



Office of the City Manager

ACTION CALENDAR

October 9, 2007

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: 2008 Virginia Street

RECOMMENDATION

Adopt a Resolution affirming the ZAB decision to allow the construction of a 1,434 sq. ft. addition at 2008 Virginia Street by raising the existing structure approximately 6' to create habitable space on the ground level, and by expanding the footprint of the building, thereby creating a two-story, west wing to the existing single-family residence.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On June 28, 2007, the ZAB approved an Administrative Use Permit to construct a 1,434 sq. ft. addition by raising the existing structure approximately 6' to create a habitable floor level and by adding a two-story, west wing to the building. Notice of the ZAB's Decision was mailed July 3, 2007. On July 17, 2007 Hallie Frazer of 1711-B Milvia Street appealed the ZAB's decision.

BACKGROUND

The proposed project is located on the south side of Virginia Street between Milvia and Shattuck, directly across from the Arts Magnet School. The subject property is a flag lot, surrounded by other parcels, with the driveway as the only street frontage. The subject area of the proposed addition abuts three adjacent rear yards, one to the south, one to the west, and one to the north. The properties to the north and west are non-conforming for lot coverage and setbacks, and the buildings on those abutting properties are both very close to their rear property lines. The abutting neighbors to the south, to the west, and to the north, appealed the Zoning Officer's decision to approve the project because they felt the project would represent an unreasonable impact to their light, air, privacy, and general welfare.

The original application proposed a 6' vertical extension of the existing house and a long and narrow two-story west wing addition that conformed to the required 15' front and rear yard setbacks and the required 4' setback. The original design had a very

close building separation between the western façade of the proposed addition and the abutting house to the west. The original design also posed some impacts to the light of the abutting neighbor to the north. The two appellants to the south of the subject property commented that the addition would be detrimental to their privacy and open space. After many months of mediation and compromise between the applicant and the appellants, a modified plan set was submitted to the Planning Department (See Exhibit B). The modified plans include the 6' vertical extension of the existing building mass as proposed in the original application, but changes the position of the proposed west wing building mass by rotating the mass 90 degrees and continuing the non-conforming north and south walls of the existing building. These modifications increase the building separation between the addition and the neighbor to the west, retain more open space between the addition and the neighbors to the south, and reduce the shadow impacts to the neighbor to the north. The applicant and appellants generally agree that the modified plan are superior and would decrease the impacts to air, light and general welfare; however the appellants still have concerns regarding privacy and possible future expansion. The applicant and appellants reached an agreement that in the future the applicant would notify neighbors before expanding the western deck and would apply for a Use Permit even though the City does not require it. Staff informed the appellants that Use Permit Conditions bind all current and future owners for the life of the project; the applicant decided to withdraw his request to include these restrictions within this Use Permit.

On June 28, 2007 the ZAB reviewed the modified plans and approved the project. The ZAB did not include Conditions of Approval that the appellants had requested (described above), for two reasons: 1) any future deck that would meet the required setbacks, lot coverage and 14' height limit would be allowed by right, and thus would not require a Use Permit and neighbor notification; and 2) any new deck, architectural feature or expansion of the building above 14' in height would require a new Administrative Use Permit and discretionary action by planning staff which requires notification of neighbors. Staff recommended that the ZAB not include these procedures as Conditions of Approval because: 1) such a condition would be very hard to track and enforce due to the City's current land use policies and procedures for approving ministerial projects, and 2) requiring a Use Permit for a project that would otherwise be allowed by right would be implementing legislation through a condition of approval.

RATIONALE FOR RECOMMENDATION

The Zoning Adjustments Board reviewed the project on June 28, 2007, and determined that the proposed addition would not unreasonably impact abutting neighbors light, air, or general welfare. The appellants have raised the following points (staff's responses follow each point):

Issue: "The evidence does not support the findings".

