



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 – 1617 Seventh Street – Administrative Use Permit #04-20000158

RECOMMENDATION

Adopt a Resolution remanding the decision of the Zoning Adjustments Board (ZAB) to eliminate a condition of approval in Administrative Use Permit # 04-20000158 to construct a 525 square-foot habitable accessory building with one parking space, with an average height of ten feet, located four feet, six inches from the property line.

FISCAL IMPACTS OF RECOMMENDATION

None

CURRENT SITUATION AND ITS EFFECTS

The subject property consists of a 1,373 square foot, single-story, single-family dwelling, situated on a 5,852 square foot lot.

BACKGROUND

On December 28, 2004, the Zoning Officer approved Administrative Use Permit No. 04-20000158 to construct a 525 square foot habitable accessory building containing one parking space and 200 sq. ft. of habitable space, labeled on the submitted plans as a play room, with an average height of ten feet, located four feet, six inches from the property line. The application also included a proposed, 160 square foot rear addition to the main house on the same lot. On January 18, 2004, Mr. Guillermo Pulido of 1613-1615 Seventh Street appealed the Zoning Officer's Decision to the Zoning Adjustments Board. Following the appeal, the property owner and the appellant agreed to mediation with assistance from the East Bay Community Mediation. In March 2005, the property owner and appellant signed an agreement on changes in the configuration of the project. However, the parties did not follow through on their agreement. Since mediation had failed, in July 2005 the property owner requested that the appeal be brought before the ZAB in order to move his project forward. On August 28, 2005, at its first meeting on the subject, the ZAB voted (as staff had recommended in the Staff Report) to deny the appeal rather than set the matter for public hearing. On September 13, 2005, Mr. Pulido appealed the ZAB's Decision to the City Council.

At the time of the application, a large walnut tree (at least 40 feet tall) was situated in the rear yard. The application showed a planned driveway that would pass over a portion of the tree's root system. As part of the approval of the AUP, the Zoning Officer included a condition that the applicant retain the services of a licensed arborist to develop a plan to insure the preservation of the tree. Staff informed the owner's representative of the planned condition. According to the owner's representative, she did not inform the owner of the proposed condition prior to the Zoning Officer's approval of the permit. Prior to the posting of the Zoning Officer's approval of the application (and without the knowledge of staff) the property owner had the tree removed. The property owner provided a written statement from the person who removed the tree, that the tree trunk was splitting, the tree was leaning and that it posed a danger to property and persons because it was in danger of falling over. The property owner has stated that he was not aware of the planned permit condition requiring preservation of the tree.

In approving the project, the Zoning Officer made the following findings:

- With the construction of the proposed 525 sq. ft. accessory building and the proposed minor (192 sq. ft.) residential addition, lot coverage will be 36% below the 40 % maximum in the R-1A District.
- Useable open space will be 858 square feet, greater than the 400 square foot minimum requirement.
- The ten foot average height of the proposed accessory structure that is not closer than four feet to a property line is within the requirements of Section 23D.08.020(B)
- The proposed accessory building will not interrupt the light or air of the neighbors on the abutting properties (Section 23D.20.020)
- The addition of an enclosed parking space and storage space will enhance the livability of the subject property.
- The project has a condition of approval that requires that a limitation of use be placed on the deed that prohibits the proposed accessory building from being used as a dwelling unit.

#### RATIONALE FOR RECOMMENDATION

Issue 1: The appellant states that he is appealing the ZAB's decision upholding the Zoning Officer's Decision approving Use Permit No. 04-20000158 because the ZAB did not attach conditions to which he and the property owner had agreed. According to the appellant, the property owner had made three agreements with the appellant, in association with his project application. According to the appellant, the first agreement between the appellant and the property owner, made prior to the permit application, was that the large tree in the rear yard would be preserved. The appellant states that the property owner's agreement to preserve the large rear yard tree was a condition that allowed the appellant to agree to "sign-off" on the project, stating "no objections." The

appellant objected to the project, following removal of the tree. The appellant asserts that he and the property owner made two additional agreements following the removal of the tree and the Zoning Officer's approval of the permit.

Response: Agreement No. 1

The presence or the lack of presence of the large rear yard tree does not have a effect on the potential for detriment of the proposed rear yard accessory building and garage. Prior to the Zoning Officer's approval of the permit, Staff requested that the City's Parks Division staff, in charge of enforcing the City's tree preservation Ordinances, inspect the tree to determine if any City ordinance protected it. In December 2004, the Parks Division staff informed the Planning staff that the tree was not protected by a City Ordinance. However, to address concerns raised by the neighbor, Mr. Pulido, and simply to save a large tree, Staff included a condition requiring that the tree be preserved.

