



Office of the City Manager

**19**PUBLIC HEARING

March 26, 2019

To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Timothy Burroughs, Director, Planning & Development Department

Subject: ZAB Appeal: 1722 Walnut Street

RECOMMENDATION

Conduct a public hearing, and upon conclusion adopt a Resolution to affirm the Zoning Adjustments Board decision to deny Use Permit/Variance #ZP2018-0021 to legalize an unpermitted detached dwelling unit in the rear yard area of a lot legally developed with an eight-unit apartment building, and dismiss the appeal.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On November 8, 2018, the Zoning Adjustments Board (ZAB) held a public hearing and denied Use Permit/Variance #ZP2018-0021 by a vote of 6-1-0-1 (Yes: Kahn, Sheahan, Selawasky, O'Keefe, Olson, Wright, Pinkston; No: Clarke; Abstain: None; Absent: Kim). On November 15, 2018, staff issued the notice of the ZAB decision. On November 28, 2018, Margrett Lewis and Joe Priest ("Appellants") filed an appeal with the City Clerk. The Clerk set the matter for review by the Council on March 26, 2019.

BACKGROUND

The project site is a 5,479-square-foot parcel that is developed with an approximately 6,000-square-foot, two-story, eight-unit apartment building that was constructed in 1926. No off-street parking exists on the site. Approximately six years ago, the property owners built a detached cottage (i.e. dwelling unit) without permits in the southwestern (rear left) corner of the property in a location where a shed had been located.

In February 2017, John Stevick ("Applicant") submitted a request for a zoning determination on the most expedient way to legalize the subject dwelling unit. The Zoning Research Letter response, dated April 3, 2017 (see Attachment 4) is that the project would be subject to current development standards of the Berkeley Municipal Code and that Variances would be required to approve the project, and that Variance findings are "often difficult to make."

A Variance is a deviation from current zoning requirements that permits a landowner to not comply with the standards required of other landowners in the same zone. Typically, a variance is granted when the property owner can demonstrate that existing zoning regulations present a practical difficulty in making use of the property due to physical characteristics of the property. The classic example involves a residential lot that is identical in size and shape to the surrounding lots, but suffers from the presence of a large, immovable boulder. In this instance, a variance waiving ordinary setback requirements may permit the landowner to build a house, even though the boulder makes construction of the house within the normal zoning envelope impossible.<sup>1</sup>

On November 14, 2017, the Neighborhood Services-Enforcement Division sent a Notice of Violation (NOV) to the property owners for construction of a dwelling unit without the required Land Use or Building and Safety Division permits or approvals. The property owners submitted the subject application on January 28, 2018. In addition to the Use Permit to construct a new dwelling unit and two Administrative Use Permits (AUPs) to reduce the required rear yard setback and to reduce the building-to-building separation, the project requires four Variances from the Multi-Family Residential (R-4) zoning development standards:

- Variance to decrease the required left side yard setback below the 4-foot minimum to 2.2 feet;
- Variance to further increase the non-conforming 60% lot coverage to 61% where a maximum of 45% is permissible for a lot with a two story building;
- Variance to not provide and to further decrease the non-conforming Useable Open Space per dwelling, providing 990 square feet, where a minimum of 1,800 square feet is required; and
- Variance to not provide the required off-street parking space for a new dwelling unit.

In order to approve a Variance, all of the following Findings must be made (BMC 23B.44.030):

1. There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District;
2. The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner;
3. The establishment, maintenance or operation of the use or the construction of a building, structure or addition thereof, to be approved will not, under the

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<sup>1</sup> Fulton, William and Shigley, Paul. *Guide to California Planning, 4<sup>th</sup> Edition*. Point Arena: Solano Press Books, 2012.

circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood; and that the granting of the Variance will promote the municipal health, welfare and safety and benefit the City as a whole;

4. Any other variance findings required by the Section of the Ordinance applicable to that particular Variance.

After multiple rounds of review to collect all the pertinent background information and obtain a complete and accurate application, staff prepared a staff report to the ZAB that recommended denial of the permit application because the required Variance findings cannot be made and because the project is inconsistent with the Purposes of the District. At the November 8, 2018 meeting, the ZAB held a public hearing, discussed the project, concluded it could not make the Findings to approve the Variances, and denied the project.

#### ENVIRONMENTAL SUSTAINABILITY

There are no environmental factors associated with this project.

#### RATIONALE FOR RECOMMENDATION

The issues raised in the Appellant's letter, and staff's responses, are as follows. For the sake of brevity, the appeal issues are not re-stated in their entirety; refer to the attached appeal letter for full text.

Issue 1: "...both the Planning Department and ZAB's recommendations and rulings directly contradict their mission to maintain and grow the housing supply, particularly rent controlled units." "ZAB's demand that this cottage be demolished is: (iii) a direct contradiction of Berkeley's stated goals of providing housing." [pages 1 and 2 of attached appeal letter]

Response 1: Policy H-19 of the Housing Element is to encourage housing production adequate to meet the housing production goals established by ABAG's Regional Housing Needs Determination for Berkeley. There are, however, eleven stated purposes of the Zoning Ordinance (Ordinance), found in Chapter 23 of the Berkeley Municipal Code (BMC), which include:

- Implementation of *all* policies of the City's adopted General and Area Plans [emphasis added];

- Regulation of the location and use of land, buildings and structures to encourage the more appropriate use of land and a compatible and harmonious relationship among land uses; and
- Provision of adequate usable open space, off-street parking and off-street loading spaces for specified land uses by requiring certain reservations of land and structures for such purposes, and by regulating the number, placement and location of such spaces and areas (BMC Section 23A.04.030).

The Ordinance states, “No land or building shall be used, or designed to be used, nor shall any new building or structure be constructed [...] except as permitted by this Ordinance, either as of right or by permit.” There are four development standards—side yard setback, lot coverage, Useable Open Space, parking—with which the illegal construction fails to comply and, therefore, is not permitted by the Ordinance. Staff’s recommendation and ZAB’s decision properly accounted for all required State and local laws and policies.

Issue 2: “ZAB Staff appeared to have gone out of their way to treat the application by John Stevick differently than others in several ways.” [page 2]

Response 2: The Appellants provide no evidence how staff or ZAB treated the Applicant differently than other applicants and is unclear what pictures the Appellants are referring to that staff failed to distribute. Staff provided all correspondence received during the processing of the application to the ZAB up until the noon deadline the day of the meeting, after which correspondents must bring their own correspondence to ZAB. The Applicant presented additional information to ZAB at the hearing, including written arguments and photographs, which were considered by the decision-makers.

Issue 3: “ZAB’s demand that this cottage be demolished is: (i) a clear physical and monetary stand which contradicts the US Constitution.” [page 2]

Response 3: The Appellants do not have a constitutional right to maintain an unpermitted, illegally constructed, nonconforming structure on their property. ZAB’s decision to require removal of the Appellant’s illegally constructed building is well within its authority to enforce the Zoning Ordinance.

Issue 4: ZAB’s demand that this cottage be demolished is...(ii) an example of the ZAB treating the owners [...] differently than other large developers. [page 2, 5]

- Response 4: The Appellants may be referencing a 2016 ZAB approval of Use Permit #ZP2016-0132 for construction of a duplex behind a four-unit apartment building. Unlike the subject project, that 2016 Use Permit complied with all development standards of the Zoning Ordinance, as allowed by right or permissible with AUP approval. No Variances were required, requested, or granted. ZAB evaluated both projects for consistency with the Zoning Ordinance and voted accordingly.
- Issue 5: “If 1722 Walnut Street were to be a completely empty lot today, the subject property could be approved for the development of 19 or more units...” [page 5]
- Response 5: As the underlying R-4 Zoning District does not have a maximum density standard, the Appellant’s assertion may be correct if the proposed project complied with the development standards of the District. However, lot coverage, setbacks, open space and parking requirements would each limit such a hypothetical project to the same degree it limits the subject proposal.
- Issue 6: “ZAB’s demand that this cottage be demolished is: (iv) a lost opportunity to work with an owner to develop smart infill that is aesthetically pleasing, has no impact on neighboring properties, is walkable to public transportation, and, most importantly, helps mitigate the unprecedented housing crisis Berkeley states we are in on their own website.” [page 2]
- Response 6: It is the responsibility of ZAB to administer the provisions of the Zoning Ordinance (BMC 23B.04.010.A). ZAB followed the framework of regulations regarding the construction of buildings and additions and the size and coverage of lots (BMC 23A.04.030.C).
- Issue 7: There clearly are exceptional or extraordinary circumstances or conditions, in terms of homelessness. [page 3]
- Response 7: In order to approve a Variance, the City must be able to make the finding that, “There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District.” The use of a Variance is generally understood as a means of reestablishing parity for property owners when their property is unusually situated or otherwise constrained from achieving the same type of development that would otherwise be allowed in the area. The subject property is a flat rectangular lot with

substantial existing legal development (an 8-unit apartment building), so it does not qualify for a Variance.

Issue 8: “[ZAB] ruled against keeping the rent-controlled unit in place, a direct contradiction to one of their most important and loudly stated missions.” [page 4]

Response 8: As previously stated in Responses 1 and 6 above, it is the responsibility of ZAB to fairly and consistently administer the provisions of the Zoning Ordinance first and foremost and, within that framework, to further the goals and policies of the City’s General Plan and other plans. As such, denial of the illegal dwelling unit is not contradictory, but is instead an appropriate action and consistent with ZAB’s authority.

The illegal dwelling, which is located on a parcel with a rent-controlled apartment building, is currently registered with the Rent Stabilization Board (RSB). Since the dwelling never received land use or building permits and, therefore, never received a Certificate of Occupancy, it is not exempt from rent control, but neither is it legally habitable and should not be registered as available for rent. If the Variance and Use Permits were granted, then, the dwelling would be required to receive all required building permits and would be issued a Certificate of Occupancy, thereby exempting it from rent control.

Staff also notes that rent control does not equate to affordable housing. As mentioned in the November 8, 2018 ZAB staff report, as early as 2016, the cottage was listed on Airbnb along with at least five other of the apartments in the main building. Based on the current availability of the unit(s), as well as the frequency of the reviews, the registered rent ceiling resets to market rate approximately two to four times a year. Currently, the subject 346-square-foot dwelling rents for \$3,580 per month, inclusive of utilities and an 18% monthly price discount.<sup>2</sup>

Issue 9: Staff’s restricted interpretation of property rights, “flies in the face of the U.S. Constitution. It is clearly a physical and monetary taking of the owner’s property.” [page 4]

Response 9: The second finding the City must make in order to grant a Variance is that, “The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property’s owner.” Property rights are a property owner’s ability to use his or her property in a manner consistent with the applicable provisions of the

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<sup>2</sup>[https://www.airbnb.com/rooms/14265796?location=Berkeley%2C%20CA%2C%20United%20States&adults=1&guests=1&s=CW1lIdq3&check\\_in=2019-04-01&check\\_out=2019-04-30](https://www.airbnb.com/rooms/14265796?location=Berkeley%2C%20CA%2C%20United%20States&adults=1&guests=1&s=CW1lIdq3&check_in=2019-04-01&check_out=2019-04-30)

Zoning Ordinance; the application cannot be used to support any condition that a property is in, or made to be, that is unlawful. Property rights are not directly related to the financial viability or profitability of a property. Contrary to the Appellants' statement, requiring property owners to remove an illegally constructed, unpermitted structure that does not comply with the Zoning Ordinance is well within ZAB's authority.