Response: The ZAB determined that the modified proposal would not be detrimental to the light, air, or general welfare of the surrounding neighbors. The ZAB assessed 1) shadow studies to analyze impacts to light access; 2) building separation and the location and articulation of the proposed building mass for impacts to air; and 3) the location and placement of windows and decks for impacts to general welfare and privacy. Furthermore, compatibility with the scale and character of surrounding development is one of the key issues that ZAB considers in making its recommendations. The ZAB found that the project would not have an unreasonable impact to light, air, or general welfare of the surrounding neighbors and that the mass and scale is consistent with surrounding development. ZAB member Bob Allan stated that he thought the appellants were over-reaching for concessions in their appeal and commented that the applicants had made significant attempts to compromise with the neighbors. The ZAB generally agreed that the modified plans would reduce the impacts to abutting neighbors and recommended approval of the modified project with a favorable 6-2-1 vote.

Issue: "The findings do not support the decision".

Response: The ZAB made the decision to approve the project based on their findings that the project would not unreasonably impact light, air or general welfare for the surrounding neighbors. The Zoning Ordinance allows issuance of a permit if the findings are made. The ZAB concluded that although the proposed development would be larger than most single-family dwellings in the neighborhood, and lies on a parcel smaller than most in the neighborhood, the project should be approved since it would be consistent with the surrounding pattern of development and would not be detrimental to the air light, views, or general welfare of abutting neighbors or the neighborhood.

Based on the shadow studies, the ZAB made findings supporting staff's determination that the new building mass would not unreasonably impact light. The ZAB also generally agreed that the appellants are not entitled to reserve the adjacent property as open space where the applicant was proposing their addition, and that the appellant's existing non-conforming yards and non-conforming setbacks were a significant factor in the anticipated impacts of the proposed development. The ZAB's findings in regards to light, air, and general welfare did support the decision to approve the modified project.

Issue: "Acting as it did, the ZAB acted without and in excess of its jurisdiction".

Response: It is the ZAB's purpose to evaluate Use Permit applications for both benefits and impacts, and to make decisions that, in its judgment, best

serve the public good (Section 23B.04.020). In this case the ZAB held a public hearing for the proposed project and determined that the project would not unreasonably impact light, air or general welfare for the surrounding neighbors. Thus the ZAB decided to approve the modified project which is well within their jurisdiction as the Zoning Adjustments Board.

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 9, 2007
2. If none of the three actions shown above is taken by November 8, 2007 (30 days 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

Debra Sanderson, Land Use Planning Manager, Planning Department, 981-7417

Attachments:

1: Resolution

 Exhibit A: Findings and Conditions of Approval

 Exhibit B: Approved Plans

2: Appeal Letter

3: Index to Administrative Record

4: Administrative Record.

RESOLUTION No.#####N.S.

AFFIRMING THE DECISION OF THE ZONING ADJUSTMENTS BOARD TO APPROVE ADMINISTRATIVE USE PERMIT No 06-20000113 FOR THE PROJECT LOCATED AT 2008 VIRGINIA STREET AND DISMISSING THE APPEAL

WHEREAS, on July 26, 2006 Lorin Hill filed for an Administrative Use Permit to allow the construction of a 1,434 sq. ft. addition by raising the existing structure approximately 6' to create habitable space on the ground level, and by expanding the footprint of the building thereby creating a two-story, west wing appendage to the building; and

WHEREAS, on June 28, 2007 the Zoning Adjustments Board approved the project; and

WHEREAS, on July 3, 2007 notice of the Zoning Adjustments Board's decision was issued; and

WHEREAS, on July 17, 2007, Hallie Frazer of 1711-B Milvia Street appealed the 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 is a reduced copy of the approved plan (dated June 13, 2007 and marked as Exhibit B) that is 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 by the Council of the City of Berkeley hereby affirms the decision of the Zoning Adjustments Board to approve Administrative Use Permit No. 06-20000113 for the project located at 2008 Virginia Street based on the findings, and subject to the conditions of approval contained in Exhibits A and B, and dismisses the appeal.

