



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 - 2235 Derby Street –Use Permit #05-1000043

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board (ZAB) to approve Use Permit #05-1000043 to add 55 square feet to a single-family dwelling that is non-conforming due to density and setbacks and allow an increase in height from 10 feet six inches to 13 feet, 11 inches.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On June 23, 2005, the ZAB approved an application to modify an existing single family dwelling by adding 55 square feet and increasing its height from 10 feet six inches to 13 feet, 11 inches. Notice of ZAB's decision was issued on July 5, 2005. On July 19, 2005, Peter J. Mutnick of 2227 Derby Street, # 3, Berkeley, appealed the ZAB decision to the City Council.

BACKGROUND

The subject property consists of three dwelling units in two buildings. A two-story building located at the front of the lot contains a lower-level unit and an upper-level unit. The upstairs unit in that building is tenant-occupied. The lower unit is vacant. The building located at the rear contains one dwelling unit. The Use Permit application only affects the rear building. City property records indicate that the rear structure was built as a dwelling unit in 1906. The building has been remodeled and added to over the years. In 1987, a single-car garage was incorporated into the building. Rent Stabilization Board records indicate that the unit has been vacant since 1996.

On February 3, 2005, the City received an Administrative Use Permit application to modify the rear single-family dwelling. The project consists of three main elements:

1. Removing two, approximately 12-foot square, "bump-outs" from the east-facing wall of the building.
2. Expanding the 16-square foot covered front porch by 52 square feet along the front of the building and

3. Removing the existing 968 square foot gabled roof structure and replacing it with a shed roof of the same size. The height would increase from 10 feet, six inches to 13 feet, 11 inches. Staff reviewed the application and determined that the existing property is over density. Three units are situated on a 6,750 square foot lot where 7,000 square feet are required under BMC Section 23D.28.070. Expansions of residential buildings on lots that exceed the density limit are allowed with a Use Permit-Public Hearing under BMC Section 23C.04.070(E). The applicant withdrew the AUP application and submitted a Use Permit application on March 30, 2005. The plans originally submitted with the AUP application were transferred to the Use Permit application.

On June 23, 2005, the ZAB held a public hearing to review the project and take public testimony. One speaker spoke in favor of the application. Two speakers spoke in opposition to the project. One speaker who spoke in opposition to the project described herself as the upstairs tenant in the front building on the lot. She expressed concerns, to the ZAB, that she felt that the owners wanted her to vacate the premises and that the project could negatively affect her security of tenure as a tenant.

The other speaker in opposition was the appellant in the case before the Council. He expressed concerns that airborne particulate matter resulting from the planned renovations would threaten his health. The project architect spoke in favor of the project, stating that project would result in the renovation of dilapidated building. He stated that the work would not affect the existing tenant in the front building on the property, and proposed the following list of conditions of approval to be attached to the Use Permit:

1. No Demolition or construction on the cottage will commence until Ms. Nicolettii's tenancy is resolved.
2. No demolition or construction on the cottage will occur until a licensed professional does a proper testing for asbestos, lead paints or other toxic materials. If any such materials are discovered they will be removed according to State Law.
3. During construction, only water based solvents, paint and similar materials will be used where possible.
4. The architect and contractor will make themselves available to meet with Mr. Mutnick prior to commencement of construction to give him the opportunity to voice his specific health concerns and to give him an opportunity to make reasonable accommodations where possible.
5. In the interest of a quick approval, Ms. Tsighe Nemarian has authorized this offer of accommodation.

Members of the ZAB and Staff expressed concerns about the difficulty of implementing and enforcing the proposed conditions because of vague wording. Staff proposed the following additional condition:

12. Prior to the issuance of a Building Permit, the applicant shall present to the City's Toxics Management Division and the Zoning Officer, for review and approval, a plan to identify and remediate any lead or asbestos on the subject property, in the area of the existing

building, subject to removal, that might pose an unreasonable risk to human health and safety. The site shall be remediated, with respect to lead and asbestos, to the satisfaction of the Toxics Management Division prior to initiation of construction activities on site.