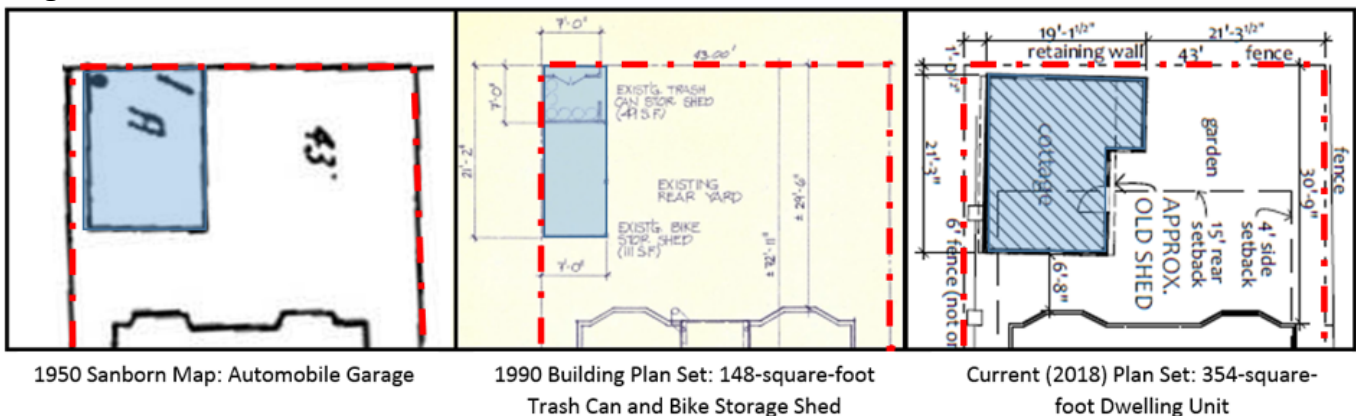
Issue 10: Staff illogically concludes that the project does not meet the purpose of the District to "Make available housing for persons who desire convenience of location and a reasonable amount of Useable Open Space. [pages 4-5]

Response 10: First to clarify, it is not staff's decision that is being appealed, but the ZAB's decision.

The Appellants state that the footprint of the illegal dwelling is not much larger than a previous detached structure that existed on the site and that the garden is actually larger than it was previously.

As shown on the 1950 Sanborn Map, a garage was located on the subject site in much the same location, but smaller footprint, as the existing illegal dwelling. A site plan included in a plan set for a 1990 Building Permit that was provided by the Applicant, however, shows the garage had been replaced by a much smaller, approximately 148-square-foot trash and bike shed. See Figure 1 below. The legal condition of the property is, therefore, reflected in the 1990 site plan.

Figure 1: 1722 Walnut Street Rear Yard Plan



Useable Open Space is defined as the area of a lot reserved for active or passive recreation use that is accessible to the occupants of the building and meets certain dimensional requirements for size, slope, and

landscape / hardscape area (BMC 23D.04.050). The existence of a foundation slab, as mentioned by the Appellants, does not exempt an area as Useable Open Space; the construction of a dwelling does.

The project site is already non-conforming for Useable Open Space under legal conditions. Approximately 1,416 square feet exist (pre-project) where 1,600 square feet are required for the eight legal dwelling units. Adding another dwelling and removing pre-existing useable open space would result in a deficit of approximately 810 square feet. This would fail to accomplish one of the stated objectives of the R-4 zoning district.

#### ALTERNATIVE ACTIONS CONSIDERED

Pursuant to BMC Section 23B.32.060.D, the Council may (1) continue the public hearing, (2) reverse, affirm, or modify the ZAB's decision, or (3) remand the matter to the ZAB.

#### ACTION DEADLINE:

Pursuant to BMC Section 23B.32.060.G, if the disposition of the appeal has not been determined within 30 days from the date the public hearing was closed by the Council (not including Council recess), then the decision of the Board shall be deemed affirmed and the appeal shall be deemed denied.

#### CONTACT PERSONS

Timothy Burroughs, Director, Planning & Development Department, (510) 981-7437  
Leslie Mendez, Senior Planner, Planning & Development Department, (510) 981-7426

#### Attachments:

- 1: Resolution  
    Exhibit A: Findings for Denial
- 2: Appeal Letter, dated November 28, 2018
- 3: ZAB Staff Report with Memorandum, dated November 8, 2018
- 4: Zoning Research Letter, dated April 3, 2017
- 5: Index to Administrative Record
- 6: Administrative Record
- 7: Public Hearing Notice



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

DENYING USE PERMIT/VARIANCE #ZP2018-0021 TO LEGALIZE AN UNPERMITTED DETACHED DWELLING UNIT IN THE REAR YARD AREA OF AN EXISTING 8-UNIT APARTMENT BUILDING AT 1722 WALNUT STREET IN THE MULTI-FAMILY RESIDENTIAL (R-4) ZONING DISTRICT.

WHEREAS, on January 29, 2018, John Stevick (“Applicant”) filed an application to legalize a detached dwelling unit located in the rear yard area of an existing eight-story apartment building located at 1722 Walnut Street (“Project”); and

WHEREAS, on September 5, 2018, staff deemed this application complete; and

WHEREAS, on November 8, 2018, at a duly noticed public hearing, the Zoning Adjustments Board denied Use Permit/Variance #ZP2018-0021 for the reasons set forth in a notice of decision released on November 15, 2018; and

WHEREAS, on November 15, 2018, staff issued the notice of the ZAB decision; and

WHEREAS, on November 28, 2018, Margrett Lewis and Joe Priest filed an appeal of the ZAB decision with the City Clerk; and

WHEREAS, on March 26, 2019, the Council held a public hearing to consider the ZAB’s decision, and, in the opinion of this Council, the facts stated in or ascertainable from the public record, including comments made at the public hearing, warrant denying the project.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that the Council hereby adopts the findings for denial made by the ZAB in Exhibit A, affirms the decision of the ZAB to deny Use Permit/Variance #ZP2018-0021, and dismisses the appeal.

Exhibits

A: Findings for Denial

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# FINDINGS FOR DENIAL

NOVEMBER 8, 2018

## 1722 Walnut Street

**Use Permit/Variance #ZP2018-0021 to permit a ninth dwelling unit on a lot with an existing two-story, eight unit apartment building.**

### PERMITS REQUIRED

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- Use Permit to construct a new dwelling unit, under BMC Section 23D.40.030
- Administrative Use Permit (AUP) to reduce the rear yard setback for two or more Main Buildings which contain dwelling units under BMC 23D.40.070.D.1
- Administrative Use Permit (AUP) to reduce the required building separation between two or more main building that contain dwelling units under BMC 23D.40.070.D.2
- Variance to decrease the required left side yard setback below minimum requirement per BMC 23D.40.070.D
- Variance to further increase the non-conforming lot coverage over the maximum requirement per BMC 23D.40.070.E
- Variance to not provide and to further decrease the non-conforming Useable Open Space per dwelling below the minimum requirement per BMC 23D.40.070.F
- Variance to not provide the minimum parking requirement (one space) for a new dwelling unit per BMC 23D.40.080.A

### I. VARIANCE FINDINGS

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Pursuant to Berkeley Municipal Code Section 23B.44.030.B, the City cannot make the findings required by Berkeley Municipal Code Section 23B.44.030.A, and therefore must deny the Variances to: (1) to permit a 2.2-foot side yard setback where a minimum of 4 feet is required for a first story by BMC 23D.40.070.D; (2) to not provide off-street parking space that is required for the new dwelling by BMC 23D.40.080.A; (3) to further increase the existing non-conforming 60% lot coverage to 61% where the maximum is 45% for a property with a two-story building per BMC 23D.40.070.E; and (4) to not provide the required Useable Open Space and further reduce the existing non-conforming open space to 990 square feet, where double that (1,800 square feet) is required by BMC 23D.40.070.F, for the following reasons:

- There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District:*

The applicant has provided no evidence, nor can staff find evidence of circumstance or conditions that apply to the land, building or use which do not generally apply to land buildings and/or uses in the same District. Neither access to public transportation nor existence of an illegal condition are considered unique or otherwise exceptional or extraordinary. Similarly, due to the age of buildings and the various changes made over time to the Zoning Ordinance, many buildings and sites are non-conforming in this District to varying degrees, including the subject site. This finding cannot be made.

- ii. *The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner:*

Staff interprets property rights as a property owner's ability to use his or her property in a manner consistent with the applicable provisions of the Ordinance; the application cannot be used to support any condition that a property is in, or made to be, that is unlawful. Nor is it related to the financial viability or profitability of a property. The applicant has not provided evidence that the use of the property with its unpermitted condition is necessary for the preservation and enjoyment of substantial property rights. In fact, the property owners purchased, and have managed, a property with eight lawful, rental dwelling units for several years. This finding cannot be made.

- iii. *The establishment, maintenance or operation of the use or the construction of a building, structure or addition thereof, to be approved will not, under the circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood; and that the granting of the Variance will promote the municipal health, welfare and safety and benefit the City as a whole:*

One of the purposes of the R-4 District is to "Make available housing for persons who desire both convenience of location and a reasonable amount of Useable Open Space." The project site is currently non-conforming for Useable Open Space and exceeds allowable lot coverage, the proposed project exacerbates both these conditions. The project, therefore, also conflicts with the purposes of the Zoning Ordinance in that it exceed the appropriate intensity of development of land and buildings through excessive lot coverage (BMC 23A.04.030.C) and it does not provide for adequate usable open space or off-street parking (BMC 23A.04.030.E). This Finding cannot be made.

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November 28, 2018

CITY OF BERKELEY  
CITY CLERK DEPT808 Gilman Street  
Berkeley, CA 94710Berkeley City Clerk  
2180 Milvia Street, 1st Fl  
Berkeley, CA 94704

2018 NOV 28 PM 4: 52

**Re: Appeal to the City Council of Zoning Adjustment Board Decision  
Use Permit/Variance #ZP2018-0021  
1722 Walnut Street, Berkeley, CA 94709**

Dear City Clerk,

As local business owners, we strongly object to the decision made by the Zoning Adjustment Board (ZAB) in this case; **it is offensive that this beautiful cottage should be demolished.** We work here in Berkeley and would like to rent a place like this to reduce our significant commutes. We and many others have problems with Berkeley's lack of affordable housing. It is our hope that the City Council will recognize the value of keeping this rent-controlled unit in place.