Exhibits

A: Findings and Conditions of Approval

B: Approved Plan

ATTACHMENT 1

FINDINGS AND CONDITIONS

JUNE 28, 2007

2008 Virginia Street

AUP # 06-20000113

CEQA FINDINGS

1. The project is categorically exempt from the provisions of the California Environmental Quality Act (CEQA, Public Resources Code §21000, et seq.) pursuant to Section 15301(a) of the CEQA Guidelines ("Existing Facilities").

GENERAL NON-DETRIMENT FINDING

2. Pursuant to Berkeley Municipal Code Section 23B.32.040, the Zoning Adjustments Board finds that the proposed construction of a 1, 434 sq. ft. addition by raising the existing structure approximately 6' to create a habitable floor level and by adding a two-story, west wing to the building, 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 development would not be detrimental to the abutting neighbor's air due to the large amount of open space that would be maintained in the applicant's rear yard.
 - B. The proposed development would not be detrimental to the abutting neighbor's light because the modified plan reduces the shadow impacts to abutting neighbors, compared to the plan that was previously approved by the Zoning Officer in Administrative Use Permit #06-20000113.
 - C. The vertical and horizontal extensions of non-conforming front and rear yards would not further encroach into the required setbacks, or be unreasonably detrimental to abutting neighbor's air, light, or general welfare for the reasons outlined above.

STANDARD CONDITIONS

1. Conditions Shall be Printed on Plans

The conditions of this Permit shall be printed on the first sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions'. The second sheet may also be used if the first sheet is not of sufficient size to list all of the conditions. The sheet(s) containing the conditions shall be of the same size as those sheets containing the construction drawings; 8-1/2" by 11" sheets are not acceptable.

2. Applicant Responsible for Compliance with Conditions

The applicant shall ensure compliance with all of the following conditions, including submittal to the project planner of required approval signatures at the times specified. Failure to comply with any condition may result in construction being stopped, issuance of a citation, and/or modification or revocation of the Use Permit.

3. Uses Approved Deemed to Exclude Other Uses (Section 23B.56.010)

- A. This Permit authorizes only those uses and activities actually proposed in the application and exclude other uses and activities.
- B. Except as expressly specified herein, this Permit terminates all other uses at the location subject to it.

4. Modification of Permits (Section 23B.56.020)

No change in the use for which this Permit is approved is permitted unless the Permit is modified by the Zoning Adjustments Board, in conformance with Section 23B.56.020.A.

Changes in the plans for the construction of a building or structure, may be modified prior to the completion of construction, in accordance with Section 23B.56.030.D. The Zoning Officer may approve changes to plans approved by the Board, consistent with the Board's policy adopted on May 24, 1978, which reduce the size of the project. The Zoning Officer may also approve a maximum two-foot variation to Board approved plans, provided, that such variation does not increase a structure's height, reduce the minimum distance to any property line, and/or does not conflict with any special objective sought by the Board. In the case of modifications to Use Permits for construction of, or additions or changes to, single-family homes which required Board review, the Zoning Officer shall follow Board policy adopted March 13, 1997, as follows:

- A. Upon applications for modifications to a home where a Use Permit has been granted, Staff shall review the Use Permit to determine if any explicit conditions were placed on the Use Permit that would be affected by the proposed modification.
- B. If, prior to acting on a Building Permit, Staff becomes aware of controversy over an earlier application, Staff may choose to conduct a more detailed review of the record to determine if conditions were implied by the Board or offered by the applicant (but not included in the Use Permit conditions) that would be affected by the proposed modification (this does not imply that Staff will review the whole Use Permit record for all applications).
- C. If there are explicit conditions (#A) or implied conditions (#B) affected by the proposed modification, the project shall be brought back to the Board as a Use Permit Modification.
- D. If there are no explicit conditions that would be affected by the proposed modification, and if Staff is not otherwise aware of implied conditions, and the project would otherwise meet the requirements of the Zoning Ordinance, Staff will approve the Building Permit without Board or public review.

5. Plans and Representations Become Conditions (Section 23B.56.030)

Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

6. Subject to all City and Other Regulations (Section 23B.56.040)

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.

7. Exercised Permit for Use Survives Vacancy of Property (Section 23B.56.080)

Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8 below.