City Monitor: Toxics Division Staff _____
Signature Date

City Monitor: Project Planner, Land Use Planning Division

Signature Date

In finalizing the condition, the ZAB expressed its concern about the need to be specific about the substances that would be subject to investigation. After discussion, the ZAB voted 6-3-0-0 to approve the Use Permit with the added condition above.

In approving the project, the ZAB made the following findings that relate to potential health affects of the project:

Finding No. 2

Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposed 55 square foot addition to a portion of a building in a required yard, that will vertically extend a non-conforming side yard and increase the floor area of a residence that is non-conforming due to density, 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:

Finding No. 2D

The proposed work will take place on a structure at the rear of the property, which, while nine inches away from the left side property line, is adjacent to the rear yard of the property to the west and not immediately adjacent to the multi-family building on the property to the west.

Finding No. 2E

The applicant has stated that they have inspected the subject rear building and have not seen any unusual circumstances with regard to possible environmental hazards at the subject building. The standard conditions that regulate construction activities, attached to the Permit, will help reduce possible adverse construction impacts with regard to noise and air quality.

RATIONALE FOR RECOMMENDATION

Issue 1: The applicant states that condition No. 12 adopted by the ZAB “is less than reassuring, since all it requires is that the applicant submit a plan (any plan?) to the Toxics Management Division and then perform remediation to the “satisfaction” of the Division. There is no mention of any legally binding standard here, and it seems like the assurance could be worth less than the paper it is written on.”

Response: The language of Condition No. 12 is adequate to insure that the possible presence of two specific substances, lead and asbestos (which are those most likely to be found in older residential structures) would be investigated and remediated. The ZAB has imposed a similar condition on at least one Permit (Seagate Project at 2041 – 61 Center Street) in a case where there was a question about the presence of toxic substances on the site. As stated above, the ZAB members had expressed concerns about the broadness of the term “toxics substances” and in drafting the language of the condition, sought to clearly define the substances that would be subject to investigation. The condition requires review and approval of any remediation plan by the City’s Toxics Management Division, which has the professional expertise to perform the tasks. The condition is enforceable in that a Building Permit cannot be issued until the Toxics Division agrees that any lead or asbestos contamination is remediated.

Issue 2: “As for Conditions 17 and 18 they are a giant step backwards from what is required by the Berkeley Municipal Code and are in fact a formula for disaster. These Conditions allow for the leaving of piles or renovation debris, i.e. demolition and construction debris, on the premises for unlimited periods of time. So long as they are “watered at least twice daily” and “covered at night during any rainy weather with plastic.”

Response: Permit Conditions 17 - 20 of the subject permit state requirements that the applicant must fulfill with regard to the control of debris, soils, sand and other loose materials during the construction period. Conditions 17 – 20 are standard conditions on all Use Permits involving construction. They are consistent with the CEQA mitigation measures recommended by the Bay Area Air Quality Management Board (BAAQMD) to mitigate potential health effects due to dust from small construction projects. This particular project is small and is typical of renovation projects permitted throughout the city. The project does not involve excavation or fill and involves minimal demolition.

Issue 3: The appellant states that conditions 17 – 20 are in conflict with the following three Sections of the Berkeley Municipal Code:

Section 12.32.020 Accumulation prohibited--Storage requirements--Removal of construction rubbish (Ord. 6319-NS § 2 (part), 1996).

C. Every person, contractor or builder engaged in the construction, repair or demolition of any building or structure shall at reasonable intervals dispose of or remove from such premises all rubbish resulting from the construction, repair or demolition and within a reasonable time of the final cessation of work on such building, structure or premises.

Section 12.32.030 Garbage containers required--Specifications--Use restrictions-- Location.

- B. Every contractor or builder engaged in the erection or repair of a building shall provide sufficient containers at or near such building for the deposit and storage of any waste resulting from the erection or repair work (Ord. 6369-NS § 1 (part), 1997: Ord. 6319-NS § 2 (part), 1996).

Section 12.40.030 Allowing hazardous debris to remain on private property prohibited.