In summary, we feel that both the Planning Department and ZAB's recommendations and rulings directly contradict their mission to maintain and grow the housing supply, particularly of rent controlled units. Their explanations given for their findings do not support their conclusions and further, the ZAB is not treating this property the same as others in the City of Berkeley. Following a brief summary, I will address each ZAB Finding Conclusion in detail and in order.

The City of Berkeley acknowledges that *Berkeley and Alameda County are in the midst of an unprecedented housing crisis.*<sup>1</sup> And yet, ZAB is insisting the one-bedroom cottage shown below be demolished



despite noting in their own findings that *“the dwelling unit is aesthetically pleasing, and that at its current height and massing, has minimal impact to air, views, or light of the existing or neighboring properties, is within 0.5 miles of Downtown BART, 0.1 miles of the closest bus stop, 0.2 miles of the closest trans-bay bus stop, and 0.2 miles of the closed UC Berkeley shuttle.”*<sup>2</sup>

<sup>1</sup> <https://www.cityofberkeley.info/homeless-entry/>.

<sup>2</sup> ZAB Staff Report for Board Action re 1722 Walnut Street, November 8, 2018.

It was also noted by the ZAB that the zoning rules being applied by the Staff to demand demolition were not in place when the building and shed were built in the early 1900's. As evidenced by fire map records and illustrated by Architect, Catherine Roha, the cottage has existed for 6 years within a footprint barely larger than that of the shed it replaced (and smaller than the shed's concrete pad).

We attended the ZAB November 8<sup>th</sup> meeting. ZAB Staff appeared to have gone out of their way to treat the application by John Stevick differently than others in several ways. In addition to the unsupported and contradictory reasoning in the Planning Department's Findings, the Staff failed to distribute the pictures and information provided as it did for the applicants of other projects at the same meeting. The Staff did not allow the applicant to rebut testimony or provide further comment as it did for other applicants at the same meeting.

ZAB's demand that this cottage be demolished is: (i) a clear physical and monetary stand which contradicts the US Constitution, (ii) an example of the ZAB treating the owners, long time Berkeley residents, differently than other large developers, (iii) a direct contradiction of Berkeley's stated goals of providing housing, and (iv) a lost opportunity to work with an owner to develop smart infill that is aesthetically pleasing, has no impact on neighboring properties, is walkable to public transportation, and, most importantly, helps mitigate the *unprecedented housing crisis* Berkeley states we are in on their own website.<sup>3</sup>

Each of the Planning Department's three findings will now be addressed in detail:

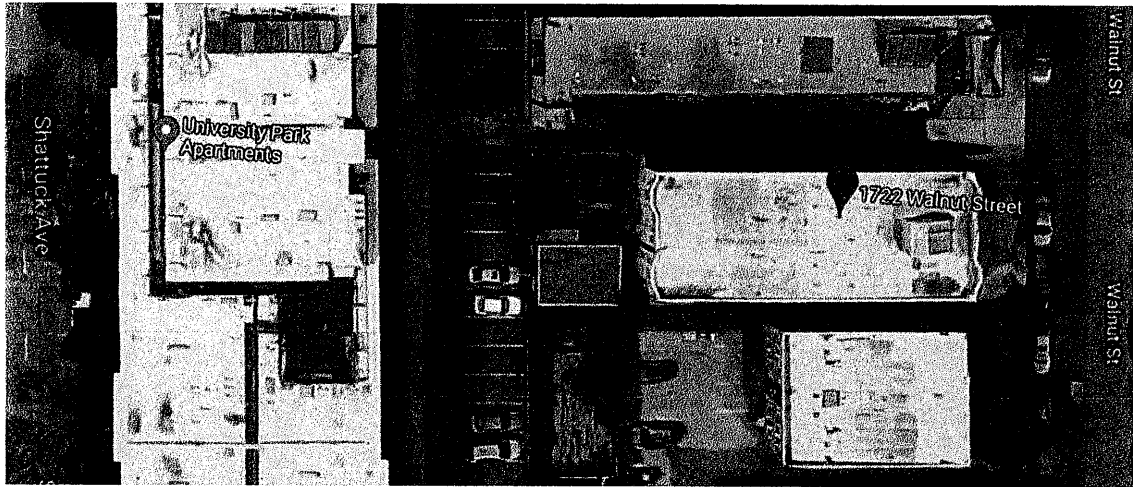
- i. There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District.*

The ZAB staff concluded that there are no exceptional or extraordinary circumstances or conditions applying to the land or building. Nothing could be further from the truth. The subject property is unique in that it has a location where an infill unit could and has been added without affecting current residents, impacting adjacent properties, or reducing green space. And it has owners who would be willing to add infill units at their own cost, to provide much needed housing. Further, the ZAB's failure to recognize the added value of the cottage has resulted in a lost opportunity of providing an additional rent-controlled unit to the City of Berkeley. It goes without saying, each and every additional housing unit is desperately needed.

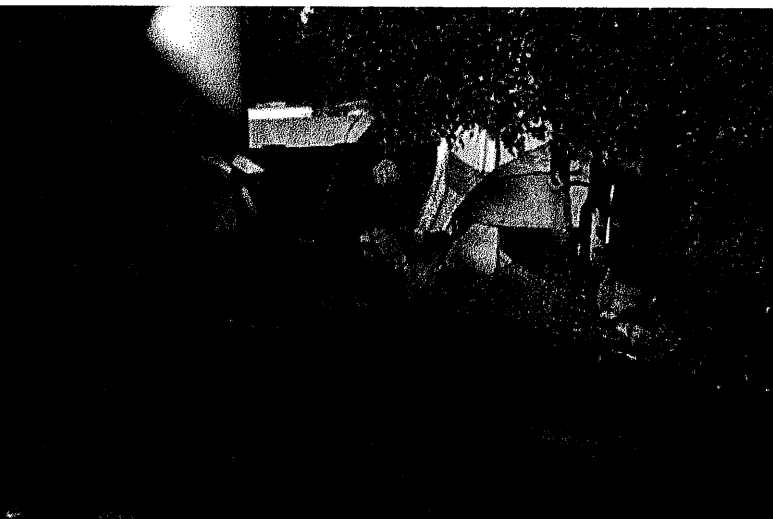
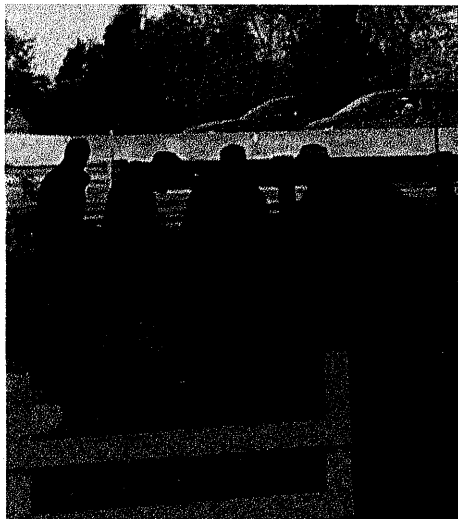
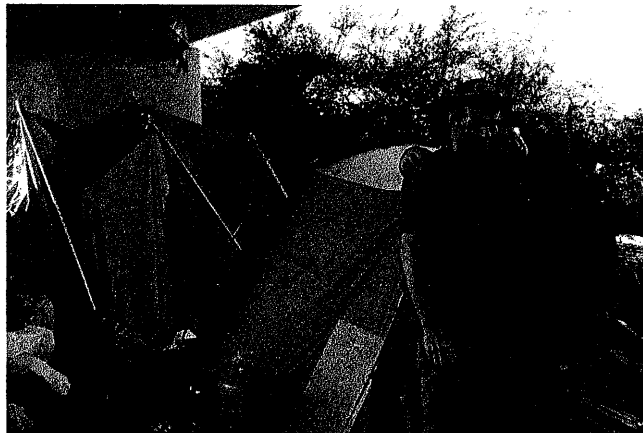
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<sup>3</sup> <https://www.cityofberkeley.info/homeless-entry/>.

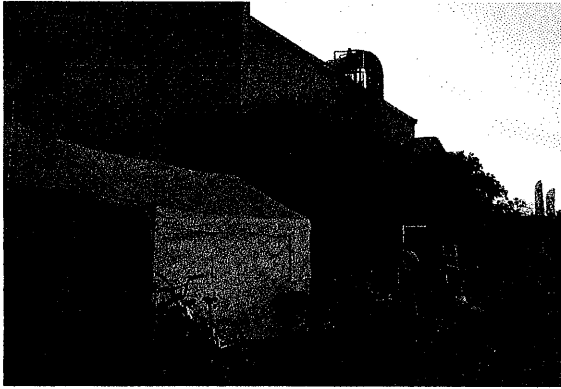
The subject building is shown below and is the only commercial residential building with a garden among the adjacent properties. The garden boxed in red:



There clearly are exceptional or extraordinary circumstances or conditions, in terms of homelessness. The pictures below were taken in Berkeley on the morning of the ZAB hearing on November 8<sup>th</sup>. Many of these folks could manage to live in an apartment with Section 8 or other assistance.



It is also very important to note that several ZAB board members proudly stated that they would not be able, in good conscience, to eliminate or take any existing rent-controlled units off the market during the November 8<sup>th</sup> meeting. However, when addressing our project, they ruled against keeping the rent-controlled unit in place, a direct contradiction to one of their most important and loudly stated missions.



The ZAB Staff's argument that exceptional or extraordinary circumstances or conditions (e.g. ***Berkeley and Alameda County being in the midst of an unprecedented housing crisis***) can be ignored simply because they judge the circumstance to be widespread "in the same District" is both hypocritical and nonsensical. The owners would be more than happy to meet with ZAB to show how the unit was constructed and currently serves as a unique, safe, and habitable home.