8. Exercise and Lapse of Permits (Section 23B.56.100)

- A. A permit for the use of a building or a property is exercised when, if required, a valid City business license has been issued, and the permitted use has commenced on the property.

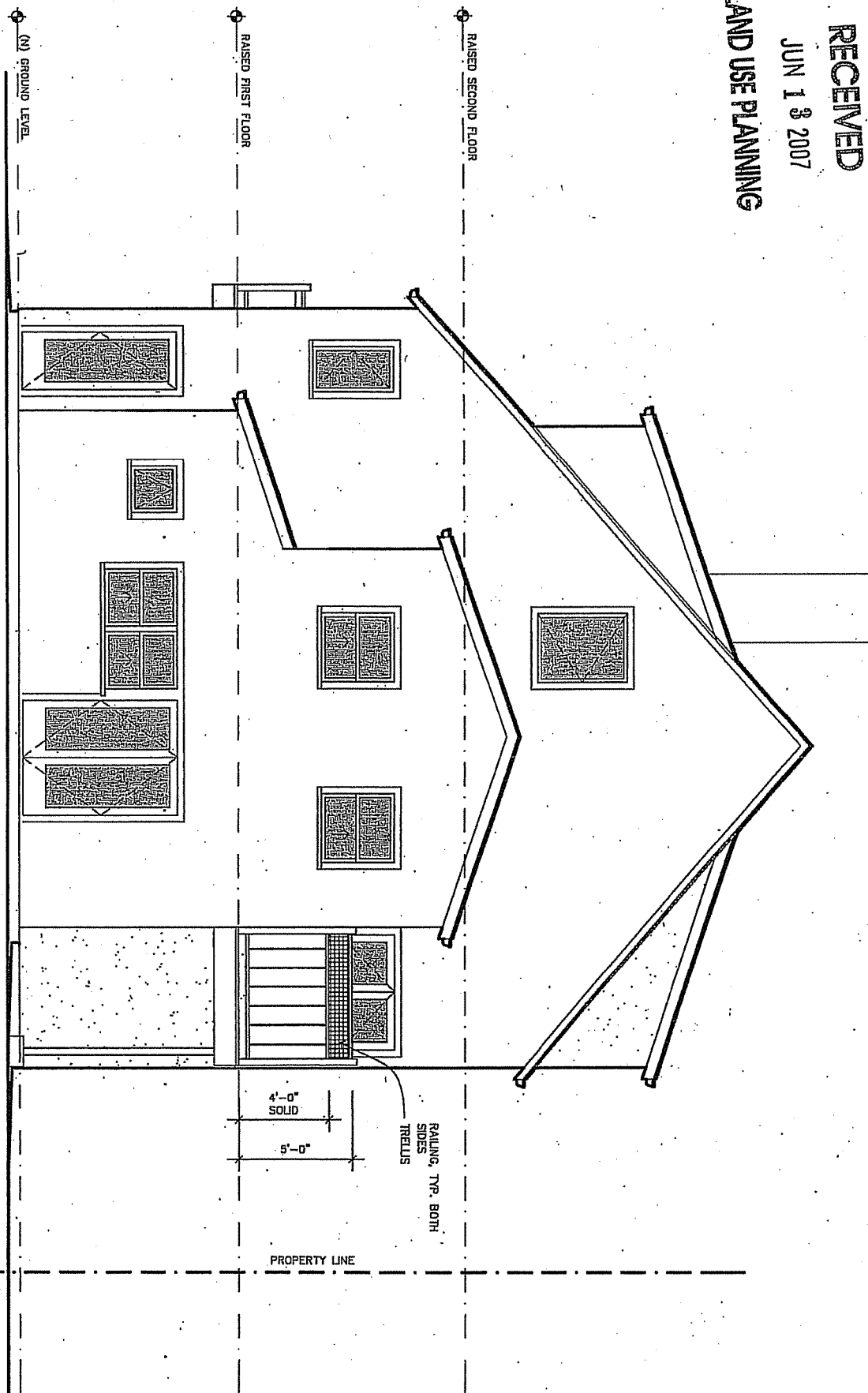
Prior to Issuance of Occupancy Permit or Final Inspection:

19. The project shall conform to the plans and statements in the Use Permit.
20. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated **6/13/2007**.