It is unlawful for any person, firm or corporation to allow debris which is of such a nature that it constitutes a fire menace or fire hazard, or constitutes a rat harbor or a menace to the life, health, comfort or convenience of the community, to remain upon any private property in the City. (Ord. 3602-NS § 5, 1957)

Response: Permit Conditions 17 – 20 are not in conflict with any of the above-cited Ordinance Sections. In exercising the Use Permit, the applicant must comply with all City Ordinances, including those that the appellant cites, in addition to the conditions of the permit. As required by BMC Section 23B.56.040, all Use Permits are subject to regulation by all City ordinances. Condition No. 6 on the subject Permit states:

The approved use and/or construction are subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies.

BMC Section 12.32.020(C) requires that contractors shall dispose of construction rubbish “at reasonable intervals.” And during those intervals, condition No. 17 requires that the debris be covered so that no particles become airborne.

The appellant derives from BMC Section 12.32.020 that “the premises be cleaned up completely and left in a pristine condition each and every night and on weekends or whenever the crews are not actually working.” Such a requirement would exceed the “reasonable interval” requirement of the Ordinance.

Issue 4: The appellant states that the Berkeley Municipal Code (BMC) requires that all debris be placed in a proper container that can be closed and left on the ground.

Response: In fact, the BMC makes a distinction between waste from construction, garbage with separate sections of the Code specifying how the differing materials are to be handled:
Section 12.32.030 Garbage containers required--Specifications--Use restrictions-- Location.

B. Every contractor or builder engaged in the erection or repair of a building shall provide sufficient containers at or near such building for the deposit and storage of any waste resulting from the erection or repair work.

C. Garbage containers for other than bulk accumulation shall be constructed of metal or other impervious material approved by the managers of environmental health and solid waste with tight-fitting covers. The containers and covers shall be in good repair, leakproof, free from holes, flytight and rodentproof. Containers shall be equipped with handles adequate to lift the weight of a full container without breaking or bending. Such container shall be maintained in a sanitary condition by the owners thereof and covers shall not be removed except for the purpose of placing waste therein or removing waste therefrom (Ord. 6369-NS § 1 (part), 1997: Ord. 6319-NS § 2 (part), 1996)

D. Rubbish except broken glass, rocks, concrete, bricks and similar solid material, plaster or dirt may be deposited in garbage containers. Hazardous waste, human waste and other potentially infectious material shall not be deposited or placed in garbage containers. Liquid garbage shall not be deposited or placed in such containers (Ord. 6369-NS § 1 (part), 1997: Ord. 6319-NS § 2 (part), 1996).

Staff believes that these sections of the BMC require that waste resulting from construction be placed in containers, but not that it be covered. Condition No. 17 of the Use Permit states, “All piles of debris, soil, sand, or other loose materials shall be covered at night and during rainy weather with plastic at least one-eighth millimeter thick and secured to the ground.” Condition No. 18 of the Use Permit states, “All active construction areas shall be watered at least twice daily, and all piles of debris, soil, sand or other loose materials shall be watered or covered.” Staff believes that these conditions can be implemented in concert with the Ordinance Sections cited above. Construction debris would be placed in containers and could be covered, when feasible. The size and bulk of some material may make covering some containers infeasible. Soil and sand, not being considered construction waste, could be placed on the ground and watered and covered. The City’s Building and Safety Division provides guidelines to contractors and other members of the public, published by the Bay Area Storm water Management Agencies Association, describing best building site practices to prevent dirt, debris and construction waste out of storm drains and creeks. These guidelines allow for placement of soil on the ground, provided that it kept out of storm drains.

Issue 5: The appellant states that the rubbish container should be kept away from the driveway and hence the bedroom windows of 2227 Derby Street.

Response: City Traffic Engineering regulations require that rubbish containers not block driveways. They are also not prohibited to be near driveways.

Issue 6: In calling for debris to be removed daily, the appellant states that City Ordinance (Section 12.40.030) requires “that hazardous debris not be left upon the premises at all...” The appellant states, “ Now, all demolition debris and most construction debris is hazardous, since all building materials, except for wood nails, contain hazardous materials.... The dust from such broken down materials is clearly hazardous as a pulmonary irritant and potential neurotoxin. The dust from the construction materials, when thrown into the air or left on the ground to be stirred by the wind is likewise hazardous. This is what must be included in the Conditions upon this project, or else the City...is acting unlawfully under its own Municipal Code....”