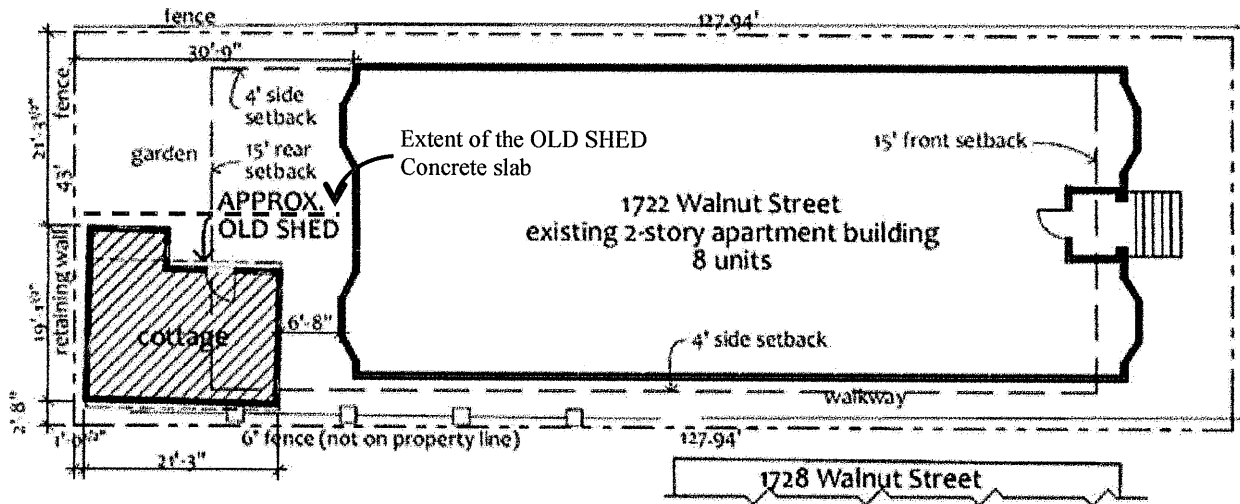
***ii. The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner:***

"Staff interprets property rights as a property owner's ability to use his or her property in a manner consistent with the applicable provisions of the Ordinance; the application cannot be used to support any condition that a property is in, or made to be, that is unlawful. Nor is it related to the financial viability or profitability of a property." The Planning Department Staff states they have restricted their interpretation of property rights to be confined to the provisions of "the Ordinance," which flies in the face of the U.S. Constitution. This is clearly a physical and monetary taking of the owner's property. Staff also ignored the owner's other stated use and enjoyment of the subject property, which is providing much needed housing.

***iii. The establishment, maintenance or operation of the use or the construction of a building, structure or addition thereof to be approved will not, under the circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood; and that the granting of the Variance will promote the municipal health, welfare and safety and benefit the City as a whole.***

In regards to this Finding, Staff initially states: "One of the purposes of the R-4 District is to *"Make available housing for persons who desire both convenience of location and a reasonable amount of Useable Open Space."* Then illogically concludes "this Finding cannot be made," because

of coverage and parking conditions. As was noted by ZAB member Clarke, the coverage has not significantly changed as the cottage essentially takes up the same space as the shed that has been in existence since the building was constructed in the early 1900's (we believe 1917), see the plan view below:



The building was constructed within the applicable rules and laws of the time. The cottage barely extends beyond the footprint of the pre-existing shed and is well within the original concrete pad of the shed. **The garden size is actually larger than it was previously** as the shed included an eight foot wide uncovered concrete slab in front of it that was removed. And as shown above, this garden is the only green area among the adjacent commercial rental properties.

During the previous applicant's (John Stevick) application preparation, he personally canvassed the many multi-residential buildings within 300 feet of the subject property. Every conversation he had was concluded with a signature of support. He did not run into a single criticism of the existing cottage. The one and only request presented to him in order to secure support was a letter from the owners of the 84-unit building immediately west expressing support so long as the owners agree that future costs incurred to maintain the retaining wall between the two properties be split. As no objections to the cottage's existence have been presented, we ask that the cottage be legalized as its presence does not impact anyone.

In regards to treating property owners equally, Berkeley has approved the building of two two-story units on the concrete parking lot of 1728 Walnut Street. In regards to parking, the ZAB staff has noted *"the dwelling unit [cottage] is aesthetically pleasing, and that at its current height and massing, has minimal impact to air, views, or light of the existing or neighboring properties, is within 0.5 miles of Downtown BART, 0.1 miles of the closest bus stop, 0.2 miles of the closest trans-bay bus stop, and 0.2 miles of the closed UC Berkeley shuttle."*<sup>4</sup> Few of the tenants in this area actually own cars or need a parking spot. One of Berkeley's stated goals is to reduce driving, congestion and greenhouse gases produced by automobiles.

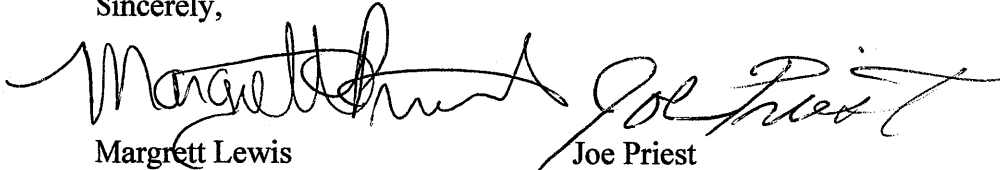
We are also of the understanding that if 1722 Walnut Street were to be a completely empty lot today, the subject property could be approved for the development of 19 or more units, many more than what currently exists on the property. This appears to me as one of the most important realities to note. If the lot itself would support additional housing units under current state and local codes, legalization of the cottage should be granted.

<sup>4</sup> ZAB Staff Report for Board Action re 1722 Walnut Street, November 8, 2018.



In summary, this aesthetically pleasing cottage has no negative impacts on neighboring properties, is situated very close to public transportation eliminating the need for parking, and would continue providing a home to Berkeley residents. I fully hope the Council reconsiders the ZAB's demand for demolition.

Sincerely,



Margrett Lewis

Joe Priest

### **A list of facts and statements for consideration:**

- The ZAB written explanations are not, in our opinion, accurate. The Planning Department's Findings should have concluded this unit could be allowed.
- The ZAB board's verbal comments: "this cottage has no negative impacts to the community and only adds to the housing supply and aesthetic appeal of the neighborhood."
- Several ZAB board members stated that they would not be able, in good conscience, to eliminate or take any existing rent-controlled units off the market during the November 8<sup>th</sup> meeting. However, when addressing this project, they ruled against keeping the rent-controlled unit.
- It was stated by the ZAB that the zoning rules now being applied by the Staff to demand demolition were **not** in place when the building and shed were built in the early 1900's.
- The cottage has existed for 6 years within the footprint of the shed it replaced, in this exact location (as evidenced by fire map records and illustrated by Architect, Ms. Catherine Roha, it is smaller than the shed's concrete pad.
- The November 8<sup>th</sup> staff findings did not support their conclusions and further, the ZAB treated this property differently than others in the City of Berkeley.
- Staff failed to distribute the pictures and substantial information provided, for this applicant, as it did for the applicants of other projects at the same meeting.
- ZAB staff stated that there are no exceptional or extraordinary circumstances or conditions applying to the land or building. Nothing could be further from the truth. The Board members stated that it does have historical precedence. The subject property is unique in that it has a location where an infill unit could and has been added without affecting current residents, impacting adjacent properties, or reducing green space.
- The owners added an infill unit without any negatives at their own cost, to provide much needed housing. During the previous applicant's (John Stevick) application preparation, he personally canvassed the many multi-residential buildings within 300 feet of the subject property. Every conversation he had was concluded with a signature of support. He did not run into a single criticism of the existing cottage. The one and only request presented to him in order to secure support was a letter from the owners of the 84-unit building immediately west expressing support so long as the owners agree that future costs incurred to maintain the retaining wall between the two properties be split. As no objections to the cottage's existence have been presented, we ask that the cottage be legalized as its presence does not impact anyone. (This was not acknowledged at November 8<sup>th</sup> ZAB meeting).
- Further, the ZAB's failure to recognize the added value of the cottage has resulted in a lost opportunity of providing an additional rent-controlled unit to the City of Berkeley.



Planning and Development Department  
Land Use Planning Division

## MEMORANDUM

DATE: November 7, 2018

TO: Zoning Adjustments Board

FROM: Leslie Mendez, Senior Planner

SUBJECT: Use Permit/Variance ZP2018-0021 1722 Walnut Street: Corrections to Staff Report and Findings (Attachment 1)

Staff was made aware that both the staff report and Findings (Attachment 1) that were published in the packet for the above referenced project (Use Permit/Variance ZP2018-0021) were not the final versions.

Below are track change revisions to the staff report. Added text is underlined and deleted text is ~~strikethrough~~.

- On page 8 of the staff report, the final paragraph under Section V. B. Finding #2 should be deleted as follows:

~~*Under the existing legal condition (i.e. eight dwelling units). In addition, is naturally limited to what is lawful (i.e. what zoning allows), and In conclusion, the applicant has not provided evidence that the use of the property in its permitted condition does not preserve the owner's substantial property rights. This finding cannot be made.*~~

- The final paragraph under Section V.B. on page 9 of the staff report should be as follows:

*In summary, the required Variances to approve the illegal dwelling cannot be made as there is no exceptional circumstance on the property (Finding 1), the variance is not necessary for the preservation of substantial property rights (Finding 2), and the project would be generally detrimental (Finding 3).*

The Findings sent out with the packet had the incorrect date, as well as included Conditions that are inapplicable to staff's recommendation to deny the project. For clarification, the corrected Attachment 1 document is attached.



Z O N I N G  
A D J U S T M E N T S  
B O A R D  
S T A F F R E P O R T

---

FOR BOARD ACTION  
NOVEMBER 8, 2018

## 1722 Walnut Street

**Use Permit/Variance #ZP2018-0021 to permit a ninth dwelling unit on a lot with an existing two-story, eight unit apartment building.**

### I. Background

#### A. Land Use Designations:

- General Plan: HDR – High Density Residential
- Zoning: R-4 – Multi-Family Residential

#### B. Zoning Permits Required:

- Use Permit to construct a new dwelling unit, under BMC Section 23D.40.030
- Administrative Use Permit (AUP) to reduce the rear yard setback for two or more Main Buildings which contain dwelling units under BMC 23D.40.070.D.1
- Administrative Use Permit (AUP) to reduce the required building separation between two or more main building that contain dwelling units under BMC 23D.40.070.D.2
- Variance to decrease the required left side yard setback below minimum requirement per BMC 23D.40.070.D
- Variance to further increase the non-conforming lot coverage over the maximum requirement per BMC 23D.40.070.E
- Variance to not provide and to further decrease the non-conforming Useable Open Space per dwelling below the minimum requirement per BMC 23D.40.070.F
- Variance to not provide the minimum parking requirement (one space) for a new dwelling unit per BMC 23D.40.080.A

**C. CEQA Determination:** Categorically exempt pursuant to Section 15303 of the CEQA Guidelines (“New Construction or Conversion of Small Structures”).

