




Office of the City Manager

ACTION CALENDAR

January 15, 2008

To:  Honorable Mayor and Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development

Subject: ZAB Appeal: 2129 Rose Street

RECOMMENDATION

Adopt a Resolution affirming the decision of the Zoning Adjustments Board to approve Administrative Use Permit No. 06-20000098 to allow the installation of a skylight and French doors to 2129 Rose Street, and dismissing the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On September 27, 2007, the ZAB approved the proposed project finding that the installation of a skylight and French doors would not be unreasonably detrimental to abutting neighbor's sunlight, air, or general welfare. On October 15, 2007 the abutting neighbor to the north, Peter Lomhoff, filed an appeal, contending the skylight and French doors are detrimental.

BACKGROUND

In 1976 the City issued Use Permit No. 7755 to build an attached workshop (for hobby purposes only) as an addition to the rear of 2129 Rose Street. This addition was legally constructed without the subject skylight and east facing French doors. The applicant and current owner of the subject property claims these elements were present at the time she purchased the house in 1983. In 1993 the Planning Department issued a Notice of Zoning Violation to the applicant for the use of an illegal therapist's office within the workshop. Soon thereafter, the applicant ceased the therapist use within the workshop.

In 2005 the Code Enforcement Division received a request for service to inspect what was believed to be an illegal dwelling unit within the subject workshop. During an inspection by the City's Building and Safety staff, several code violations were observed including elements of an illegal dwelling unit, i.e. an illegal sink, bathroom, and cooking facilities as well as the subject skylight and French doors. The applicant made the corrections required by the Planning Department by eliminating the illegal dwelling unit (removing the kitchen facilities and shower), legalizing the half bathroom (toilet and

sink) with a Building Permit, and by applying for an Administrative Use Permit to legalize the pre-existing skylight and French doors.

On September 22, 2006, the Zoning Officer approved the AUP with the findings of non-detriment, and the condition that the applicant file a Notice of Limitation with the City and the county, which states that the workshop shall be allowed a toilet and sink, but shall not have cooking or bathing facilities, and shall not be permitted to be used as a bedroom or dwelling unit. The applicant has filed the appropriate deed restriction with both the City and County. On October 12, 2006 the abutting neighbor to the north, Mr. Lomhoff, appealed the Zoning Officer's decision. At this point, the applicant considered avoiding the appeal process and submitted a building permit application to remove the skylight and French doors. However, after several months of consideration, the applicant decided to proceed with the appeal process to keep the two features. On September 27, 2007, the ZAB affirmed the Zoning Officer's decision. On October 15, 2007 the abutting neighbor to the north, Mr. Lomhoff, appealed the ZAB's decision.

RATIONALE FOR RECOMMENDATION

On October 15, 2007 the abutting neighbor to the north, Mr. Peter Lomhoff, appealed the ZAB's decision to allow the construction of a skylight and French doors to an existing attached workshop. In his appeal letter dated October 15, 2007, the appellant contends that the Skylight and French doors are detrimental to his peace, comfort, and general welfare because activity within the workshop has yielded obtrusive lighting into his bedroom window, noise late at night, and obtrusive smells from the illegal cooking and bathroom facilities. The appellant also contends that the ZAB did not consider a discrepancy pertaining to the rear property line setback when denying the appeal and that Special conditions imposed by the Zoning Officer would not protect his peace, comfort, and general welfare because the applicant has a history of code violations and evasion of land use regulations.

Staff Response: On September 27, 2007, the ZAB unanimously denied the appeal 9-0 and upheld the Zoning Officer's decision to approve the project adopting the Findings and Conditions of Approval found in attachment A, and the approved plans found in attachment B. There was very little discussion amongst the board pertaining to the project. Staff does not believe the architectural elements of a skylight and French doors are detrimental to the appellant's peace and general welfare; rather that the recent history of illegal uses that have disturbed him. The appellant has not filed complaints about the illegal skylight and French doors or the discrepancy pertaining to the rear yard setback until recently, some 20 years after the architectural features were originally installed, and approximately 30 years after the original workshop was constructed.

Staff does not believe the discrepancy pertaining to the rear property line, shown as 3'6" in the approved Use Permit No. 7755 but field verified as 1'6", is relevant because the attached workshop was built to the size and extent as shown in the approved 1976 plan and the installation of a skylight and French doors would not change the building separation between the workshop and the appellant's house. The skylight and French doors have existed in their current locations for over twenty years. The 2' discrepancy

over the rear yard setback does not affect staff's decision to approve the AUP to legalize these features. Staff believes that it is not the architectural features of a skylight and French doors that pose an impact to the appellant, but rather it is the history of illegal uses within the workshop that have disturbed his peace, comfort and welfare. Conditions of approval and deed restrictions are now in place to restrict the use of the space to a workshop for hobby purposes only. Should the appellant believe that the space is being used improperly, he may file for a request for service with the code enforcement division. If an investigation yields findings that the applicant is improperly using the space, the City may revoke Use Permit No. 7755 and or AUP No. 06-20000098.