Response: Construction materials are not generally considered hazardous materials; some may be hazardous if handled improperly. The applicant has not demonstrated that construction materials and construction debris are hazardous or present a potentially negative health effect when handled properly, or that this project in particular, uses hazardous materials.

Materials that are generally labeled as hazardous have special handling requirements. In the subject case, the ZAB imposed a condition designed to mitigate the possible health effects of lead and asbestos, two substances commonly found in older homes that can threaten the health of nearby persons, when not handled in a safe manner. In cases where there is a potential negative health effect because of the presence of hazardous materials, the government imposes special handling procedures to ensure public safety. City Use Permits, including the subject Permit have standard conditions to insure that all dust, hazardous or not, is controlled.

Issue 7: The applicant states that the project should not be approved unless it can be completed in less than one month.

Response: The City does not place a one-month time limit on a renovation or construction projects. The Zoning Officer may declare a permit lapsed if it is not exercised within one year of issuance (BMC Section 23B.56.100).

Issue 8: Subsequent to filing this appeal, the appellant informed staff that he had been diagnosed with a life-threatening illness. The appellant has informed staff that he feels that the dust and debris from the proposed project would exacerbate his illness.

Response: The appellant has not presented any evidence nor is the staff aware of any evidence that the construction materials, debris, or dirt associated with the proposed project, one that is typical of small construction projects, when handled in accord with the approved Permit conditions and in accord with City Ordinances, would constitute a health hazard to members of the general public, to nearby individuals or exacerbate existing illnesses of nearby residents.

The project is typical of small remodeling projects permitted throughout the city. The ZAB attached conditions to the Permit to reduce the possible impacts of dust and debris that could result from the project as well as remediate any hazards that arise from the discovery of lead or asbestos during renovation. No new issues have been raised in the appeal that were not already considered and where appropriate, addressed by the ZAB. Therefore, staff is recommending that the Council affirm the ZAB's decision.

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 appeals first appeared on Council agenda: October 25, 2005
2. If none of the three actions shown above is taken by November 29, 2005 (30 days plus tolling period from the date the appeal first appears 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) 981-7411

ATTACHMENTS:

1. Resolution
 - Exhibit A: Conditions of Approval
 - Exhibit B: Project Plans, Stamped July 5, 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 ZONING ADJUSTMENTS BOARD DECISION TO APPROVE USE PERMIT #05-10000043 FOR THE PROJECT LOCATED AT 2235 DERBY STREET AND DISMISSING THE APPEAL

WHEREAS on March 30, 2005 6, 2005, Sarah Emery filed a Use Permit application to add 55 square feet to a single-family dwelling that is non-conforming due to density and setbacks and allow an increase in height from 10 feet six inches to 13 feet, 11 inches; and

WHEREAS on June 9, 2005, 213 Public Hearing Notices were posted in the project vicinity and 213 public hearing notices were mailed to residents, owners of property and neighborhood organizations expressing interest within 300 feet of the project; and

WHEREAS on June 23, 2005, the Zoning Adjustments Board opened a public hearing to consider the project; and

WHEREAS a total of three persons spoke during the hearing, two of whom described themselves as project opponents, and one as a supporter; and

WHEREAS on June 23, 2005, after closing the public hearing and considering the written correspondence and testimony regarding the renovation of the rear building at 2235 Derby Street, the Zoning Adjustments Board, based on evidence that the project would not have any substantial adverse impact on the environment, the surrounding neighborhood and the City as a whole, and that the project to be categorically exempt under Section 15301 of the California Environmental Quality Act Guidelines approved Use Permit Application # 05-10000043; and

WHEREAS on June 23, 2005, in approving Administrative Use Permit application #05-10000043 the Zoning Adjustments Board found that

1. The project is categorically exempt under the California Environmental Quality Act Guidelines, Section 15301—Existing Facilities.
2. Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposed 55 square foot addition to a portion of a building in a required yard, that will vertically extend a non-conforming side yard and increase the floor area of a residence that is non-conforming due to density, 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 proposed 55 square foot increase in square footage will not significantly contribute to the mass and bulk of the subject structure. The increased square footage will result from the enlarged exterior, front porch. The larger front porch, without walls on three sides, will not contribute to a feeling of greater density or of less open space on the subject lot.