#### D. Parties Involved:

- Applicant                      John Stevick, 1636 Walnut Street, Berkeley, CA 94709
- Property Owner              Elizabeth Scherer and Glen Stevick, 1636 Walnut Street, Berkeley, CA 94709

Figure 1: Vicinity Map

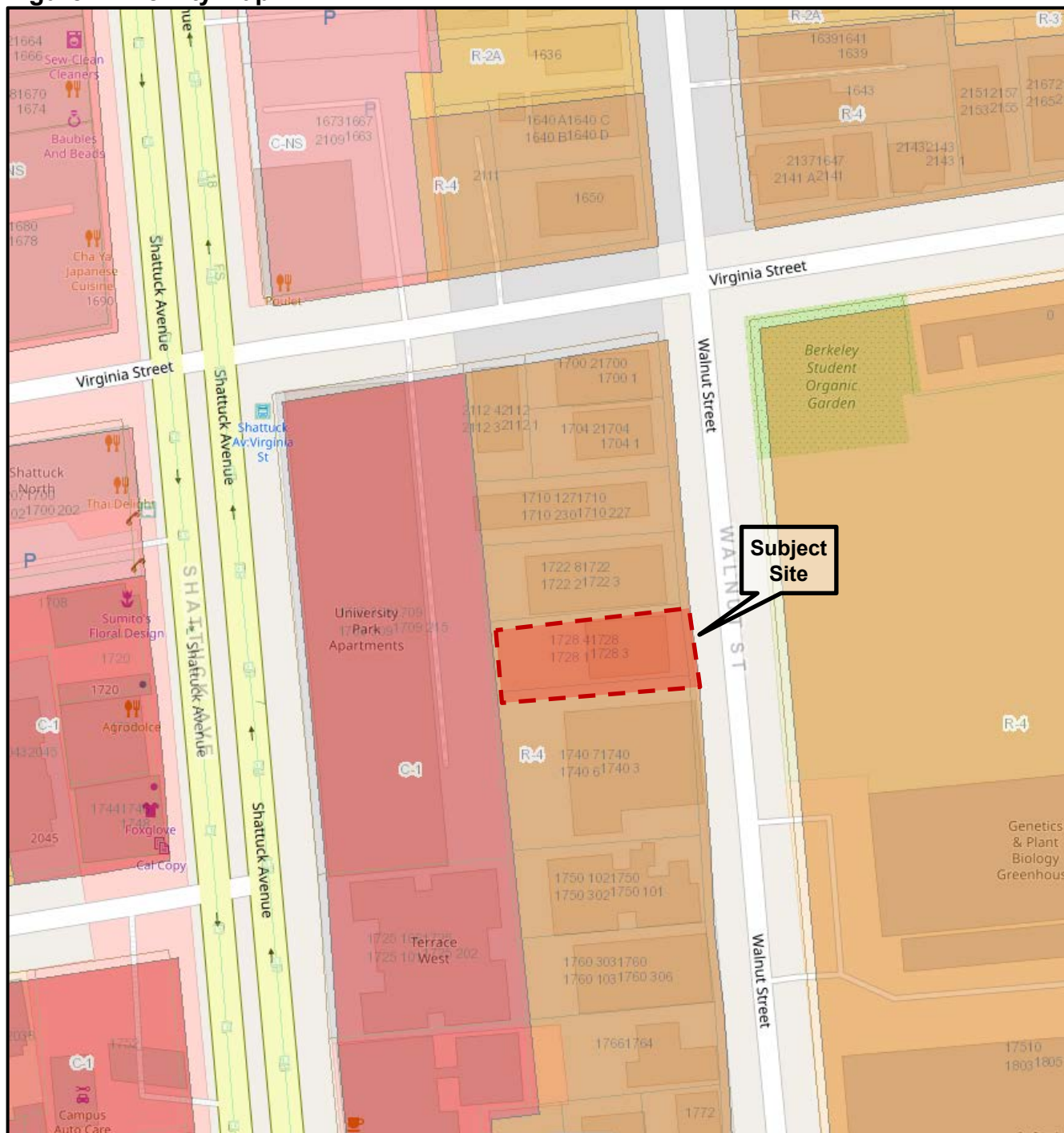
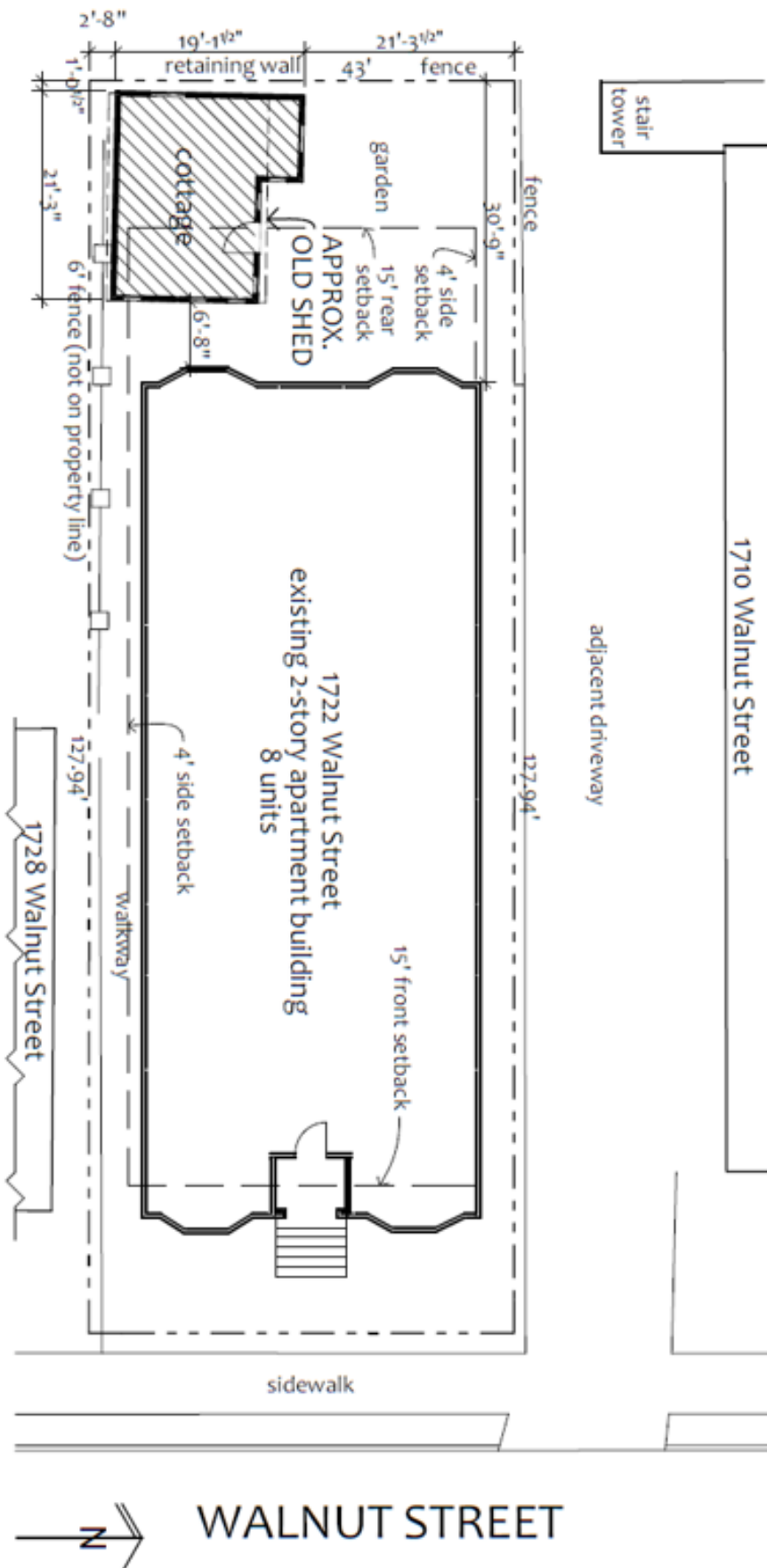


Figure 2: Proposed Site Plan



**Table 1: Land Use Information**

Location		Existing Use	Zoning District	General Plan Designation
Subject Property		Multi-Family	R-4	High Density Residential
Surrounding Properties	North	Multi-Family	R-4	High Density Residential
	South	Multi-Family	R-4	High Density Residential
	East	Research, Laboratory (Oxford Tract Farm)	R-4	High Density Residential
	West	Multi-Family (University Park Apartments)	C-1	Avenue Commercial

**Table 2: Special Characteristics**

Characteristic	Applies to Project?	Explanation
Affordable Housing Mitigations for rental housing projects (Per BMC 22.20.065)	No	As a project constructing less than five new dwelling units, this applies to the project.
Housing Accountability Act (Gov't Code Section 65589.5)	Yes	As a project use of residential units the HAA applies to the project.
Creeks	No	There are no creeks in or around the project.
Density Bonus	No	The project is requesting a Density bonus.
Historic Resources	No	The project site does not contain a City Landmark or a known historic resource.
Oak Trees	No	There are no oak trees on the site.
Rent Controlled Units	Yes	The eight units in the apartment building are subject to rent control.
Residential Preferred Parking (RPP)	Yes	The project site is in RPP Zone F.
Seismic Hazards (SHMA)	No	The site is not located in a seismic hazard zone.
Soil/Groundwater Contamination	No	There is no history of ground water contamination on the site and it is not located in the Environmental Management Area.
Transit	Yes	AC Transit and UC Berkeley Shuttle lines run on Shattuck Avenue and Hearst Avenue, both one block from the project site.

**Table 3: Project Chronology**

Date	Action
January 29, 2018	Application submitted
September 5, 2018	Application deemed complete
October 25, 2018	Public hearing notices mailed/posted
November 8, 2018	ZAB hearing

**Table 4: Development Standards**

Standard BMC Sections 23D.40.070-080		Existing	Proposed Total	Permitted/ Required
Lot Area (sq. ft.)		5,479	No change	5,000 min
Gross Floor Area (sq. ft.)		5,800	6,146	n/a
Dwelling Units	Total	8	9	n/a
	Below Market Rate	0	0	0 min
Building Height	Average (ft.)	Apartment: 29	Cottage: 11.25	35 max 65 w/UP
	Maximum (ft.)	Apartment: 30	Cottage: 11.25	n/a
	Stories	Apartment: 2	Cottage: 1	3 max 6 w/UP
Building Setbacks (ft.)	Front	<b><i>Apartment: 11.7</i></b>	Cottage: 105	15 min
	Rear	Apartment: 31	Cottage: 1	15 min AUP to reduce on lot w/ two or more buildings containing dus
	Left Side	Apartment: 5.2	<b><u>Cottage: 2.2</u></b>	1st-2 <sup>nd</sup> story: 4 min 3 <sup>rd</sup> story: 6 min 4 <sup>th</sup> story: 8 min 5 <sup>th</sup> Story: 10 min 6 <sup>th</sup> story: 12 min
	Right Side	<b><i>Apartment: 3.4</i></b>	Cottage: 21.3	
Lot Coverage (%)		<b>60</b>	<b><u>61</u></b>	45 max (for 2 stories)
Usable Open Space (sq. ft.)		<b>1,098</b>	<b><u>990</u></b>	1,800 min (200 per du)
Automobile Parking		<b>0</b>	<b><u>0</u></b>	9 min (1 per du)

Items in ***bold italics*** are existing, lawful, non-conforming conditions.

Items in **underlined bold 11 pt. font** are requested Variances.

## II. Project Setting

**A. Neighborhood/Area Description:** The property is located approximately one quarter mile to the northwest of the UC Berkeley campus in an area bound by Shattuck Avenue to the west, Virginia Street to the north, Oxford Street to the east, and Delaware Street to the south. The neighborhood is a combination of commercial businesses along Shattuck Avenue, and numerous multi-family and mid-size (two- to four-story) multi-family buildings along Walnut Street. A large area is dedicated to the Oxford Tract Farm and greenhouses to the east. AC Transit lines 7, 18, and FS run along Shattuck Avenue, and line 67 runs along Oxford Street.