At All Times:

21. All exterior lighting shall be shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.
22. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way. Drainage plans shall be submitted for approval of the Building & Safety Division and Public Works Department, if required.
23. The applicant shall ensure that all excavation takes into account surface and subsurface waters and underground streams so as not to adversely affect adjacent properties and rights-of-way.

RECEIVED
JUN 13 2007
LAND USE PLANNING



4
1/4" = 1'-0"
PROPOSED WEST ELEVATION

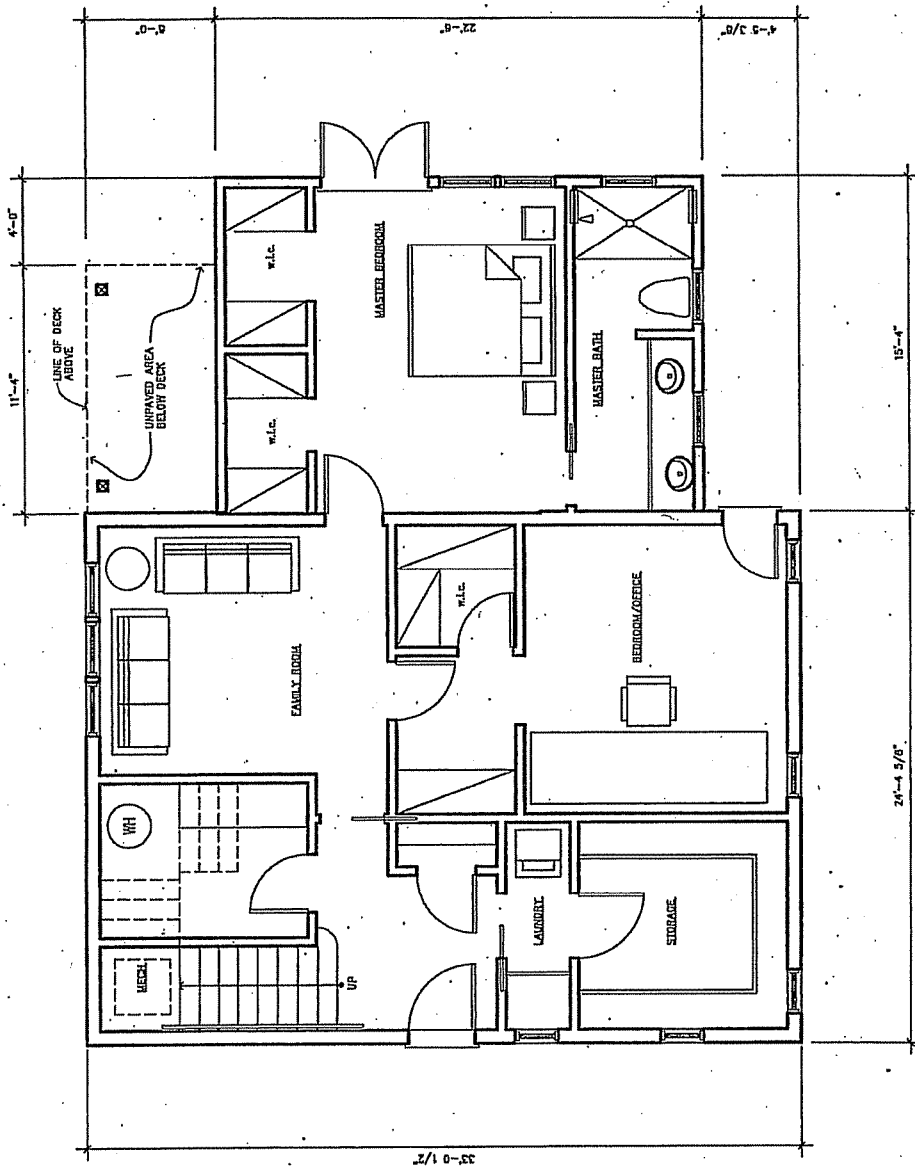
PER AGREEMENT 6-09-2007

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SCALE: 1/4" = 1'-0"