November 15, 2005

- B. The proposed shed roof, with a maximum height of 13 feet, 11 inches will not be detrimental to light to and views from surrounding properties. The maximum height is located 24 feet from the rear property line. While 9 inches away from the right side property line, the roof slopes down to a height of 9 feet, 3 feet away from the rear property line. The sloping feature of the proposed roof will allow light to reach adjacent properties while not significantly obstructing views from those properties.
 - C. The design and scale of the proposed structure will reflect the built environment in the immediate area. The proposed sloping shed roof structure is a common type of roof structure for rear building and is compatible with the appearance of other rear buildings in the area.
 - D. The proposed work will take place on a structure at the rear of the property, which, while 9 inches away from the left side property line, is adjacent to the rear yard of the property to the west and not immediately adjacent to the multi-family building on the property to the west.
 - E. The applicant has stated that they have inspected the subject rear building and have not seen any unusual circumstances with regard to possible environmental hazards at the subject building. The standard conditions that regulate construction activities, attached to the Permit, will help reduce possible adverse construction impacts with regard to noise and air quality.
3. Pursuant to BMC Section 23C.04.070(B), the Zoning Adjustments Board finds that the vertical extension of the non-conforming side yard that would occur as a result of the proposed height increase will not be detrimental to the subject property, surrounding properties or to the city as a whole for the following reasons:
 1. The vertical increase in the non-conforming left side yard not a major increase in height (3-feet, 5-inches) and will not result in a structure that is out of character with surrounding buildings and uses.
 2. The proposed sloping shed roof will allow light to reach surrounding rear yards and will result in 9 foot roof height 3 feet from the rear property line and will not adversely affect views from adjacent yards.
 4. Pursuant to BMC Section 23C.04.070(B), the Zoning Adjustments Board finds that the project does not further reduce any existing nonconforming yards or exceed the applicable maximum or calculated average height limits and therefore, complies with the use permit requirement set forth in this section.
 5. Pursuant to BMC Section 23C.04.070(E), the Zoning Adjustments Board finds that the project does not increase the residential density or exceed the applicable maximum or calculated average height limits for the R-2 District and therefore, complies with the Use Permit requirement set forth in this section; and

WHEREAS on June 23, 2005, in approving Administrative Use Permit # 05-10000043, in response to the appellant's stated concerns about possible health risks related to the project, the Zoning Adjustments Board imposed an additional condition requiring that prior to the issuance of a Building Permit, the applicant present a plan to identify and remediate any lead or asbestos on the subject property, in the area of the existing building, subject to removal, that might pose an unreasonable risk to human health and safety, to the City's Toxics Management Division and the Zoning Officer, for review and approval; and

November 15, 2005

WHEREAS that condition required that the site be remediated, with respect to lead and asbestos, to the satisfaction of the Toxics Management Division prior to initiation of construction activities on site; and

WHEREAS City's Toxics Management Division has the professional expertise to review the adequacy of the required lead and asbestos remediation plan; and

WHEREAS on July 5, 2005, notice of the Zoning Adjustments Board's decision was issued; and

WHEREAS on July 19, 2005, Peter J. Mutnick of 2227 Derby Street # 3 appealed this decision to the City Council; 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 are reduced copies of the approved plans (dated July 5, 2005 and marked as Exhibit B) that are included by reference as though fully incorporated herein; and

WHEREAS the Council has considered the record of the proceedings before the Zoning Adjustments Board; the recent 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 affirming the decision of the Zoning Adjustments Board to approve the subject Administrative Use Permit, and dismissing the appeal.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby affirms the decision of the Zoning Adjustments Board to approve Use Permit #05-10000043 for the project located at 2235 Derby Street, based on the findings, and subject to the conditions of approval contained in Exhibits A and B, and dismisses the appeal.

Exhibits

A: Conditions of Approval

B: Project Plans, stamped June 5, 2005