**B. Site Conditions and Background:** The project site is a 5,479-square-foot, rectangular (43' x 127.42') parcel that is developed with an approximately 6,000-square-foot, two-story, eight-unit apartment building that was constructed in 1926. No off-street parking exists on the site. Approximately six years ago, the property owners built a detached cottage (i.e. dwelling unit) without permits in the southwestern (rear left) corner of the property in a location where a shed had been located. The cottage is registered with the Rent Stabilization Board (RSB) along with an unpermitted



basement unit, listed on the RSB website as “Not Available for Rent since 8/1/2017” (<https://www.cityofberkeley.info/RentBoardUnitSearch.aspx>).

As early as 2016, the cottage was listed on Airbnb along with at least five other of the apartments in the main building (see Attachment 4). As the listings are for stays of a minimum of at least 14 days, they do not qualify as short term rentals. Staff raises this point as the applicant statement alludes to the region’s housing crisis. The applicant has written, “The rear cottage in question in a small one-bedroom unit that not only adds to the beauty of the backyard, but to the housing supply as well. As the area is in such short supply of housing, we would very much like to see this unit, which has already been in use for the past six years, be allowed to stay on the market.” Staff wishes to make clear from the current availability of the unit(s) as shown on the Airbnb site, as well as the frequency of the reviews, that these units are not being used as housing for families, or even for students during the school year; the use is more akin to an extended stay hotel.

### III. Project Description

After receiving a Notice of Violation from the Neighborhood Services Enforcement Division (Code Enforcement) in November 2017, the property owners submitted the current project application to the Planning Department for retroactive approval of the ninth dwelling unit on the property. The dwelling unit is located in the 354-square-foot, 11.25-foot tall detached one-bedroom cottage in the rear yard area.

### IV. Community Discussion

**A. Neighbor/Community Concerns:** Prior to submitting this application to the city in January 2018, the applicant installed a pre-application poster at the project site. On October 25, 2018, the City mailed public hearing notices to interested neighborhood organizations, and to property owners and occupants within 300 feet of the project site, and staff posted notices within the neighborhood at three locations.

At the time of this writing, staff has received public comment over the phone from a long time resident of the property, Lisa Klug. She stated that the property seems like a hotel now with people coming in and out; that her name is the only one left on the mailboxes as other residents are transient; that the property owner has offered to buy her out twice, but she turned down the offer; and that the cottage is taking up a large part of the rear yard area. The resident mentioned as a disclosure that she is currently in a lawsuit with the property owner. Ms. Klug subsequently submitted correspondence in opposition to the project that can be found in Attachment 5.

**B. Committee Review:** This project is not subject to committee review.



## V. Issues and Analysis

- A. The Housing Accountability Act:** The Housing Accountability Act §65589.5(j) requires that when a proposed housing development complies with the applicable, objective General Plan and Zoning standards, but a local agency proposes to deny the project or approve it only if the density is reduced, the agency must base its decision on written findings supported by substantial evidence that:
- (1) The development would have a specific adverse impact on public health or safety unless disapproved, or approved at a lower density; and
  - (2) There is no feasible method to satisfactorily mitigate or avoid the specific adverse impact, other than the disapproval, or approval at a lower density.

There are multiple aspects of the proposed development project that do not meet the base regulatory standards of the BMC: 1) off street parking; 2) usable open space; 3) lot coverage; 3) side and rear yard setbacks; and 4) building-to-building separation. Therefore, §65589.5(j) **does not apply** to this project as currently proposed.

- B. Variances:** The project would require four Variances from the development standards of the R-4 District: (1) to permit a 2.2-foot side yard setback where a minimum of 4 feet is required for a first story (BMC 23D.40.070.D); (2) to not provide the required off-street parking for the new dwelling (BMC 23.D.40.080.A); (3) to further increase the existing non-conforming 60% lot coverage to 61% where a maximum of 45% is permissible for a property with a two-story building (BMC 23D.40.070.E); and (4) to not provide the required Useable Open Space and further reduce the existing non-8

Finding #1: There are exceptional or extraordinary circumstances or conditions applying to the land, building or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings and/or uses in the same District.

In support of this Finding the applicant has provided the following evidence:

*“This building is within 0.5 miles of Downtown BART, 0.1 miles of the closes bus stop, 0.2 miles of the closest trans-bay bus stop, and 0.2 miles of the closed UC Berkeley shuttle. The existing cottage in question has been in existence for over 6 years and serves a relaxing and tranquil respite from the 4+ story buildings surround it and the greater and ever expanding Downtown Berkeley.”*

Although the statements, some subjective, may be true, they do not highlight how they represent exceptional or extraordinary circumstance applying to this property that do not generally apply to other properties in the same zoning district. In fact, access to the existing transportation system applies to all the properties in the vicinity. Staff also does not believe that the existence of the illegal unit qualifies as an exceptional or extraordinary condition as any property owner could follow through with unpermitted development. In addition, staff cannot identify any other exception or extraordinary condition on the site that support this Finding to permit non-compliance with the development standards that apply to all other properties within the District. This finding cannot be made.

Finding #2: The granting of the application is necessary for the preservation and enjoyment of substantial property rights of the subject property's owner.

In support of this Finding, the applicant provided the following evidence:  
*"The surrounding neighborhood is very dense relative to the majority of Berkeley and becoming increasingly so each year with new, large-scale mixed use projects continuing to go up. We are simply asking for the same kind of coverage that neighboring lots enjoy on the very same block. Many other buildings in the immediate vicinity are over density as can be seen by referring to the attached vicinity map."*

Due to the age of buildings and the various changes made over time to the Zoning Ordinance, many buildings and sites are non-conforming in this District to varying degrees, including the subject site. This statement, however, does not address the required finding. Staff interprets property rights as a property owner's ability to use his or her property in a manner consistent with the applicable provisions of the Ordinance; the application cannot be used to support any condition that a property is in, or made to be, that is unlawful. Nor is it related to the financial viability or profitability of a property. The applicant has not provided evidence that the use of the property with its unpermitted condition is necessary for the preservation and enjoyment of substantial property rights. In fact, the property owners purchased, and have managed, a property with eight lawful, rental dwelling units for several years. This finding cannot be made.

Under the existing legal condition (i.e. eight dwelling units). In addition, is naturally limited to what is lawful (i.e. what zoning allows), and In conclusion, the applicant has not provided evidence that the use of the property in its permitted condition does not preserve the owner's substantial property rights. This finding cannot be made.

Finding #3: The establishment, maintenance or operation of the use or the construction of a building, structure or addition thereof, to be approved will not, under the circumstances of the particular case, materially affect adversely the health or safety of persons residing or working in the neighborhood of the property of the applicant and will not, under the circumstances of the particular case, be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood; and that the granting of the Variance will promote the municipal health, welfare and safety and benefit the City as a whole.

In support of this Finding, the applicant has submitted the following evidence:  
*"It is our pleasure to provide an additional safe and habitable living space within walking distance of Downtown Berkeley and UC Berkeley campus. We find that the cottage actually enhances the backyard aesthetic and compliments [sic] the garden for all property residents in comparison to the dilapidated shed that stood in the cottages place before."*

Staff agrees that the dwelling unit is aesthetically pleasing, and that at its current height and massing, has minimal impact to air, views, or light of the existing or neighboring properties. In addition, if the project were to be approved, the project would be conditioned to obtain a building and occupancy permit ensuring compliance with all current building and fire codes, thereby removing any potential life/safety impacts to

adjacent properties as well as guests and residents of the subject property. However, one of the purposes of the R-4 District is to “*Make available housing for persons who desire both convenience of location and a reasonable amount of Useable Open Space.*” The project site is currently non-conforming for Useable Open Space and exceeds allowable lot coverage, the proposed project exacerbates both these conditions. The project, therefore, also conflicts with the purposes of the Zoning Ordinance in that it exceed the appropriate intensity of development of land and buildings through excessive lot coverage (BMC 23A.04.030.C) and it does not provide for adequate usable open space, off-street parking (BMC 23A.04.030.E). This Finding cannot be made.

Finding #4: Any other variance findings required by the Section of the Ordinance applicable to that particular Variance.

This Finding is not applicable to the Variance requests.

In summary, the required Variances to approve the illegal dwelling cannot be made as there is no exceptional circumstance on the property (Finding 1), the variance is not necessary for the preservation of substantial property rights (Finding 2), and the project be generally detrimental (Finding 3),

**C. Reduction of Rear Yard Setback and Building to Building Separation:** The project proposes a 1-foot rear yard setback where a minimum of 15 feet is required and proposes a 6.75-foot building to building separation, where a minimum of 8 feet is required. Section 23D.40.070.1 and 2 of the Zoning Ordinance, allow both the rear yard and the building separation to be reduced with approval of an Administrative Use Permit (AUP) for two or more Main Buildings which contain Dwelling Units as applies to the subject project. In addition, as described in Variance Finding 3 above, in its current location, the cottage does not have detrimental impacts to air, light, or views. The findings to approve these reductions in the development standards can be made.

## VI. Recommendation

Because of the project’s inconsistency with the Zoning Ordinance and General Plan, staff recommends that the Zoning Adjustments Board

**DENY** Use Permit/Variance #ZP2018-0021 pursuant to Section 23B.32.040 and subject to the attached Findings (see Attachment 1).

### Attachments:

1. Findings
2. Project Plans, dated April 18, 2018
3. Notice of Public Hearing
4. Airbnb Listings, downloaded October 18, 2018
5. Correspondence Received (at the time of publication of this report)

**Staff Planner:** Leslie Mendez, LMendez@cityofberkeley.info, (510) 981-7426



Planning and Development Department  
Land Use Planning Division

Our ref.: PLN2017-0007

April 3, 2017

John Stevick  
1636 Walnut St.  
Berkeley, CA 94709

Dear Mr. Stevick,

**RE: Zoning Research Letter – 1722 Walnut St., Berkeley, 058 217700600**

This letter responds to your request for a Zoning Research Letter for the property with the above address. The following letter provides zoning information and the aforementioned address.

**1) CURRENT ZONING**

This property is located in the Multi-Family Residential District (R-4). The property is subject to all applicable provisions in Berkeley Municipal Code Chapter 23D.40 (see attachment 1).

**2) PROPERTY HISTORY**

The City's Finance Card indicates the construction of a two-story, eight-unit apartment building on this site; there is no note of a garage (see attachment 2). City Staff has reviewed zoning permit and building permit files for the property and have found no record approving or otherwise of a structure in the southwest corner. While the Sanborn Insurance map shows an auto garage at the southwest corner of the lot, again, it is not found in any City records and it is unclear how this garage would be accessed.

In 1989 a permit was granted to increase height of building from three stories to four stories and 38.5 feet. However, this was not exercised and the City has no records of building permits.