The findings and conditions of the Administrative Use Permit, as well as the deed restriction filed with the county assessor, reinforce the legal use of the space as a workshop for hobby purposes only. The applicant has indicated that she would most likely use the space as a writing workshop. The deed restriction the applicant has filed is standard for accessory buildings. The workshop space had previously been used illegally as a psychotherapy office and then as a dwelling unit. The City's Code Enforcement Division investigated both situations and the applicant has since removed the office and the illegal unit. The required limitation of use (described above) provides the City ample power to enforce the Conditions of Approval if this or any future owner tries to use the space as an office or dwelling unit. Staff believes this condition is adequate to ensure that the applicant does not improperly use this space in the future. If the appellant believes the applicant is improperly using the workshop space, he is entitled to file a request for service with the City's Code Enforcement Division.

Staff finds no evidence that a skylight and French doors would increase the likelihood of illegal behavior. Numerous other accessory buildings in the City contain these amenities, and we have seen no reason to believe that these buildings are more conducive to illegal use than those with no skylight and ordinary doors. Again, if the appellant believes there is illegal activity occurring within the workshop, he is entitled to file a request for service with the City's code enforcement division.

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: January 15, 2008
2. If none of the three actions shown above is taken by February 14, 2008 (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. 06-20000098 FOR THE PROJECT LOCATED AT 2129 ROSE STREET AND DISMISSING THE APPEAL

WHEREAS, in 1976, the City approved Use Permit No.7755, allowing an attached workshop (for hobby purposes only) as an addition to the rear of 2129 Rose Street; and

WHEREAS, on June 30, 2006 Joan Spiegel filed for an Administrative Use Permit to allow the installation of a skylight and French doors to a building within a non-conforming rear yard setback; and

WHEREAS, on September 22, 2006 the Zoning Officer approved AUP No. 06-20000098 to allow the installation of a skylight and French doors to a building within a non-conforming rear yard setback; and

WHEREAS, on September 27, 2007 the Zoning Adjustments Board unanimously denied the appeal 9-0, and approved the project (See attachments A and B) without a public hearing finding the project would not unreasonably impact abutting neighbors.

WHEREAS, on October 4, 2007 notice of the Zoning Adjustments Board's decision was issued; and

WHEREAS, on October 15, 2007, Peter Lomhoff of 1335 Walnut 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), approved September 27, 2007 by the Zoning Adjustments Board, that are included by reference as though fully incorporated herein; and

WHEREAS, attached hereto is a reduced copy of the approved plan (dated June 30, 2006 and marked as Exhibit B) that is included by reference as though fully incorporated herein.

