directed by Council. If 60 days pass, and the ZAB has made no subsequent decision, then the original decision and the original appeal of that decision shall be placed back on the Council agenda in the same manner as a new decision and appeal.)

Action Deadlines:

1. Date appeals first appeared on Council agenda: July 19, 2005
2. If none of the three actions shown above is taken by October 11, 2005 (30 days from the date the appeal first appears on the agenda plus the City Council's summer recess (July 20 to September 12, 2005 or 54 days)), the decision of the ZAB is deemed affirmed.
3. A public hearing must commence within 60 days of the date the vote to hold a hearing is taken.

CONTACT PERSON

Mark Rhoades, Land Use Planning Manager 981-7411  
Steve Solomon, Senior Planner 981-7487

Approved:



Dan Marks

Director

Planning and Development Department

Attachments:

1. City Council Resolution
2. Kalmar appeal letter
3. Kline/Branam appeal letter
4. Nelson appeal letter
5. White appeal letter
6. Notice of Decision
7. ZAB Staff Reports and associated information

RESOLUTION NO. N.S.

AFFIRMING THE ZONING ADJUSTMENT BOARD'S DECISION TO APPROVE USE PERMIT #03-10000069 FOR THE PROJECT LOCATED AT 2615 MARIN AVENUE AND DISMISSING THE APPEALS

WHEREAS, on July 7, 2003, David W. Richmond, filed for a Use Permit to construct a single-family dwelling at 2615 Marin Avenue; and

WHEREAS, on August 26, 2004 the Zoning Adjustments Board approved the requested Use Permit after having accepting testimony at the duly noticed public hearings of July 8, July 22, and August 26, 2004; and

WHEREAS, on September 22, 2004, a Notice of Decision of the Board's action was issued; and

WHEREAS, on October 5, 2004, Daphne Kalmar and Georg Kalmar owners of 2635 Marin Avenue; and Kimberley G. Kline and Stephen "Hopper" Branam of 893 Keeler Avenue separately appealed the Board's decision to the City Council; and

WHEREAS, on January 18, 2005 the City Council held a hearing on the appeals and remanded the case with direction that the ZAB "hold a new public hearing to review a different project to reconsider the location and configuration of the proposed building located at 2615 Marin Avenue;" and

WHEREAS, on April 28, 2005 the Zoning Adjustments Board approved the requested Use Permit after having accepted testimony at the duly noticed public hearings of March 28, April 14, April 28, 2005; and

WHEREAS, on May 5, 2005, a Notice of Decision of the Board's action was issued; and

WHEREAS, on May 19, 2005 Daphne Kalmar and Georg Kalmar owners of 2635 Marin Avenue; Kimberley G. Kline and Stephen "Hopper" Branam of 893 Keeler Avenue; Matt White of 2633 Marin Avenue; and Arvalea Nelson of 875 Keeler Avenue separately appealed the Board's decision to the City Council; and

WHEREAS, a negative declaration was prepared for this project and adopted pursuant to the *California Environmental Quality Act Guidelines*; and

WHEREAS, on July 19, 2005 the City Council considered the appeal of the Zoning Adjustments Board's action to approve Use Permit #03-10000069 for 2615 Marin Avenue, the related public record, and the report presented and prepared by Staff; and

WHEREAS, the record of the proceedings before the Zoning Adjustments Board has been considered and reviewed by this Council, and, in the opinion of this Council, the facts stated in, or ascertainable from such records including the Zoning Adjustments Board's findings and the letters associated with this appeal, warrants dismissing the appeal and upholding the Zoning Adjustments Board's action to approve the project.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby adopts the findings and conditions of approval contained in the Notice of Decision, dismisses the appeals, and affirms the Zoning Adjustment Board's decision to approve Use Permit #03-10000069 for the project located at 2615 Marin Avenue.