



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

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For Board Action  
February 23, 2012

## 1722 Ninth Street

**Public Hearing to Consider Recommendation to City Council as to Whether 1722 Ninth Street is: 1) in Violation of Use Permit A1931 Under BMC Section 23B.60.020 and should be revoked; and 2) a Public Nuisance Under BMC Section 23B.64.020 and should be conditioned to abate the nuisance.**

### **RECOMMENDATION**

That the Board consider the evidence presented in this report and testimony presented at the public hearing, and recommend to the City Council that it find that the property at 1722 Ninth Street is: 1) in violation of Use Permit A1931 under Berkeley Municipal Code (BMC) Chapter 23B.60, and order that Use Permit A1931 be revoked; and 2) a public nuisance under BMC Chapter 23B.64, and impose conditions to abate the nuisance.

### **BACKGROUND AND SUMMARY**

#### Berkeley Municipal Code Provisions for This Hearing

The Zoning Adjustments Board (ZAB) is conducting this hearing pursuant to both BMC Chapters 23B.60 (Compliance and Revocation) and 23B.64 (Abatement of Nuisances). For the purposes of both Chapters, the ZAB is an advisory body to the Council. With regard to the Use Permit revocation, BMC Section 23B.60.020.A provides that the Council may revoke or modify a Permit if it finds that the “holder of the permit has failed to comply with at least one or more of the conditions set forth therein”.

With regard to the nuisance abatement, BMC Section 23B.64.050.D provides that the Council may find that “the use, structure or building constitutes a nuisance and impose any remedy provided for in this Chapter, or take no action.”

The ZAB's duties in this proceeding are:

- to conduct a public hearing, and
- to "make a written recommendation to the Council whether to revoke or modify the Permit on the grounds specified in Section 23B.60.020, based on the evidence, testimony, and facts presented to the Board at the hearing"; and
- to "make a written recommendation to the Council as to whether a nuisance exists and, if so, the appropriate remedy, based on the evidence, testimony, and facts presented to the Board at the hearing."

The Council will conduct its hearing within 60 days of the issuance of the ZAB recommendation. Upon making any of the required findings, "the Council may impose any remedy available at law or in equity which shall include, but is not limited to, any of the following or combination thereof: enjoining the use in whole or in part; imposing reasonable conditions upon any continued operation of the use, including those uses which constitute non-conforming uses; requiring continued compliance with any conditions so imposed; requiring the use to guarantee that such conditions shall in all respects be complied with; and, upon a failure of the user to comply with any conditions so imposed, imposing additional conditions or enjoining the use in whole or in part."

### **Violation of Use Permit A1931**

#### **Illegal Conversion of Accessory Structure to Dwelling Unit**

The property at 1722 Ninth Street is owned by Roberto and Ramona Alcala (owners). The property is a single-story, single-family home with an accessory structure in the rear. In 1991, the owners had obtained a roofing permit for the accessory structure and construction was stopped when inspectors observed expansion of the structure with a proposed bathroom. At that time, a kitchen had already been illegally installed in the accessory structure. Attached hereto as Exhibit 1 is a January 27, 1992 ZAB staff report describing the illegal construction.

Subsequently, the owners applied for a Use Permit and Variance to convert the previous garage to a Dwelling Unit and this application was denied. Instead, the ZAB approved a Use Permit to convert the garage to living space. Consequently, the owners were required to remove the illegally-constructed kitchen and dining room and the structure was only permitted to be habitable space as an accessory use for occupants of the main building. Attached hereto as Exhibit 2 is Use Permit A1931.

Despite the fact that the Dwelling Unit application was denied, and the owners were ordered to remove the kitchen, the owners have never done so in violation of Use Permit (UP) A1931. Specifically, the approved plans attached to UP A1931 strike out the proposed kitchen and dining space and state "omit kitchen/dining per Board decision".

Although the owners never removed the kitchen in the accessory structure, they did file a deed restriction on January 26, 2011 purporting to prohibit its use as a dwelling unit.

Nonetheless, on December 13, 2011, City staff inspected the property and confirmed that the accessory structure continues to contain an illegal kitchen and is, therefore, an illegal Dwelling Unit. Thus, the owners have “failed to comply with at least one or more of the conditions set forth” in UP A1931 pursuant to BMC Section 23B.60.020.A and Council may revoke the permit. Attached hereto as Exhibit 3 is the Deed Restriction.