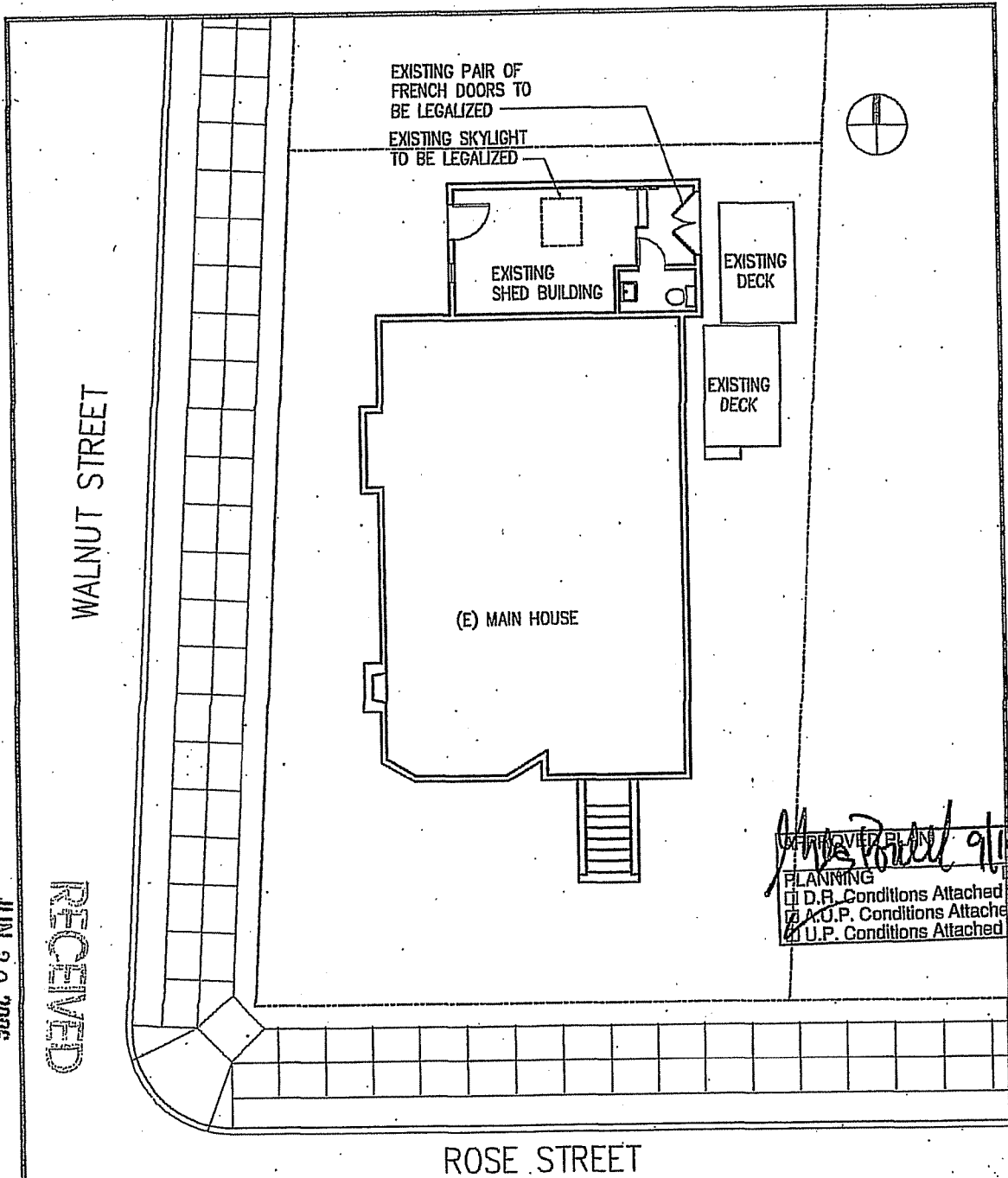
WHEREAS, the Council has considered the record of the proceedings before the Zoning Adjustments Board; the recent Staff reports and correspondence presented to the City Council, and, in the opinion of this Council, the facts stated in, or ascertainable from this information, warrant affirming the decision 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. 06-20000098 for the project located at 2129 Rose Street based on the findings, and subject to the conditions of approval and plans contained in Exhibits A and B, and dismisses the appeal.

Exhibits

A: Findings and Conditions of Approval

B: Approved Plan



APPROVED PLAN
 PLANNING DATE
 D.P. Conditions Attached
 U.P. Conditions Attached
 9/18/06
 4/1

JUN 30 2006

RECEIVED

LAND USE PLANNING

1 PROPOSED PLAN
 SCALE 1/8" = 1'-0"

Sheet
 A2.0

Scale 1/8"=1'-0"
 PROPOSED PLAN
 Drawn By DBH
 Checked By DBH
 Sheet Title
 Drawing Issue
 Date
 Date
 Date

SPIEGEL RESIDENCE
2129 ROSE STREET
 BERKELEY, CA
 APN 060-246 608 800

DAVID B. HALL
ARCHITECT
 23 27TH STREET, SAN FRANCISCO, CA 94110
 T 415.225.8142 / E david@dpsf.com

When electronic or other printing is utilized, the user shall be responsible for ensuring that the printed version of the plan is legible and that the user has obtained the necessary permissions for all dimensions and conditions on the job and that all dimensions and conditions are verified from the drawings and conditions shown by this rendering. Shop details must be submitted to the office for approval before proceeding with fabrication.

EXHIBIT A**FINDINGS AND CONDITIONS**
SEPTEMBER 22, 2006**2129 Rose Street****Administrative Use Permit #06-2000098****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").