Staff was motivated purely by their concern to preserve large trees whenever practical, not by concerns over the accessory building's impacts on the neighbor. The Staff Report to the ZAB states:

... while it is likely that the tree provided a "softening" effect for the subject property and surrounding properties, staff does not believe that the effect of the loss of the tree would be so dramatic so as to allow the effects of the proposed accessory building to rise to a level of detriment.

The approved permit has a condition that cannot be fulfilled: that the large tree in the rear yard be preserved. In declining to set the matter for a public hearing and upholding the Zoning Officer's approval of the permit application, the ZAB inadvertently upheld the condition that cannot be fulfilled. The permit needs to be modified with regard to the condition requiring preservation of the tree. Therefore staff recommends that the City Council remand the item to the ZAB to allow it to consider modifying the permit with regard to the requirement to preserve the tree. The ZAB must consider such a modification at a public hearing.

Agreement No. 2

The appellant asserts that he and the property owner had agreed that the property owner would "move his proposed construction three feet further away from our shared property line, plant trees between the property line and his new building, and split the cost of a fence with concrete foundation, a framework of pressure treated lumber and a stucco base." The property owner submitted to staff an agreement signed by the property owner and appellant reflecting these commitments, dated March 30, 2005.

Agreement No. 3

According to the appellant, "the third agreement was to build a cement block fence."

- Response:** Agreements 2 and 3, to which the appellant refers, are not related to the Zoning Officer's or ZAB's decision approving the permit. The property owner and the appellant developed agreements 2 and 3 after the Zoning Officer approved the permit. The Zoning Officer was not a party to these agreements. The ZAB's decision, upholding the Zoning Officer's decision, also was not based on any agreements between the appellant and property owner, following the Zoning Officer's decision. That agreements 2 and 3 were not ultimately entered into between the appellant and the property owner is a matter between the appellant and the property owner. The City was never a party to these agreements and the Zoning Officer's decision approving the permit was made prior to these two agreements.
- Issue:** The appellant writes that the staff report to the ZAB that recommended upholding the Zoning Officer's decision was "not accurate in saying that James (property owner) and I (appellant) failed to agree on the design of the fence. In fact we did agree, but without telling us, James (property owner) decided not to honor his commitment."
- Response:** Staff's statement that the property owner and the appellant failed to agree on a design for the fence is accurate. Immediately above the appellant's assertion that staff report was not correct, the appellant writes, "Apparently James wrote the Planning Department on July 8 to say that he was rejecting our agreement." The property owner ultimately did not agree to the design for the fence.
- Issue:** The appellant states, "It is now late in the process for us to present evidence of the noise generated by James's dogs and his cars and motorcycles, the density of the existing buildings surrounding the back of James' lot (which are not shown on the outdated site plans) and the visual impact of his construction right in front of and largely covering the window in our main common living area. These were issues we chose not to pursue based on our belief that we and James were working towards a common solution.
- Response:** The Staff report to the ZAB noted that the proposed location of the garage at the rear of the property owner's lot is a typical location for a garage and that it is the appellant's atypical location of his main dwelling at the rear of the lot that would cause him to be near and experience motor vehicle noise associated with the proposed garage in a typical rear yard location for garages. The Staff Report concluded that the location did not present unreasonable impacts on its neighbor. After reviewing the Staff Report, ZAB did not think the issue warranted further review; it chose not to set the item for public hearing, and denied the appeal.
- Staff has not previously been made aware of any issues regarding excess noise of dogs. Noise levels for motor vehicles and for animals are regulated by Chapter 13.40 of the City Municipal Code (Noise Ordinance). A complaint regarding noise disturbances caused by dogs and motor vehicles would be directed to and handled by the City's Environmental Health Division.

Staff disagrees that the project would result in a property that is too dense. The garage and attached 200 square foot habitable space are typical of many such projects approved throughout the City. The project does not exceed the lot coverage limits in the subject R-1A (Limited Two-Family Residential) District. Thirty-four percent lot coverage is proposed where 40% is allowed. The project proposes a 4 foot, 6 inch, left side yard setback, greater than the minimum 4 foot side yard setback required for residential buildings in the R-1A District and greater than the zero-foot side yard setback allowed for accessory buildings behind the first 75 feet of the lot. There will be no change in the number of dwelling units.

