

July 19, 2005

CITY OF BERKELEY
CITY CLERK DEPT

To the City Council of the City of Berkeley:

05 JUL 19 PM 3: 10

I hereby appeal the following Action of the Zoning Adjustment Board, best identified by this excerpt taken from the City's website at:

<http://www.ci.berkeley.ca.us/commissions/zoning/2005zoning/minutes/062305M45.htm>

ACTION MINUTES

ZONING ADJUSTMENTS BOARD AGENDA

THURSDAY, JUNE 23, 2005

7:00 PM

CITY COUNCIL CHAMBERS, OLD CITY HALL

2134 MARTIN LUTHER KING JUNIOR

New Hearings:

5. 2235 DERBY STREET

Request by Sarah Emery, 1810-Sixth Street Berkeley, CA 94710

Use Permit #05-10000043 to add 55 square feet and add height (existing 10 ft., 6 in. ridge height to 13 ft., 11 in. shed roof height) to a single-family dwelling that is non-conforming due to density (3 units on a 6,750 sq. ft. lot where 7,000 square feet are required) and setbacks (9 in. left side setback and 3 foot rear setback);(R-2, Restricted two Family Residential, SRF)

Continued From:

None

Action:

Approved with change (6-3-0) (No: Wilson, Sprague, Metzger)

I, Peter J. Mutnick, am a resident of the apartment building on the adjoining property to the property in question. That adjoining property is to the west of the property in question. My address is 2227 Derby Street, Apartment 3.

I submitted a letter to the first Planner who reviewed the plan and a second letter to the Zoning Adjustment Board for the above Hearing, both of which are attached to this letter. I was present and spoke at the Hearing for the customary five minutes. Just before the Hearing, outside in the hall, I asked one of the architects, named Todd Polinski, how long the project would take, something that was not discussed anywhere in the inquiry conducted by the City. Todd told me frankly that it would take at least six months. I was surprised that it would take such a long time. He said he was just being straightforward and honest. Then I asked him if they didn't also plan a renovation of the main building, and I asked him how long that would take. He said yes they did, and it would take about a year. I expressed dismay at the prospect of 18 months of renovation right outside my bedroom window.

I carried that dismay into the Hearing, and during my five minutes before the Zoning Adjustment Board, I explained to the Board how a series of six month renovations at my previous residence had made me very sick, ultimately requiring hospitalization and an emergency cardiac procedure at Alta Bates Hospital, on May 26, 1999. I explained to the Board that the consequences of breathing airborne particulate matter from a renovation site while you sleep every night can be absolutely devastating on the nervous system and the lungs and the heart. It is even worse than the exposure that the workers get,

because they can go home at night and recover, while for the tenant exposed incessantly to such pulmonary irritants and neurotoxins, there is no rest or repose. The effect on health can be immediate.

I expressed dismay that the Board was ignoring its own finding that the subject property was over density, as is our apartment building, next door to the subject property and separated from it by less than twenty feet. This over density problem is obviously connected to the problem of a prolonged exposure due to multiple renovations, because if the property were not over density, there would not be two separate structures requiring two different renovations lasting, at a minimum, six plus twelve or eighteen months.

I explained to the Board that the mitigations suggested by the Planner, Stephen Ford, were not adequate and that the additional mitigations offered voluntarily by the applicant should at the very least be adopted. (The voluntary offer of the applicant is attached to this letter.) I expressed dismay that members of the Board had expressed unwillingness to accept those mitigations or consider other ones in their place, if they were not properly worded, as the Board members claimed. Several of the Board members, which turned out to be a majority, seemed entirely callous to the human equation in such a renovation as this, as though only buildings mattered to them and not human beings.

The Board did finally adopt a watered-down version of one of the additional mitigations offered voluntarily by the applicant, and that now appears as Condition 12 in the Notice of Decision. However, it 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.

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 of 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." This is a joke, a very bad and cruel joke, that shows complete disdain for the health and well-being of neighboring residents, as well as complete and utter disdain for the law.

Watering a pile of renovation dust, containing hazardous materials, will definitely release considerable amounts of it into the air. Although it might be better than leaving it dry, it is no solution at all. The only solution is to follow the Berkeley Municipal Code in requiring that hazardous debris NOT be left upon the premises at all, especially overnight or when the crews are not actually working. This would help to ensure that tenants have the same protections workers have in terms of having some repose from the effects of the deadly dust. The only Condition that would protect tenants at all over such a long period of time is to require that the premises be cleaned up completely and left in pristine condition each and every night and on weekends or whenever the crews are not actually working. Moreover, the Berkeley Municipal Code requires that all debris be placed in a proper container that can be closed, and not left on the ground at all. That container should be kept away from the driveway and hence the bedroom windows of the many residents of 2227 Derby Street.

These are the Code Sections of the Berkeley Municipal Code that apply *and that would be violated* by the Conditions established in this matter by the Zoning Adjustment Board:

Section 12.32.020 Accumulation prohibited--Storage requirements--Removal of construction rubbish.