FINDINGS FOR APPROVAL

2. As required by Section 23B.28.050 A of the Zoning Ordinance, the installation of a skylight and French doors to a building within a non-conforming rear yard setback, under the circumstances of this particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort, and general welfare of the persons residing or working in the 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 because:
 - The alterations to the building do not further reduce the existing non-conforming yard or exceed the height limit for the district. (Section 23C.04.070.B)
 - The alterations to the building, skylight and French doors, do not increase building height or mass and therefore do not impact abutting neighbor's light and/or air.
 - The alterations to the building do not detrimentally impact abutting neighbor's privacy. According to the owner of the subject property, the French doors and skylight have existed as part of the building since at least 1983, when she purchased the property. A site visit to the subject property on 8/15/2006 revealed that the skylight does not give workshop occupants views into the windows of the abutting property at 1355 Walnut Street, but rather allows for a natural light source into the workshop. Pictures were taken from within the workshop, which show that the skylight does not allow for direct view corridors into abutting neighbor's properties. The French doors, which face east towards the property owner's side yard, do not detrimentally impact abutting neighbor's privacy because they are oriented towards the owner's side yard, and are screened from adjacent residencies by a fence and vegetation along the rear and side property lines.
 - The applicant shall file a deed restriction, Condition # 10, with the County recorder stating that the workshop shall not be used as a dwelling unit, containing cooking facilities, a full bathroom, or be used as sleeping quarters.

STANDARD CONDITIONS

The following conditions, as well as all other applicable provisions of the Zoning Ordinance, apply to this Permit:

1. Conditions Shall be Printed on Plans

The conditions of this Permit shall be printed on the *second* sheet of each plan set submitted for a building permit pursuant to this Use Permit, under the title 'Use Permit Conditions'. *Additional sheets* may also be used if the *second* 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 excludes 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 or structure for which this Permit is issued is permitted unless the Permit is modified by the Zoning Officer, except that the Zoning Officer may approve changes that do not expand, intensify, or substantially change the use or building.

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

Except as specified herein, the site plan, floor plans, building elevations and/or any additional information or representations, whether oral or written, indicating the proposed structure or manner of operation submitted with an application or during the approval process are deemed conditions of approval.

6. Subject to All Applicable Laws and Regulations (Section 23B.56.040)

The approved use and/or construction is subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies. Prior to construction, the applicant shall identify and secure all applicable permits from the Building and Safety Division, Public Works Department and other affected City divisions and departments.

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.
- B. A permit for the construction of a building or structure is deemed exercised when a valid City building permit, if required, is issued, and construction has lawfully commenced.
- C. A permit may be declared lapsed and of no further force and effect if it is not exercised within one year of its issuance, except that permits for construction or alteration of structures or buildings may not be declared lapsed if the permittee has: (1) applied for a building permit; or, (2) made substantial good faith efforts to obtain a building permit and begin construction, even if a building permit has not been issued and/or construction has not begun.

SPECIAL CONDITIONS IMPOSED BY THE ZONING OFFICER

Pursuant to BMC 23B.28.050.D, the Zoning Officer attaches the following additional conditions to this Permit:

Prior to Issuance of Any Building Permit

9. The applicant shall apply for a building permit to legalize the existing French doors and skylight within 30 days or be subject to enforcement.
10. Prior to issuance of a building permit, all owners of record of the subject property shall sign and record with the Alameda County Clerk-Recorder a "Notice of Limitation on Use of Property" (available from Land Use Planning Division) and provide a copy of same to the project planner. This Notice of Limitation shall stipulate that no part of this structure shall be used as or converted to an additional dwelling unit unless and until permission is requested of the City of Berkeley and authorized through a Use Permit, Administrative Use Permit, or Zoning Certificate, which ever is applicable. This Limitation on Use shall include the explicit acknowledgment that no shower, tub, or kitchen facilities may be installed in the allowed workshop nor shall the space be used as sleeping quarters. This limitation may not be revised or removed from this property without the prior written permission of the Zoning Officer of the City of Berkeley.

City Monitor: Project Planner

Signature

Date

During Construction

11. Construction activity shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. on Monday through Friday, and between 9:00 a.m. and noon on Saturday. No construction-related activity shall occur on Sunday.
12. If underground utilities leading to adjacent properties are uncovered and/or broken, the contractor involved shall immediately notify the Public Works Department and the Building & Safety Division, and carry out any necessary corrective action to their satisfaction.
13. Subject to approval of the Public Works Department, the applicant shall repair any damage to public streets and/or sidewalks by construction vehicles traveling to or from the project site.
14. 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 in thickness and secured to the ground.
15. 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.
16. Trucks hauling debris, soil, sand, or other loose materials shall be covered or required to maintain at least two feet of board.
17. Public streets shall be swept (preferably with water sweepers) of all visible soil material carried from the site.
18. The applicant shall establish and maintain drainage patterns that do not adversely affect adjacent properties and rights-of-way.
19. 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.
20. Any construction during the wet season shall require submittal of a soils report with appropriate measures to minimize erosion and landslides, and the developer shall be responsible for following these and any other measures required by the Building and Safety Division and the Public Works Department.

