



Office of the City Manager

ACTION CALENDAR

November 15, 2005

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development

Subject: ZAB Appeal – 1532 Martin Luther King, Jr. Way – Use Permit No. 04-10000079

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board (ZAB) to approve Use Permit No. 04-10000079 to demolish an existing dwelling unit in order to construct three dwelling units, and dismissing the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On July 28, 2005, the ZAB approved an application to demolish an existing dwelling unit in order to construct three dwelling units. Staff issued the Notice of the ZAB's decision on August 9, 2005. On August 22, 2005, the City received an appeal from Emma Davenport, Kiran and Laura Singh, Gabriel and Jennifer Griego, Kim Kruckel and Danny Baptista, Gus Baldauf and Ashley Hamlett.

BACKGROUND

On July 15, 2004, Mr. Wallace Whittier submitted a use permit application to demolish the existing 1,067 square foot, one-story, single-family dwelling unit to construct two units within a two-story, 2,189 square foot building within the front portion of the parcel and one 700 square foot dwelling within a single-story cottage building at the rear. On November 11, 2004, the application was deemed complete.

On May 12, 2005, the ZAB held a public hearing and was presented with a staff report that provided analysis on shadow and privacy impacts, neighborhood character, site drainage, on-street parking congestion and rear yard setback. The ZAB received testimony from 15 speakers and directed that the applicant consider revising the project to lower the height of the single-story building by two feet; change the façade to better conceal the off-street parking spaces to eliminate the carport look; provide clearly identifiable entries to the dwellings; and provide a façade that demonstrates greater respect for the existing character of the neighborhood.

On June 23, 2005, the ZAB held a continued public hearing to review the applicant's June 6, 2005 submittal that reduced the height of the rear residence by two-feet; provided a five-foot tall property-line fence to partially screen the off-street parking spaces; provided a seven-foot trellis within the front-yard to define the front entry; and revised the building design to use lap siding and double-hung windows. While the ZAB acknowledged that the applicant's changes had improved the project, the ZAB directed the applicant to also better define the entries; to provide better screening for the parking spaces; and to reduce the fence height along the front property line. ZAB continued the hearing to July 14, 2005 and again to July 28, 2005 to allow additional time for the applicant to revise the project plans.

On July 28, 2005, the ZAB held a continued public hearing; received testimony from nine speakers and reviewed the applicant's July 19, 2005 submittal. The revised plan presented to the ZAB moved the front door for the front unit to a more prominent position at the center-front of the building; moved the second unit's front entrance so its path is more noticeable from the street; changed the front-yard fencing to better screen the parking areas from the street; and reduced the fence height along the front property line from four to three feet. After closing the public hearing, the ZAB voted 5-4-0-0 to approve Use Permit #04-10000079. Two ZAB members felt the project had too many units for the site, even though the Zoning Ordinance allows three units on this size property in this Zoning District. Two other ZAB members voted against it without expressing any reasons.

The ZAB adopted the following finding:

1. Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposed demolition of an existing single family dwelling and the construction of a two-story, duplex and a one-story cottage, with three provided on-site parking spaces, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City, for the following reasons:
 - A. The project is, with one exception, consistent with the purposes and the standards (lot coverage, setbacks, height limit, and unit-density) of the Restricted Multiple-Family District. The one-exception being the reduction in the rear-yard setback, from 15- to 10-feet for which a Use Permit is being required.
 - B. The exception to the rear yard setback for the cottage will not cause detriment because the cottage will be a single-story in height and therefore will not cause significant shadowing or privacy impacts.
 - C. That the principal impact of this two-story building is shadowing and that shadowing is not significant. The project will increase the shadowing of the single-family home located to its north (1530 Martin Luther King). The shadow impact it would create would not be significantly different than that typically caused by most properties in the R-2A and R-2

zoning districts; these multi-story buildings are typically built close to one another on relatively small lots, these lots are arranged in a rigid grid and they have zoning standards that leave little opportunity for alternative building configurations that could avoid shadowing impacts. That is, the shadows this project would cast would not be significantly greater than any other building in the adjacent multi-family residential zoning districts. Also, a shadow study provided by the applicant considered the six alternative designs of the project configuration and further, the project's scale and massing are well below the maximum's the zoning districts would allow. For example the maximum floor area that could be allowed is 6,466 sq. ft. and the project is proposing about 3,300 sq. ft. (a living area of 2,900 sq. ft. plus about 400 sq. ft. of parking.