## **Nuisance**

### **Illegal Expansion of Single-Family Home**

In addition to the illegal conversion of the accessory structure, the owners have also constructed the following improvements to the single-family home all without benefit of permits or inspections:

- Converted the attic to habitable space including 2 bedrooms; and
- Constructed an approximately 5 foot addition to the rear of the home; and
- Constructed a dormer on the south side of the home.

The owners were served with Notices of Violation (NOVs) regarding this illegal construction on October 5, 2001, November 30, 2001, May 3, 2006, June 27, 2006 and April 19, 2007. The 2007 NOV ordered them to obtain permits within 15 days and to vacate the attic and accessory building until final inspections had been approved. Attached hereto as Exhibit 4 are copies of the NOVs.

The owners failed to respond to the NOV in any manner and, as stated above, on December 13, 2011 an inspection was conducted and all of the illegal conditions noted in the 2007 NOV were still present and both the attic and accessory building remained occupied.

### **BMC Violations for Illegal Expansion**

BMC Section 23B.64.020.B defines a public nuisance as a “[v]iolation of any provision of this chapter or any other City, state or federal regulation, ordinance or statute.”

Conversion of the attic and construction of dormer without permits violates BMC Sections 23A.12.010 and 19.28.020/CBC 105.1 which requires a Building Permit.

The addition to the rear of the main structure extending the building mass approximately 5 feet towards rear property line without permits violates BMC Section 23A.12.010, Section 23D.20.070.C which requires an Administrative Use Permit (AUP) to construct an addition over 14 feet in average height and BMC Section 19.28.020/CBC 105.1.

Thus, based only on the BMC violations set forth above, 1722 Ninth Street constitutes a public nuisance per Section 23B.64.020.B.

### Use of Property as a Nuisance

In addition to the illegal construction, the owners and occupants of the home have used it in such a manner as to render it a public nuisance. In particular, BMC Section 23B.64.020.A states that a nuisance may also be:

Maintenance or operation, by omission or commission in such a way as to result in or facilitate any of the following activities, each of which the City hereby declares to be a public nuisance: disturbances of the peace, illegal drug activity including sales or possession thereof, public drunkenness, drinking in public, harassment of passers-by, gambling, prostitution, public vandalism, excessive littering, excessive noise (particularly between the hours of 11:00 p.m. and 7:00 a.m.), noxious smells or fumes, curfew violations, lewd conduct or police detention, citations or arrests or any other activity declared by the City to be a public nuisance.

Over the course of many years, the neighbors have called the Berkeley Police Department (BPD) to respond to the following repeated behaviors and complaints at the property:

1. Setting off fireworks;
2. Screaming and yelling both inside and outside the house;
3. Playing loud music both inside and outside the house;
4. Physical fighting between the occupants of the house including fights with weapons;
5. Drinking alcohol in public;
6. Using illegal substances in public; and
7. Parking and working on cars on the sidewalk.

Specifically, *just over the course of the last two years alone*, BPD has received calls reporting the following:

**Fireworks** - Calls regarding the occupants setting off fireworks were investigated by BPD on July 21, 2011, May 6, 2011 and July 13, 2009 at midnight. Attached hereto as Exhibit 5 are copies of detailed calls for service reports from these dates.

**Screaming and Yelling** – Calls regarding the occupants screaming and yelling at each other both in public and inside the home were investigated by BPD on July 10, 2011 at 1:30 am, June 24, 2010 at 11:30 pm, October 29, 2009, August 4, 2009 (this included a report of knife seen by the reporting party), July 15, 2009, June 18, 2009 and June 9, 2009 at 10 pm. Attached hereto as Exhibit 6 are copies of detailed calls for service reports from these dates.

**Loud Music** - Calls regarding the occupants playing loud music both outside and inside the home were investigated by BPD on June 12, 2011, June 5, 2011 at 11pm, April 23, 2010 and April 18, 2010 at 11:30 pm. Attached hereto as Exhibit 7 are copies of detailed calls for service reports from these dates.

**Fighting** - Calls regarding the occupants physically fighting both outside and inside the home were investigated by BPD on July 28, 2010, June 27, 2010, February 15, 2010, two incidents on June 9, 2010 and April 30, 2009. Attached hereto as Exhibit 8 are copies of detailed calls for service reports from these dates.