RECEIVED

JUN 13 2007

LAND USE PLANNING

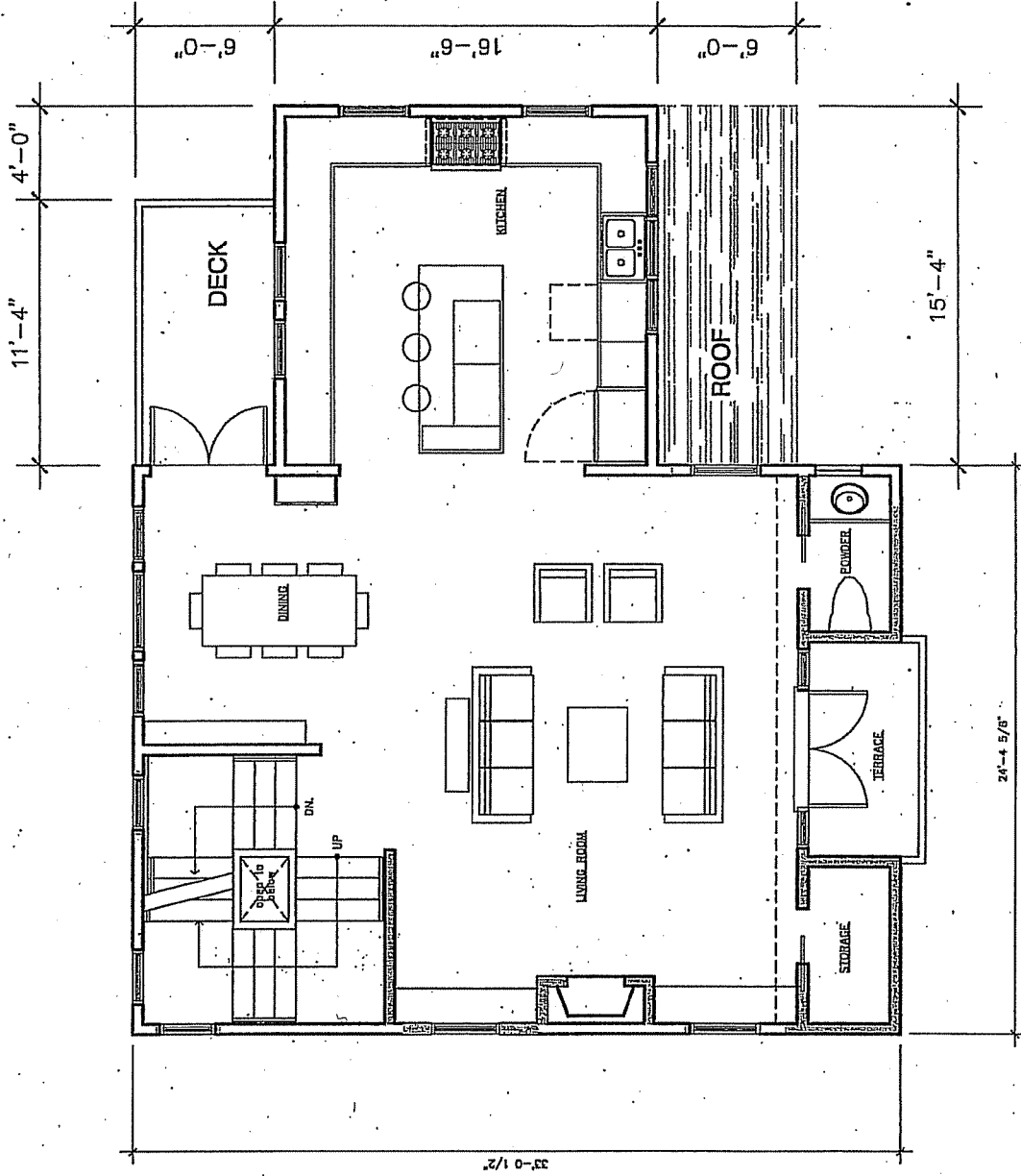


PER AGREEMENT 6-09-2007

2 PROPOSED FIRST FLOOR PLAN

1/4" = 1'-0"