- D. The project could not effect the views of nearby properties because they are located in the Berkeley flat lands and do not have significant long distance views.
 - E. The project would not significantly affect the privacy of adjoining properties. A letter from adjoining neighbors cited the project as causing the loss of privacy. The letter does not mention any specifics; therefore Staff believes that the term privacy is used generically, meaning a general loss of privacy. However, a project overlooking a neighboring lot's outdoor space is not considered as causing detriment because such situations are typical in the Berkeley flatlands and cannot be avoided. Because of the tight relationship of housing development in the flatlands, findings of detriment are limited to direct viewing of an interior living area of an adjoining home. Further, the project is proposing a deck at the second-floor level near the northerly property line. The deck would not cause a significant loss of privacy to the interior of the adjacent home because the deck, located at the rear of the proposed duplex would not be located immediately opposite of the adjacent home and much of the adjoining home would be screened from view from the deck by another second-story portion of the proposed building.
 - F. Prior to the issuance of a building permit to demolish an existing building, it is the City's standard procedure to require the applicant will obtain a "J" permit from the Bay Area Air Quality Management District, to address air quality issues.
2. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq.) pursuant to Sections 15303, *New Construction or Conversion of Small Structures* and 15301(1), *Existing Facilities*, of the CEQA Guidelines.
 3. Pursuant to Berkeley Municipal Code Section 23C.08.010 *Demolition or Elimination of Dwelling Units--General Requirement*, the Zoning Adjustments Board finds that the elimination of a dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City because the one-unit lost will be replaced by three new units.

4. Pursuant to Berkeley Municipal Code Section 23C.08.020, *Demolitions of Buildings Containing Dwelling Units*, the Zoning Adjustments Board finds that the demolition is necessary to permit construction of at least the same number of dwelling units as the demolished structure; the project would demolish one-unit and construct three-units.

RATIONALE FOR RECOMMENDATION

The appellant raised the following points (staff's responses follow each point):

Issue 1: “Screening off off-street parking”

Response: This appeal point asserts that the off-street parking spaces approved by the ZAB do not comply with the screening requirements of the Zoning Ordinance. However, the section that the appeal refers to only applies to parking spaces proposed within a required yard abutting a street (BMC Section 23D.12.080). In this case, the parking spaces are not within the required yard, i.e., within the front 15 feet of the property. Nonetheless, the ZAB was concerned with the visibility of the off-street parking spaces and twice directed that the applicant revise the plan to provide better screening. In addition, the ZAB considered but rejected, project alternatives that located the parking spaces elsewhere, concluding that the proposed off-street parking location was preferable. Notwithstanding the lack of alternative locations for the off-street parking spaces, the applicant did revise the project to provide additional screening of the spaces from the public right-of-way.

Issue 2: “Loss of privacy related to the approved rear yard setback reduction”

Response: The approved cottage is setback ten feet from the rear property line, and will not reduce privacy. In the non-single family residential Zoning Districts, the Zoning Ordinance allows a rear yard reduction for projects that provide additional dwelling units (BMC Section 23D.32.070.D.1). In accord with this section, the project approved by the ZAB included a five-foot reduction to the minimum rear yard setback of 15-feet. The ZAB's discussion regarding the rear yard setback included consideration of the existing topography which places the single-story dwelling lower in elevation than other residences along Martin Luther King, Jr. Way and the presence of mature vegetation and rear-yard accessory buildings that will impair the view on or off-site to the west.

This appeal point also asserts that adding three dwelling units on a lot in this neighborhood will create a disproportionate and inappropriate number of people in the area, which would affect the privacy of neighbors. In this case, the ZAB considered the potential privacy impacts resulting from the two-story dwelling and concluded that such situations are typical in the Berkeley flatlands.

Issue 3: “Shadow Impacts”

Response: The ZAB addressed shadow impacts at each hearing for this project, including a review of shadow studies for several project alternatives. The project approved by the ZAB represented design changes to minimize off-site shadow impacts. The May 12, 2005, Staff Report provided analysis of the shadow impacts related to the project and the alternatives, and found that the alternatives would offer reduced shadowing for portions of the day, but that the alternatives would create new shadows at other times. These shadow studies demonstrated that the shadowing impact would only occur during the three winter months. During that period, about half of the first floor windows would be completely shaded; the other half of the first floor windows would receive partial sun; and the upstairs windows would receive full sun after mid-morning. Currently, about half of the first floor windows are shaded during the winter after mid-morning.

In summary, the ZAB concluded that the shadow impacts were not unreasonable, finding that the shadow impacts were similar to those typically caused by most structures on properties in the R-2A and R-2 zoning districts.