**Drinking Alcohol in Public** – A call regarding the occupants drinking outside and talking loudly was investigated by BPD on May 27, 2010 at 11:30 pm. Attached hereto as Exhibit 9 is a copy of the detailed call for service report from this date.

**Using Illegal Substances in Public** – A call regarding the occupants using illegal substances in public was investigated by BPD on April 29, 2010. Attached hereto as Exhibit 10 is a copy of a detailed call for service report from this date.

**Parking and Working on Cars in the Sidewalk and Backyard**– Calls regarding the occupants parking and working on cars creating gasoline fumes in the sidewalk and backyard were investigated by BPD on April 26, 2010, April 25, 2010, April 24, 2010, December 27, 2009, December 17, 2009, November 2, 2009, July 16, 2009 and June 16, 2009. Attached hereto as Exhibit 11 are copies of detailed calls for service reports from these dates.

### **Police Detentions and Arrests Including Those for Illegal Drug Activity**

#### **12/8/09 Probation Search Reveals Marijuana, Firearms and Ammunition**

A number of parolees list this property as their home address. As a result, BPD has conducted probation searches of the home periodically. On December 8, 2009, BPD conducted such a search. Attached hereto as Exhibit 12 is a copy of the police report relating to this search.

Upon being granted entry, one occupant, Andrew Alcala, fled out the back door and was arrested on an outstanding robbery warrant from 2007. The officers also searched the converted attic area and found seven ziploc bags containing marijuana, weighing around 25 grams each as well as a large plastic bag with two pounds of marijuana. Near the marijuana, officers also found around 600 rounds of .38 caliber ammunition and a .22 caliber handgun. The officers arrested another occupant, Oscar Areas, for possession of the marijuana, firearm, and ammunition. Both Mr. Areas and Mr. Alcala were charged and served jail time for the arrests made as a result of this search.

#### **12/11/10 Parole Search Reveals Marijuana and Auto Burglary Tools**

While on patrol an officer searched a car in the driveway of the property which was occupied by Edward Cooper an individual known to the officer to have been on parole for possession of a stolen vehicle and probation for burglary. The other occupant of the car was on probation for possession of a stolen vehicle as well. During the search, the officer discovered marijuana in the center console of the car and burglary tools in the car as well. Both individuals were arrested. Attached hereto as Exhibit 13 is a copy of the police report relating to this search.

### **6/24/11 Probation Search Reveals Firearms and Ammunition**

While on patrol an officer observed Edward Cooper who was known to be a parolee at large for assault with a deadly weapon standing outside a car across the street from the property. He opened the driver's side door, took something out and then entered 1722 Ninth Street before the officer could make contact with him. When the officer asked the Alcalas to bring him to the door, the occupants told him that Mr. Cooper was not in the home. Officers subsequently searched the home and could not locate him. They then searched Mr. Cooper's car and found metal knuckles, loaded .40 caliber magazines including a high capacity 29-round magazine. Attached hereto as Exhibit 14 is a copy of the police report relating to this search.

### **6/27/11 Response to Call From Inside Property Regarding "Hella Guns" Reveals Marijuana on Occupant**

On June 27, 2011, BPD received a call from someone inside the property claiming that Edward Cooper was inside the property with 'hella guns'. Attached hereto as Exhibit 15 is a copy of the detailed call for service report from this date<sup>1</sup>. Officers watched the house and saw a person who they thought was Mr. Cooper come out of it and get into the passenger seat of a car. They detained the car, but the passenger was not Mr. Cooper it was Salvador Alcala, Jr. who was on probation for burglary. Mr. Alcala removed 110 marijuana buds in a plastic bag from his underwear based upon the officer's orders. He was arrested for an outstanding warrant as well as possession of marijuana for sale. Attached hereto as Exhibit 16 is a copy of the police report relating to this arrest.

### **8/9/11 Vehicle Stop of Person Leaving the Property Reveals Methamphetamine, Large Amount of Cash, Stun Gun and Digital Scale**

On August 9, 2011, officers were watching people coming and going from the house. A car approached the property and a person got out of the car and entered the house. The car then left the house and drove west on Virginia Street and failed to stop at a stop sign. After seeing the passenger holding what appeared to be drugs, officers detained and questioned him. He stated he was a parolee and then officers searched him finding \$1036 in his pocket and 21.9 grams of methamphetamine, a digital pocket scale, a stun gun, and several cell phones in the car. The passenger was arrested for possession of methamphetamine for sale. The driver was also arrested for possession of drug paraphernalia for two narcotic smoking glass pipes found in her purse. Attached hereto as Exhibit 17 is a copy of the police report relating to these arrests.