The vicinity map submitted with the application omitted one small rear building on the lot abutting the appellant's property and one building at the rear of the lot located to the south of the subject property. Staff's review of overhead photographs shows that there is little difference between the vicinity map submitted with the application to the actual number and configuration of nearby buildings. Staff does not believe that these omissions are significant enough to conclude that the project would cause detriment. On the contrary, the presence of other rear buildings in the area shows that the proposed building in the rear is typical of lot configurations in the area.

The project is typical of small rear yard garages and accessory buildings permitted throughout the city. No new issues have been raised in the appeal that were not already considered by the ZAB. However, since the approved permit contains a condition (preservation of the large tree in the rear yard) that cannot be met, following remand, the Zoning Adjustments Board will need to consider modifying the permit in order for it to be issued. The ZAB also has the option of overturning the Zoning Officer's approval of the Permit. Therefore, staff recommends that the Council remand the ZAB's decision to allow a public hearing for the consideration of modifying the conditions of approval.

#### 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 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: November 15, 2005
2. If none of the three actions shown above is taken by December 13, 2005 (30 days from the date the appeal first appears on the agenda), the decision of the ZAB is deemed affirmed.

CONTACT PERSON

Mark Rhoades, Land Use Planning Manager, (510) 981-7411

Attachments:

1. Resolution
  - Exhibit A: Conditions of Approval
  - Exhibit B: Project Plans, October 18, 2004
2. Administrative Record for AUP No. 04-20000158

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

REMANDING ADMINISTRATIVE USE PERMIT 04-20000158 TO THE ZONING ADJUSTMENTS BOARD TO CONSIDER THE CONDITION REQUIRING PRESERVATION OF A REAR YARD TREE AT 1617 SEVENTH STREET

WHEREAS on October 18, 2004, Mary Bull-Ransome filed an Administrative Use Permit application to construct a 525 square-foot habitable accessory building with one parking space and 200 square feet of habitable space included, with an average height of ten feet, located four feet from the property line; and

WHEREAS on December 29, 2004, the Zoning Officer evaluated the evidence and concluded 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 was categorically exempt under Section 15301 of the California Environmental Quality Act Guidelines; and

WHEREAS on December 29, 2004, the Zoning Officer thereby approved Administrative Use Permit 04-20000158, finding that,

- With the construction of the proposed 525 square foot accessory building and the proposed minor (192 sq. ft.) residential addition, lot coverage will be 36% below the 40 % maximum in the R-1A District.
- Useable open space will be 858 square feet, greater than the 400 square foot minimum requirement.
- The ten foot average height of the proposed accessory structure that is not closer than four feet to a property line is within the requirements of Section 23D.08.020(B)
- The proposed accessory building will not interrupt the light or air of the neighbors on the abutting properties (Section 23D.20.020)
- The addition of an enclosed parking space and storage space will enhance the livability of the subject property.
- The project has a condition of approval that requires that a limitation of use be placed on the deed that prohibits the proposed accessory building from being used as a dwelling unit.
- The project has a condition of approval that requires that prior to the issuance of a Building Permit the applicant engage the services of a licensed arborist to develop a plan that will insure that the large walnut tree in the rear yard will not be damaged as a result of the proposed structure so as to undermine its long-term viability and

WHEREAS on January 18, 2005, Mr. Guillermo Pulido of 1613 – 1615 Seventh Street, appealed the Zoning Officer's decision to the Zoning Adjustments Board; and

WHEREAS on August 25, 2005, the Zoning Adjustments Board, at its regularly scheduled meeting, evaluated the evidence and voted 8-0-1 to deny the appeal and uphold the Zoning Officer's decision; and

WHEREAS in voting to uphold the Zoning Officer's decision, the ZAB upheld a condition of the permit regarding tree preservation that could not be met because the tree had been removed prior to the Zoning Officer's approval of Administrative Use Permit 04-20000158; and

WHEREAS on September 1, 2005, notice of the Zoning Adjustments Board's decision was issued; and

WHEREAS on September 13, 2005, Mr. Guillermo Pulido of 1615/1613 Seventh Street 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 October 18, 2004 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 remanding Administrative Use Permit 04-20000158 to the Zoning Adjustments Board to consider the condition requiring preservation of a rear yard tree at 1617 Seventh Street.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley hereby remands Administrative Use Permit 04-20000158 to the Zoning Adjustments Board to consider the condition requiring preservation of a rear yard tree at 1617 Seventh Street.

Exhibits

A: Conditions of Approval

B: Project Plans, stamped October 18, 2004