**3) LEGAL USE OF THE SUBJECT PROPERTY**

Based on the information available to the department, the legal use of the subject property is a two-story apartment with four units on the first floor, and four units on the second floor (total of eight legal dwelling units).

**4) ACCESSORY DWELLING UNIT (ADU)**

An ADU is defined in Berkeley Municipal Code Section 23.F.04.010 as follows: A second unit on a lot which is occupied by one Single Family Dwelling and zoned single family residential (R-1), or a unit approved under the provisions for Accessory Dwelling Units on a lot which is occupied by one Single Family Dwelling and zoned R-1A, R-2, R-2A, R-3, R-4, R-5, R-S OR R-SMU. The property is zoned as R-4 and contains an eight-unit apartment building, and is not eligible for an ADU.

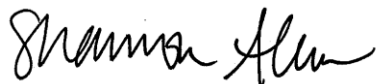
**5) CONFORMING WITH CURRENT ZONING REQUIREMENTS**

To legalize the “rental cottage” as a dwelling unit, a Use Permit with Public Hearing would be required; to legalize this as a storage structure, a Zoning Certificate would be required. However, the project site and new structure is subject to the development standards listed in BMC 23D.40.070, which includes height limits, building setbacks, building separations, lot coverage and open space per dwelling unit. If certain standards cannot be met, in some instances they may be reduced subject to an Administrative Use Permit. However, some standards, such as lot coverage, can only be modified with a Variance. Please refer to BMC Chapter 23B.44, Variances, for information on the application and hearing process as well as the Findings that are required. Please note that Variance Findings are often difficult to make.

The determinations in this letter are based on a review of the facts available to me at this time, excepting additional information that may become available in the future. While this letter is true to the best of my knowledge, it shall not be considered legally binding in any way.

If you have additional questions, please contact Camille Jackson with Land Use Planning Division by calling him directly at (510) 981-7471

Sincerely,



Shannon Allen, AICP, Principal Planner

Prepared by Camille Jackson, Land Use Planning Division Intern

Attachments (2)

Attachment-1 Multi-Family Residential District Provisions

Attachment -2 Finance Card

**Chapter 23D.40**

**R-4 MULTI-FAMILY RESIDENTIAL DISTRICT PROVISIONS**

**Sections:**

- 23D.40.010      Applicability of Regulations**
- 23D.40.020      Purposes**
- 23D.40.030      Uses Permitted**
- 23D.40.040      Special Provisions -- Design Review**
- 23D.40.050      Reserved**
- 23D.40.060      Reserved**
- 23D.40.070      Development Standards**
- 23D.40.080      Parking -- Number of Spaces**
- 23D.40.090      Findings**

**Section 23D.40.010      Applicability of Regulations**

The regulations in this Chapter shall apply in all R-4 Districts. In addition, the general provisions in Sub-title 23C shall apply. Where the H District overlays a property so as to be classified R-4(H), the Hillside District provisions of Chapter 23E.96 shall also apply. (Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.020      Purposes**

The purposes of the Multi-family Residential (R-4) Districts are to:

- A. Implement Master Plan policy by encouraging development of relatively high density residential areas;
- B. Make available housing for persons who desire both convenience of location and a reasonable amount of Usable Open Space;
- C. Protect adjacent properties from unreasonable obstruction of light and air;
- D. Permit the construction of residential structures, such as residential hotels, and hotels, which will provide housing opportunities for transient or seasonal residents;
- E. Permit the construction of institutional and office uses when such will not be detrimental to the immediate neighborhood. (Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.030      Uses Permitted**

The following table sets forth the Permits required for each listed item. Each use or structure shall be subject to either a Zoning Certificate (ZC), an Administrative Use Permit (AUP), a Use Permit approved after a public hearing (UP(PH)) or is Prohibited.

<i>Table 23D.40.030</i>		
<b>Use and Required Permits</b>		
<b>Use</b>	<b>Classification</b>	<b>Special Requirements (if any)</b>
<b>Uses Permitted</b>		
Child Care Centers	UP(PH)	
Clubs, Lodges	UP(PH)	

<i>Table 23D.40.030 (Continued)</i>		
<b>Use and Required Permits</b>		
<b>Use</b>	<b>Classification</b>	<b>Special Requirements (if any)</b>
Community Care Facilities/Homes Changes of Use New Construction	ZC UP(PH)	Subject to parking requirements. See Section 23D.40.080.A
Community Centers	UP(PH)	
Dwelling Units, Single-family, Duplex, or Multi-Family, subject to R-4 Standards  Residential Additions (up to 15% of lot area or 600 square feet, whichever is more restrictive)  Major Residential Additions	UP(PH)  ZC  AUP	See Section 23D.40.070 for restrictions.  See definition in Sub-title F. Denial subject to Section 23D.40.090.B.
Group Living Accommodations subject to R-4 standards	UP(PH)	
Hospitals	UP(PH)	Subject to parking requirements. See Section 23D.40.080.A
Hotels	UP(PH)	Subject to parking requirements; see Section 23D.40.080.A. Also subject to Design Review; see Section 23D.40.040
Libraries	UP(PH)	Subject to parking requirements. See Section 23D.40.080.A
Nursing Homes	UP(PH)	Subject to parking requirements. See Section 23D.40.080.A
Offices	UP(PH)	Subject to parking requirements. See Section 23D.40.080.A. Also subject to design review; see Section 23D.40.040.
Parking Lots	UP(PH)	Subject to Section 23D.12.090
Parks and Playgrounds	ZC	
Public Safety and Emergency Services	UP(PH)	
Religious Assembly Uses	UP(PH)	
Schools, Public or Private	UP(PH)	
Senior Congregate Housing Six or fewer persons Seven or more persons New Construction	ZC AUP UP(PH)	Changes of use from an existing dwelling unit
<b>Accessory Uses and Structures</b>		
Accessory Buildings or Structures	ZC	Must satisfy the requirements of Chapter 23D.08
If has either habitable space and/or exceeds the requirements under Chapter 23D.08	AUP	
When located on a vacant lot without a Main Building	AUP	
Accessory Dwelling Units in compliance with Section 23D.10.040	ZC	

<i>Table 23D.40.030 (Continued)</i>		
<b>Use and Required Permits</b>		
<b>Use</b>	<b>Classification</b>	<b>Special Requirements (if any)</b>
Accessory Dwelling Unit which does not comply with requirements under Section 23D.10.040	AUP	Subject to making of applicable findings set forth in Section 23D.10.060
Child Care, Family Day Care		
Small Family Day Care Homes of eight or fewer children	ZC	
Large Family Day Care Homes of nine to 14 children	AUP	
Fences		
Six ft. or less in height	ZC	
Exceeding six ft. in height	AUP	In required setbacks
Home Occupations		
Low Impact	ZC	If the requirements of Section 23C.16.020 are met
Moderate Impact, teaching-related	AUP	Subject to the requirements of Section 23C.16.030.A
Moderate Impact	UP(PH)	Subject to the requirements of Section 23C.16.030.B
Hot Tubs, Jacuzzis, Spas	AUP	See Section 23D.08.060.C
Stables for Horses	AUP	
Stores and Shops (Incidental to another Use)	UP(PH)	Contained within a building with no street access and no displays or merchandise visible from the street
<b>Miscellaneous Uses</b>		
Cemeteries, Crematories, Mausoleums	Prohibited	
Columbaria	AUP	Allowed with a ZC if incidental to a Community and Institutional Use, limited to 400 niches, and no more than 5% of the subject property area. When located outside of the main building columbaria structures are subject to Chapter 23D.08.
Commercial Excavation	UP(PH)	Including earth, gravel, minerals, or other building materials including drilling for, or removal of, oil or natural gas
Emergency Shelter		Such shelters may operate only during the wet weather season from November 15 through April 15. See Chapter 23C.10.
Up to 15 beds	ZC	
More than 15 beds	UP(PH)	
Public Utility Substations, Tanks	UP(PH)	
Wireless Telecommunications Facilities		
Microcell Facilities	AUP	Subject to the requirements and findings of Section 23C.17.100
All Other Telecommunication Facilities	UP	Subject to the requirements and findings of Section 23C.17.100



<i>Table 23D.40.030 (Continued)</i>		
<b>Use and Required Permits</b>		
<b>Use</b>	<b>Classification</b>	<b>Special Requirements (if any)</b>
<b>Legend:</b>		
ZC -- Zoning Certificate	UP(PH) -- Use Permit, public hearing required	
AUP -- Administrative Use Permit	Prohibited -- Use not permitted	

(Ord. 7426-NS § 25, 2015; Ord. 7322-NS § 2, 2013; Ord. 7210-NS § 14, 2011; Ord. 7155 § 7, 2010; Ord. 7129-NS § 7, 2010; Ord. 6949-NS § 14 (part), 2006; Ord. 6909-NS § 7 (part), 2006; Ord. 6854-NS § 11 (part), 2005; Ord. 6763-NS § 25 (part), 2003; Ord. 6671-NS § 6, 2001; Ord. 6658-NS § 1, (2001); 6644-NS § 1, 2001; Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.040 Special Provisions -- Design Review**

Commercial and mixed use projects shall be subject to Design Review as set forth in Chapters 23E.08 and 23E.12. (Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.050 Reserved**

*Reserved.* (Ord. 7210-NS § 15, 2011; Ord. 6658-N.S. § 2, 2001)

**Section 23D.40.060 Reserved**

*Reserved.* (Ord. 7426-NS § 26, 2015; Ord. 6763-NS § 26 (part), 2003)

**Section 23D.40.070 Development Standards**

- A. No lot of less than 5,000 square feet may be created.
- B. No more than one person who resides in a Group Living Accommodation use shall be allowed for each 350 square feet of lot area. One additional person who resides in a Group Living Accommodation use may also be allowed for any remaining lot area which may be less than 350 square feet, but not less than 200 square feet in area.
- C. Each Main Building shall be limited in height as follows:

	<u>Height limit average (ft.)</u>	<u>Stories limit (number)</u>
Main Building	35*	3*
All Residential Additions	16**	Not Applicable

\* Main Buildings may exceed 35 ft. and three stories in height, to a height of, but not exceeding, 65 ft. and six stories subject to obtaining a Use Permit  
 \*\* The Zoning Officer may issue an Administrative Use Permit to allow residential additions to exceed 16 feet in average height, up to the district limit.

- D. Each Main Building shall be set back from its respective lot lines, and shall be separated from one another, in accordance with the following limits:

	<u>Yard location</u>				
	<u>Front</u>	<u>Rear*</u>	<u>Side</u>	<u>Street side</u>	
1st	15	15	4	6	8

<u>Story</u>	<u>Yard location</u>				<u>Building separation*</u>
	<u>Front</u>	<u>Rear*</u>	<u>Side</u>	<u>Street side</u>	
2nd	15	15	4	8	12
3rd	15	15	6	10	16
4th	15	17	8	12	20
5th	15	19	10	14	24
6th	15	21	12	15	28

\*See Sections 23D.40.070.D.1 and 2 for yard and building separation reductions

- For two or more Main Buildings which contain Dwelling Units, the Rear Yard may be reduced subject to obtaining an Administrative Use Permit.
- For two or more Main Buildings which contain Dwelling Units, the required building separation may be reduced subject to Administrative Use Permit.