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. (Ord. 6319-NS § 2 (part), 1996)

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.

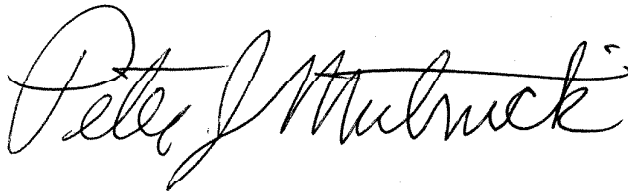
Section 12.40.030 Allowing hazardous debris to remain on private property prohibited.

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)

Now, all demolition debris and most construction debris is hazardous, since all building materials, except for wood and nails, contain hazardous materials, and hence each of them has a so-called "haz-mat" sheet, containing the list of the hazardous materials it contains. 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 into the air by the wind, is likewise hazardous. None of that can be allowed to remain on private property at all. That is the law. That is what must be included in the Conditions upon this project, or else the City, in granting permission for the project, is acting unlawfully under its own Municipal Code and is therefore in blatant abuse of its discretion.

These are the minimal requirements of law, but the simple fact is that this project should not be approved at all, unless it can be completed in less than one month. This is not a big project, and there is no reason it cannot be completed within that time frame if the crews work continuously and without unnecessary delay. A more casual approach might be more convenient for the work crews and their scheduling, but it would have devastating consequences upon the tenants. The only reason it would take six months is if the landlord, like my previous landlord at 2826 Telegraph Avenue, is using the project to make life miserable for her existing tenant, Sara Nicoletti, whom she is trying to evict. If, in the process, she can make life miserable for a host of other tenants, as well, all the better from her point of view. This is savagery, now having the endorsement of the Zoning Adjustment Board. The City Council must come to a different conclusion or else this matter will be decided in the court system.

Signed,



Peter J. Mutnick
2227 Derby Street, Apartment 3
Berkeley, California 94705
510-540-7401
pjmutnick@sbcglobal.net

February 23, 2005

Fatima Crane, Planner for the City of Berkeley, Fax No.: (510) 981-7420

To Fatima Crane and whomever else it may concern:

I understand that you are the City Planner, who must approve or not approve a proposed renovation at 2235 Derby Street, in Berkeley, California, which is currently pending. There are three units (2231, 2233, and 2235) on that same property, which is 6750 square feet, according to the Alameda County Recorder. It is therefore over density and a public hearing is required, which I hereby request and demand.

The tenants in 2231 and 2235 have apparently been evicted without good cause and hence illegally - the pretext was that renovations would be done on both of those units, even though plans for 2235 only are now submitted. The landlady is presently trying to evict Sara Nicoletti in unit 2233, claiming, perhaps falsely, that she is going to move into that apartment. The landlady denies, apparently falsely, that unit 2231 is comparable or that it is non-comparable and available. Sara Nicoletti is fighting the eviction, and the renovation on 2235 is undoubtedly intended, at least in part, to force her out.

It is a common practice, as I can testify from personal experience in a lawsuit at 2826 Telegraph Avenue, for a landlord to use an extended renovation as a means of forcing a constructive eviction, which is of course illegal. The landlady at 2233 Derby Street has been advised by the same notorious eviction attorney, Bruce C. Reeves, as our landlord at 2826 Telegraph Avenue.

I am now a next door neighbor to 2231-2235 Derby Street. I live at 2227 Derby Street, Apartment 3. My bedroom window is directly adjacent to 2231-2235 Derby Street. The main building, containing 2231 (downstairs) and 2233 (upstairs), is less than 15 feet away. The detached unit, 2235, is less than 50 feet away. The driveway leading to the detached unit is directly under my bedroom and bathroom windows.

I will therefore be strongly affected by the proposed renovation at 2235 Derby Street, as I was strongly affected and made sick by the renovation at 2826 Telegraph Avenue, to the point of needing an emergency cardiac procedure at Alta Bates Hospital. I had a series of tachycardias induced by prolonged exposure, night and day, to respiratory irritants from the renovation. The same thing is very likely to happen as a result of the renovation at

2235 Derby Street. I therefore request and demand a public hearing, which is technically required according to Aaron Sage, with whom I have discussed the matter.

At the public hearing, I would like both the intent and the means of carrying out the renovation to come under full scrutiny, before it makes me or the current tenant or anyone else sick. Since this could well be a matter of life and death, I urge you to conduct a public hearing, according to Berkeley law and requirements.

Sincerely,

A handwritten signature in cursive script that reads "Peter J. Mutnick". The signature is written in black ink and is positioned below the word "Sincerely,".

Peter J. Mutnick,
Tenant at 2227 Derby Street, Berkeley, California
(510) 540-7401

RECEIVED
JUN 15 2005
LAND USE PLANNING

To the Zoning Adjustment Board, City of Berkeley, and whomsoever it may concern:

I am writing concerning the project at 2235 Derby Street, UPPH 05-10000043. My concern is that the renovation project that is planned may impact me and possibly other neighbors environmentally, during the actual renovation itself. My bedroom window is less than 20 feet from the main house at 2231/2233 Derby Street and less than 75 feet from the detached unit at 2235 Derby Street. I have had a past experience with this type of renovation at my previous residence at 2826 Telegraph Avenue, which resulted in a lawsuit. The lawsuit was settled before it went to trial.