Prior to Issuance of Occupancy Permit or Final Inspection:

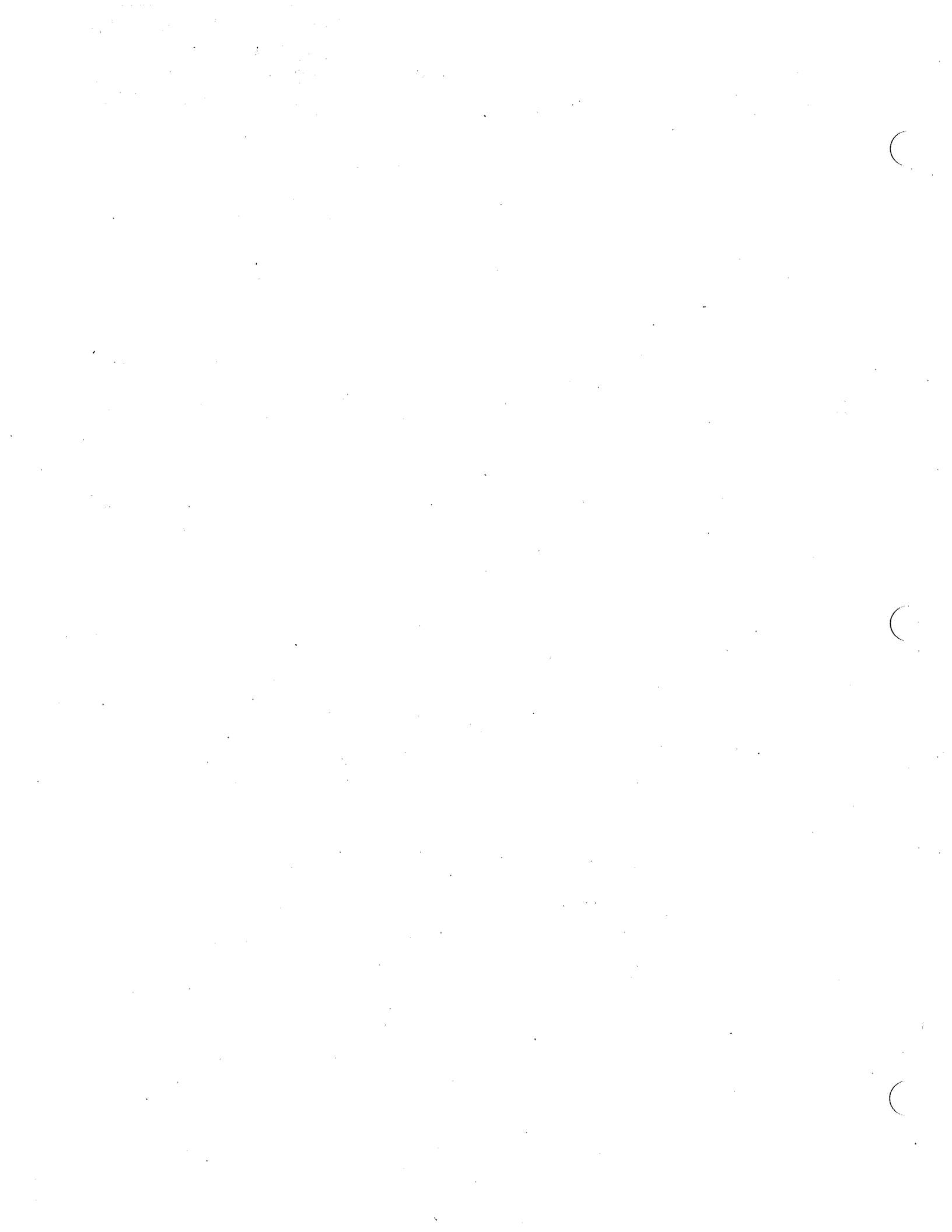
21. Prior to issuance of occupancy permit or final inspection, all construction at the subject property shall substantially conform to the approved Use Permit drawings or to modifications approved by the Zoning Officer.
22. All landscape, site and architectural improvements shall be completed per the attached approved drawings dated 6/30/2006.

At All Times (Operation):

23. All exterior lighting shall be shielded and directed downward and away from property lines to prevent excessive glare beyond the subject property.

Mark Rhoades, Zoning Officer

Prepared by: Nathan F. Dahl



Index to Administrative Record

2129 Rose Street

Prepared December 7, 2007

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Attachment 4

Attachment 4 to this report, ZAB Appeal 2129 Rose 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/>