E. Maximum lot coverage may not exceed the following coverage percentages:

<u>Main Building Height (stories)</u>	<u>Lot Coverage Area (%)</u>	
	<u>Interior and Through Lots</u>	<u>Corner Lots</u>
1 or 2	45	50
3	40	45
4 through 6	35	40

F. Each lot shall contain the following minimum Usable Open Space area: for each Dwelling Unit, 200 square feet; for each person who resides in a Group Living Accommodation use, 90 square feet. (Ord. 6949-NS § 15 (part), 2006; Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.080 Parking -- Number of Spaces**

A. A lot shall contain the following minimum number of Off-street Parking Spaces:

<b>Parking Required</b>	
<u>Use</u>	<u>Number of spaces</u>
Dormitories; Fraternity and Sorority Houses; Rooming and Boarding Houses; and Senior Congregate Housing	One per each five residents, plus one for manager
Dwellings, Multiple (fewer than ten)	One per unit (75% less for seniors, see Section C below)
Dwellings, Multiple (Ten or more)	One per 1,000 sq. ft. of gross floor area (75% less for seniors, see Section C below)
Dwellings, One and Two Family	One per unit*
Employees	One per two non-resident employees for a Community Care Facility**
Hospitals	One per each four beds, plus one per each three employees
Hotels	One per each three guest rooms, plus one per each three employees
Libraries	One per 500 sq. ft. of floor area that is publicly accessible

<b>Parking Required</b>	
<u>Use</u>	<u>Number of spaces</u>
Nursing Homes	One per each five residents, plus one per each three employees
Offices, Medical	One per 300 sq. ft. of gross floor area
Offices, Other	One per 400 sq. ft. of gross floor area; (may be reduced, see Section D below)
<p>* This also shall include Accessory Dwelling Units. An application for an Accessory Dwelling Unit that does not meet this standard may apply for an administrative use permit to waive this requirement subject to a special finding under Section 23D.10.060.B.</p> <p>**This requirement does not apply to those Community Care Facilities which under state law must be treated in the same manner as a single family residence.</p>	

- B. Other uses requiring Use Permits, including, but not limited to, Child Care Centers, Clubs, Lodges and community centers, shall provide the number of Off-street Parking Spaces determined by the Board based on the amount of traffic generated by the particular use and comparable with specified standards for other uses.
- C. For multiple dwellings where the occupancy will be exclusively for persons over the age of 62, the number of required Off-street Parking Spaces may be reduced to 25% of what would otherwise be required for multiple family dwelling use, subject to obtaining a Use Permit.
- D. For offices, other than medical offices, the Board may reduce the parking requirement from one Off-street Parking Space per 400 square feet of gross floor area to a minimum of one parking space per 800 square feet of gross floor area, subject to making the required finding under Section 23D.40.090.C. In addition, any parking supplied jointly with multiple family residential uses shall be subject to the requirements set forth in Section 23D.12.060.B.
- E. Senior Congregate Housing, Hotels, Hospitals, Nursing Homes, Offices (including Medical Offices) and Schools, when having a total gross floor area exceeding 10,000 square feet, shall satisfy the requirements of Chapter 23E.32 and the following requirements:
  - 1. Off-street loading spaces at the ratio of one space for the first 10,000 square feet of gross floor area.
  - 2. Off-street loading spaces at the ratio of one space for each additional 40,000 square feet of gross floor area of above the 10,000 square feet. (Ord. 7426-NS § 27, 2015; Ord. 6763-NS § 27 (part), 2003; Ord. 6478-NS § 4 (part), 1999)

**Section 23D.40.090 Findings**

- A. In order to approve any Permit under this chapter, the Zoning Officer or Board must make the finding required by Section 23B.32.040. The Zoning Officer or Board must also make any findings required by the following paragraphs of this section to the extent applicable. If the Zoning Officer or Board makes the applicable finding required by the following paragraph of this section then the permit shall be denied.
- B. To deny a Use Permit for a major residential addition or residential addition subject to 23D.40.070 the Zoning Officer or Board must find that although the proposed residential addition satisfies all other standards of this Ordinance, the addition would unreasonably obstruct sunlight, air or views.
- C. The reduction in the parking requirement is justified, in this particular case, because of a reduced amount of direct contact with clients, visitors or the general public. (Ord. 7426-NS § 28, 2015; Ord. 6980-NS § 7 (part), 2007; Ord. 6763-NS § 28 (part), 2003; Ord. 6478-NS § 4 (part), 1999)

Address

1722 Walnut

Page 36 of 39 Book

8

Par. No.

6

Block

2177

Surveyed by

Date

Remarks

ATTACHMENT 2

ATTACHMENT 2

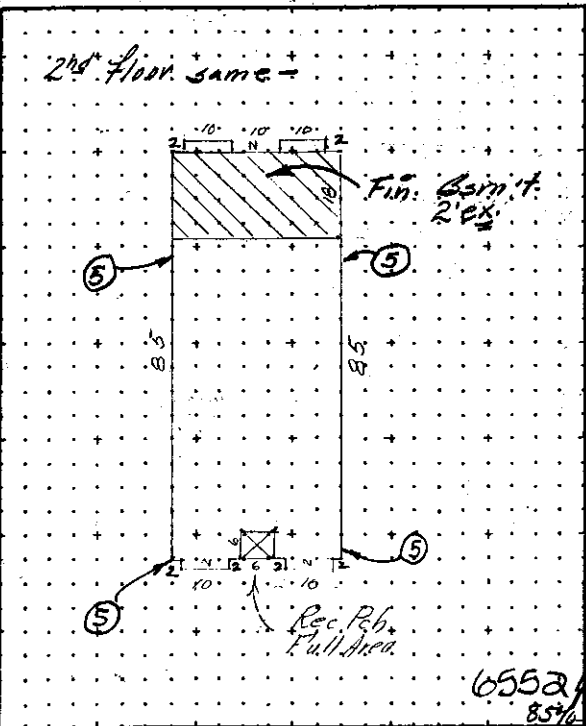
Date	Imp. R.C.	% Gd	Table	N.R.C.L.D.	Obs. etc.	Adj. R.C.L.D.	Building Department Records				
27	25346	55	45	—	—	13940Y	Permit for	Apts	Alt		
							Permit No.	26096	31942		
38	54353	47	50			25545	Year Built	1926	9-24-28		
							Amount	\$17,500 <sup>00</sup>	\$350 <sup>00</sup>		
							Additions, Alterations, etc.				
							#93404 10/13/61 \$3000. REPLACE PART OF FOUNDATION. 1-25-62 COMPLETE-LDB				
							#113294-1/3/69-\$1,000 <sup>00</sup> -FIRE REPAIR				

## Assessment Record

1949-50	7950 ✓		
1951-52	7780 ✓		
1956-57	7780 ✓		
1962-63	7950 ✓		

Remarks, Reappraisals, etc.

Use Page 27 of 39 Stories 2 Constr. Class. D.C. 6  
 Foundation Av. Conc. Excavation ATTACHMENT 4  
 Structural Av. F.C. Grade \_\_\_\_\_  
 Exterior Walls Stucco Windows Wd. Sash  
 Roof Material T & G Type Flat Pitch \_\_\_\_\_



Rooms	ROOM & FINISH DETAIL										Plumbing Detail	
	Floors					Floor Finish	Trim	Interior Finish		Fixture	No.	
	B	1	2	3	Type			Top	Walls			Ceiling
Ent. Hall		1	1				P	P	Plast		B	
Living Rm.		4	4				Wd	all	all		S	
Dining Rm.											W	
Kitchen Nk.		4	4				P				L	
Breakfast											S	
Study											W	
Bed Rm.											A	
Bath		4	4				Tile				50.00	
Laundry											F	
Recreation											Ch	
Furnace		1					Conc				P	
Garage											Misc.	

COMPUTATIONS				Year		Year 63-64		Year	
Unit	Area	Unit C.	Cost	Unit C.	Cost	Unit C.	Cost	Unit C.	Cost
1st Floor	29.70	7.11	12,207	846	25,126				
2nd	29.70	5.49	10,363	719	21,354				
Fin. Bsm't.	6.12	2.00	12,244	549	3,359				
Heat 5940 #			1550	76	4514				
Misc. Equipment									
<b>TOTAL R. C.</b>				<b>25,346</b>	<b>R. C. 54,353</b>	<b>R. C.</b>			

Misc. Structures—Garages, etc.

Type	Size	Ext.	Rf.	Int.	Flr.	Area	At	Cost
x								
x								
x								
x								

6552  
 85%  
 65%

Heating  
 Steam zone Unit  
 12 radiators



Administrative Record  
ZAB Appeal:  
1722 Walnut Street

This attachment is on file and available for review at the City Clerk Department, or can be accessed from the City Council Website. Copies of the attachment are available upon request.

**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.cityofberkeley.info/citycouncil/>

ATTACHMENT 7

**NOTICE OF PUBLIC HEARING-BERKELEY CITY COUNCIL  
SCHOOL DISTRICT BOARD ROOM, 1231 ADDISON STREET**

**ZAB APPEAL: USE PERMIT/VARIANCE #ZP2018-0021**

Notice is hereby given by the City Council of the City of Berkeley that on **TUESDAY, MARCH 26, 2019 at 6:00 P.M.** a public hearing will be conducted to consider an appeal against a decision by the Zoning Adjustments Board's denial of Use Permit/Variance #ZP2018-0021, to legalize an unpermitted detached dwelling unit in the rear yard area of a lot legally developed with an eight-unit apartment building.

A copy of the agenda material for this hearing will be available on the City's website at [www.CityofBerkeley.info](http://www.CityofBerkeley.info) as of **March 14, 2019**.

For further information, please contact Leslie Mendez, Project Planner at (510) 981-7426 Written comments should be mailed or delivered directly to the City Clerk, 2180 Milvia Street, Berkeley, CA 94704, in order to ensure delivery to all Councilmembers and inclusion in the agenda packet.

Communications to the Berkeley City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service or in person to the City Clerk. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk at 981-6900 or [clerk@cityofberkeley.info](mailto:clerk@cityofberkeley.info) for further information.

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Mark Numainville, City Clerk

Mailed: March 12, 2019

**NOTICE CONCERNING YOUR LEGAL RIGHTS:** *If you object to a decision by the City Council to approve or deny (Code Civ. Proc. §1094.6(b)) or approve (Gov. Code 65009(c)(5)) an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6, no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

*If you challenge the above in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Berkeley at, or prior to, the public hearing. Background information concerning this proposal will be available at the City Clerk Department and posted on the City of Berkeley webpage at least 10 days prior to the public hearing.*