Issue 4: “Loss of View”

Response: This appeal point asserts that the two-story structure would impair views of the Berkeley Hills and of trees, gardens and open space. The ZAB’s approval included a finding that “the project could not effect the views of nearby properties because they are located in the Berkeley flat lands and do not have significant long distance views.” This finding is consistent with other ZAB actions to approve two-story structures in the flat areas of Berkeley, reflecting ZAB’s conclusion that if the ZAB chose to protect these views, development would be unreasonably constrained.

Issue 5: “Drainage Problems”

Response: The existing situation was established prior to City-imposed standards to address on-site drainage. New construction is required to convey all run-off associated with this parcel to the City right-of-way. Thus, implementation of Condition of Approval #12 will improve the drainage situation.

Issue 6: “Demolition”

Response: This appeal point asserts that the ZAB did not make the correct finding to approve the demolition of the existing single-family residence. However, the section that the appeal refers to offers two options for the ZAB as shown below (BMC Section 23C.08.020):

1. The demolition will remove a structure that is hazardous, unusable or is infeasible to repair; or

2. The demolition is necessary to permit construction approved pursuant to this Ordinance, of at least the same number of dwelling units as the demolished structure.

In this case, in accord with the latter finding, the ZAB found the demolition is necessary to permit construction of at least the same number of dwelling units as the demolished structure, in that “the project would demolish one-unit and construct three-units”. The ZAB also made the general non-detriment finding (BMC Section 23C.08.010.B) that the elimination of a dwelling unit would not be “materially detrimental to the housing needs and public interest of the affected neighborhood and the City because the one-unit lost will be replaced by three new units”.

ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060, the Council may take one of the following actions on appeals of ZAB decisions:

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 appeal first appeared on Council agenda: October 25, 2005.
2. If none of the three actions shown above is taken by November 24, 2005 (30 days from the date appeal first appeared on the agenda), 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, (510) 981-7410

Attachments:

1: Resolution

Exhibit A: Findings and Conditions of Approval

Exhibit B: Project Plans, Stamped July 19, 2005

2: Notice of Appeal

3: Notice of Decision - Zoning Adjustments Board

4: Zoning Adjustments Board Reports, Attachments and Correspondence

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

AFFIRMING THE DECISION OF THE ZONING ADJUSTMENTS BOARD TO APPROVE
USE PERMIT NO. 04-10000079 FOR THE PROJECT LOCATED AT 1532 MARTIN
LUTHER KING, JR WAY AND DISMISSING THE APPEAL

WHEREAS, on July 15, 2004, Mr. Wallace Whittier submitted a use permit application to demolish the existing 1,067 square foot, one-story, single-family residence to construct two units within a two-story, 2,189 square foot building within the front portion of the parcel and one 700 square foot residence within a single-story building to the rear; and

WHEREAS, on November 11, 2004, the application was deemed complete; and

WHEREAS, on May 12, 2005, the Zoning Adjustments Board held a public hearing; reviewed a staff report that provided analysis on shadow and privacy impacts, neighborhood character, site drainage, on-street parking congestion, and rear yard setback; and received testimony from 15 speakers; and

WHEREAS, on May 12, 2005, the Zoning Adjustments Board, directed that the applicant consider revising the project to lower the height of the single-story building to the rear by two feet; change the façade to conceal off-street parking spaces and to eliminate the carport look; provide clearly identifiable entries to the dwellings; and provide a façade that better matches the character of the neighborhood; and

WHEREAS, on June 23, 2005, the Zoning Adjustments Board held a continued public hearing to review the applicant's June 6, 2005 submittal that reduced the height of the rear residence by two-feet; provided a five-foot tall fence along the front property line to partially screen off-street parking spaces; provided a seven-foot trellis within the front-yard to define the front entry; and revised the building design to propose lap siding and double-hung windows; and

WHEREAS, on June 23, 2005, the Zoning Adjustments Board directed that the applicant better define the entries; provide better screening for the parking spaces; and reduce the fence height along the front property line; and

WHEREAS, on July 14, 2005, the Zoning Adjustments Board continued the public hearing to July 28, 2005 to allow additional time for the applicant to prepare a revised submittal; and

WHEREAS, on July 28, 2005, the Zoning Adjustments Board held a continued public hearing; received testimony from nine speakers; reviewed the applicant's July 19, 2005 submittal that moved the front door for the front unit to a more prominent position at the center-front of the building; moved the second unit's front entrance so its path was more noticeable from the street; changed the front-yard fencing to better screen the parking areas from the street; and reduced fence height along the front property line from four feet to three feet; and