RECEIVED
JUN 13 2007
LAND USE PLANNING



PER AGREEMENT 6-09-2007

PROPOSED SECOND FLOOR PLAN

2

1/4" = 1'-0"

Attachment 2 - Appeal Letter

Hallie M. Frazer
1711-B Milvia Street
Berkeley, CA 94709
(510) 849-9457
halliefrazer@yahoo.com

CITY OF BERKELEY
CITY CLERK DEPT.

07 JUL 17 AM 8:58

July 17, 2007

Mayor Tom Bates and Councilmembers
2180 Milvia Street
Berkeley, CA 94604

**RE: 2008 VIRGINIA STREET / APPEAL OF ZAB DECISION
GRANTING USE PERMIT #06-20000113**

Dear Mayor Bates and Councilmembers:

On behalf of myself and all of the surrounding property owners and neighbors of 2008 Virginia Street, I am writing to appeal the ZAB's decision of June 28, 2007 granting Applicants a Use Permit.

The general grounds for this appeal are:

- 1) The evidence does not support the findings;
- 2) The findings do not support the decision;
- 3) Acting as it did, the ZAB acted without and in excess of its jurisdiction.

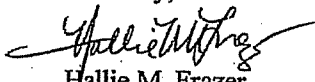
Specifically, we are appealing certain parts of the ZAB decision which would have affirmed an agreement made between the parties to mitigate the detriment of the project. The ZAB did not include the portions of the agreement which would have protected the neighbors.

Counsel for Applicants agreed to provide said protections in a private agreement but did not do so prior to the deadline for this appeal. Therefore, we need the Council to intervene, follow Council precedent to include the agreed upon conditions to the Use Permit. Without those protections, the project represents an unreasonable detriment to all surrounding neighbors.

Please set this matter for public hearing.

Thank you for your consideration.

Sincerely,


Hallie M. Frazer

Index to Administrative Record

2008 Virginia Street
Prepared August 21, 2007

Date	Item	Page
7/26/2006	Administrative Use Permit Application Materials	1
7/31/2006	Introduction letter from Nathan Dahl to Lorin Hill	25
9/21/2006	Notice of Decision Approving AUP # 06-20000113	26
10/5/2007	Correspondence from Applicant to Neighbors	43
10/11/2007	Revised Appeal Deadline Notice	44
10/11/2007	Neighbor Appeals of AUP # 06-20000113	47
10/20/2006	Rosemary Dady appeal of AUP	61
10/24/2006	Non-applicant appeal	64
1/11/2007	ZAB Notice of Public Hearing	66
1/25/2007	ZAB Staff Report 1/25/2007	82
3/8/2007	ZAB Notice of Public Hearing	91
3/22/2007	ZAB Staff Report 3/22/2007	93
5/10/2007	ZAB Notice of Public Hearing	94
5/24/2007	Staff Report 5/24/2007	99
5/24/2007	Supplemental Staff Report 5/24/2007	181
5/24/2007	Packet from Neighbors to the ZAB	189
6/14/2007	Staff Report 6/14/2007	245
6/14/2007	ZAB Notice of Public Hearing	246
6/28/2007	ZAB Staff Report 6/28/2007	248
7/3/2007	ZAB Notice of Decision Mailed: Proof of Service	273
7/17/2007	ZAB Decision Appealed by Hallie Frazer	277
8/1/2007	Receipt of Appeal from Clerk's Office	278



Attachment 4

Attachment 4 to this report, ZAB appeal 2008 Virginia Street is on file and available for review at the City Clerk Department, or can be accessed from the City Council Website.

City Clerk Department
2180 Milvia Street
Berkeley, CA 94704
(510) 981-6900

or from:

The City of Berkeley, City Council's Web site
<http://www.ci.berkeley.ca.us/citycouncil/>