As a result of the previous exposure to high amounts of particulate matter during two consecutive renovations there, I now have environmental illness or a heightened sensitivity to airborne particulate matter, which can include pulmonary irritants and/or neurotoxins. Renovation debris is especially pernicious, insofar as it contains both demolition debris and construction debris. There is a high likelihood that lead dust will be contained in the demolition debris. At the time of the previous renovations, I became seriously ill and required hospitalization and an emergency cardiac procedure. It is now well known that airborne particulate matter can have a direct action on the heart, once it is inhaled through the lungs.

I think it is very likely, therefore, that during the upcoming renovation I will be forced to either get sick or to involuntarily vacate my apartment. I believe that it is the responsibility of the one creating such an environmental impact to first of all mitigate, and to also compensate for the cost of relocating at acceptable accommodations during the renovation. If not, I will have professional testing done to establish the presence of airborne materials that endanger the health and well-being of humans. I will then sue both the landlord and the city to get the compensation that I believe will be owed.

A further concern is that this landlord is doing what my previous landlord at 2826 Telegraph Avenue did. She may be using this renovation at least in part as a pretext to force out the existing tenant, Sara Nicoletti, thus creating an illegal constructive eviction. An unlawful detainer proceeding is presently in the Court, but the renovation may be a convenient part of the overall strategy to force out the existing tenant.

Sincerely,

Peter J. Mutnick, 2227 Derby St. #3, Berkeley CA 94705 (510-540-7401)

Law Office of MATTHEW SIEGEL

1736 Franklin St., 10th Floor
Oakland, CA 94612
(510) 839-9248
Fax (510) 444-1704

RECEIVED

JUN 14 2005

LAND USE PLANNING

June 14, 2005

Land Use Planning Division
2120 Milvia St.
Berkeley, CA 94704

Sent by Mail and Fax

Re: Use Permit #05-100000043/ 2235 Derby St./ Letter of Opposition

Dear Zoning Adjustment Board;

This letter is to notify you of my clients' opposition to the above-referenced Use Permit and application for improvements to the property.

I am the attorney for Sara Nicoletti, the sole remaining tenant at the tri-plex located at 2231-35 Derby St. and am writing this letter on her behalf. My client currently resides at 2233 Derby St., the upper half of the duplex which is 2231 and 2233 Derby St. The cottage in the back is 2235 Derby St.

My client opposes the application for several reasons.

First, it should be noted that prior to this application, the property at 2233 Derby St. was cited for over twenty-five (25) housing code violations in late 2003. Ms. Nicoletti had requested these repairs for over a year prior to her finally contacting the City.

In response to these citations, the owners took over five months to fix the property. During this time the repairs were conducted in an unprofessional manner with rude, harassing and, at times, drunken repairmen doing the repairs. At one point, Ms. Nicoletti was yelled at by one worker who showed up unannounced and demanded access to her home.

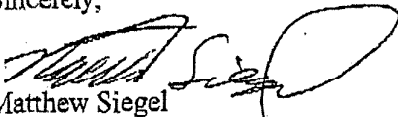
Further, to the extent that the work contemplated, calls on my clients' unit being renovated, I am curious how any work done to her unit will impact her, especially as it pertains to any work done on her back steps, which provides her only way of exit via the rear part of her home.

Finally, it should be noted that this property is currently being litigated and is the subject of an Unlawful Detainer (eviction) action wherein the owners are alleging that they need my clients' home for their own use. Ms. Nicoletti is asserting her rights under the law (both State and local) and is contesting the claims made by the owners.

Finally, should this work be allowed, my client is concerned about the effect the work would have on her health and welfare and whether the owner would be required to offer her any relocation benefits should she need to be relocated.

Thank you for your attention to this matter.

Sincerely,


Matthew Siegel
atty for S. Nicoletti

RECEIVED
JUN 14 2005
LAND USE PLANNING

June 23, 2005

In recognition of the concerns addressed by Ms. Nicoletti (residing tenant in upper unit of the front building) in her letter of 2/22/05, Mr. Siegel, (Ms. Nicoletti's attorney) in his letter of 6/14/05 and Mr. Mutnick (adjoining neighbor) in his letter of 2/23/05 we offer the following mitigations.

Voluntary Additional Conditions of Approval for 2235 Derby Street Cottage: Use Permit #05-1000043

1. No demolition or construction on the cottage will commence until Ms. Nicoletti's tenancy is resolved.
2. No demolition or construction on the cottage will occur until a licensed professional does 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 shall 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 them an opportunity to make reasonable accommodations where possible.

In the interest of a quick approval Ms. Tsighe Nemariam has authorized us to make this offer of accommodation.