WHEREAS, on July 28, 2005, the Zoning Adjustments Board, approved Use Permit #04-10000079, finding that:

1. Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposed demolition of an existing single family dwelling and the construction of a two-story, duplex and a one-story cottage, with three provided on-site parking spaces, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort, or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood, or to the general welfare of the City, for the following reasons:
 - A. The project is, with one exception, consistent with the purposes and the standards (lot coverage, setbacks, height limit, and unit-density) of the Restricted Multiple-Family District. The one-exception being the reduction in the rear-yard setback, from 15- to 10-feet for which a Use Permit is being required.
 - B. The exception to the rear yard setback for the cottage will not cause detriment because the cottage will be a single-story in height and therefore will not cause significant shadowing or privacy impacts.
 - C. That the principal impact of this two-story building is shadowing and that shadowing is not significant. The project will increase the shadowing of the single-family home located to its north (1530 Martin Luther King). The shadow impact it would create would not be significantly different than that typically caused by most properties in the R-2A and R-2 zoning districts; there multi-story buildings are typically built close to one another on relatively small lots, these lots are arranged in a rigid grid and they have zoning standards that leave little opportunity for alternative building configurations that could avoid shadowing impacts. That is, the shadows this project would cast would not be significantly greater than any other building in the adjacent multi-family residential zoning districts. Also, according to a shadow study provided by the applicant considered the six alternative designs of the project configuration and further, the project's scale and massing are well below the maximum's the zoning districts would allow. For example the maximum floor area that could be allowed is 6,466 square feet and the project is proposing about 3,300 square feet (a living area of 2,900 square feet plus about 400 square feet of parking).
 - D. The project could not effect the views of nearby properties because they are located in the Berkeley flat lands and do not have significant long distance views.
 - E. The project would not significantly affect the privacy of adjoining properties. A letter from adjoining neighbors cited the project as causing the loss of privacy. The letter does not mention any specifics; therefore staff believes that the term privacy is used generically, meaning a general loss of privacy. However, a project overlooking a neighboring lot's outdoor space is not considered as causing detriment because such situations are typical in the Berkeley flatlands and cannot be avoided. Because of the tight relationship of housing development in the flatlands, findings of detriment are limited to direct viewing of an interior living area of an adjoining home. Further, the project is proposing a deck at the second-floor level near the northerly

property line. The deck would not cause a significant loss of privacy to the interior of the adjacent home because the deck, located at the rear of the proposed duplex would not be located immediately opposite of the adjacent home and much of the adjoining home would be screened from view from the deck by another second-story portion of the proposed building.

- F. Prior to the issuance of a building permit to demolish an existing building, it is the City's standard procedure to require the applicant will obtain a "J" permit from the Bay Area Air Quality Management District, to address air quality issues.
2. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq.) pursuant to Sections 15303, *New Construction or Conversion of Small Structures* and 15301(l), *Existing Facilities*, of the CEQA Guidelines.
 3. Pursuant to Berkeley Municipal Code Section 23C.08.010 *Demolition or Elimination of Dwelling Units--General Requirement*, the Zoning Adjustments Board finds that the elimination of a dwelling unit would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City because the one-unit lost will be replaced by three new units.
 4. Pursuant to Berkeley Municipal Code Section 23C.08.020, *Demolitions of Buildings Containing Dwelling Units*, the Zoning Adjustments Board finds that the demolition is necessary to permit construction of at least the same number of dwelling units as the demolished structure; the project would demolish one-unit and construct three-units.

WHEREAS, on August 22, 2005, the City received an appeal from Emma Davenport, Kiran and Laura Singh, Gabriel and Jennifer Griego, Kim Kruckel and Danny Baptista, Gus Baldauf and Ashley Hamlett; and

WHEREAS, on November 15, 2005, the Council has considered the record of the proceedings before the Zoning Adjustments Board; staff reports and correspondence presented to the City Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, warrant approving the subject Use Permit and dismissing the appeal; and

WHEREAS, attached hereto are the findings and conditions of approval applicable to this permit (Exhibit A) that are included by reference as though fully incorporated herein; and

WHEREAS, attached hereto is a reduced copy of the approved plan (dated July 19, 2005 and marked as Exhibit B) that is included by reference as though fully incorporated herein.

NOW THEREFORE, BE IT RESOLVED the Council of the City of Berkeley hereby affirms the decision of the ZAB to approve Use Permit No. 04-10000079 based on the findings, and subject to the conditions of approval contained in Exhibits A and B, and dismisses the appeal.