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<sup>1</sup> On July 14, 2011, the Pinole police attempted to stop a car that had failed to signal when changing lanes. Attached hereto as Exhibit 18 is a copy of the police report relating to this incident. The driver, later found to be Edward Cooper, attempted to evade the officers and a crash occurred as a result of the pursuit. Pinole police recovered a loaded .40 caliber Glock handgun from the front passenger seat of the car. The owner of the car, an individual who had been arrested by Pinole police the night before, stated that he had not given permission to anyone to drive the car and reported it stolen.

## Neighbor Testimony

Although the neighborhood surrounding this property has been severely impacted for decades by the nuisance behavior of the occupants, they are unwilling to publicly testify for fear of retaliation. However, some neighbors have provided written testimony to staff and requested that it be given to ZAB anonymously. Consequently, staff can affirmatively state that the testimony has been provided by individuals who are neighbors of the property. Staff has honored these individuals' requests for anonymity due to their reasonable fear of retaliation by the occupants and has, therefore, redacted any identifying information from the communications.

Attached hereto as Exhibit 19 is a letter from a neighboring family who describes decades of harassing behavior perpetrated by the occupants of the property. In particular, they describe neighborhood intimidation including having objects thrown at them and thrown onto their property as well being subject to racist remarks. They further describe the noise disturbances they had to endure "at all hours" which were loud enough to rattle their windows. They also describe witnessing public drinking, drug dealing and drug use.

Attached hereto as Exhibit 20 is a letter from another neighboring family who also describes long-term nuisance behavior by the occupants of the property including frequent public disturbances "at all hours of the day and night" and drug dealing in front of the house.

Attached hereto as Exhibit 21 is a letter from a third neighboring family who reiterates the long-standing nuisance behavior by the occupants of the property. This neighboring family testifies regarding loud music, drug dealing and drug use.

Attached hereto as Exhibit 22 is a letter from another neighboring family who describes how the occupants of the property have harassed and threatened them, the drug use they have witnessed and the increasingly detrimental effect the occupants have had on the neighborhood over decades.

Attached hereto as Exhibit 23 is a letter from another neighboring family who has been a neighbor of the property for nearly 40 years and describes how the occupants' use of the home has severely impacted the use of their home including the following:

- Firecrackers being thrown at their small children by the occupants when the children were playing in the backyard;
- Being subject to verbal assaults when asking the occupants to move their own cars out of the neighboring family's driveway;
- Debris and garbage being dumped on their property from the occupants including dirty diapers, drug paraphernalia and condoms;
- Long-standing drug sales which involve cars arriving all night long and sounding their horns to alert the occupants that a customer is waiting;

- Drug use so pervasive that the smell of marijuana smoke pervades their own home on a nearly daily basis;
- Noise disturbances so intense that their house shook;
- Their cars being vandalized and being subject to other thefts.

Attached hereto as Exhibit 24 is a letter from another neighboring family who also describes the significant and prolonged impact the property has had upon the neighborhood and themselves including the following:

- Drug use so pervasive that the smell of marijuana smoke pervades their home;
- Their home and cars being vandalized and garbage being dumped into their yard including cell phones, condoms, dirty diapers and broken bike locks;
- Constant noise from radios and screaming and fighting particularly between 9pm and 6am.

Attached hereto as Exhibit 25 is a letter from another neighboring family who also describes witnessing over 3 decades of drug dealing, theft, noise impacts and vehicle vandalism.

Attached hereto as Exhibit 26 is a letter from another neighboring family who states that the neighbors have complained to City officials for many years about the activities of the occupants, but have not seen any effective relief.

Attached hereto as Exhibit 27 is a letter from another neighboring family who reiterates the other neighbors' testimony and describes noise disturbances, drug dealing, vehicle vandalism and theft, harassment of neighbors by the occupants and many years of complaints to the City.

### **Conclusion**

As a result of the foregoing, not only does the property meet the definition of a nuisance under Section 23B.64.020.B due to the violations of the BMC as a result of the illegal expansion of the home, but it meets the definition under Section 23B.64.020.A as well.

The activity described above identifies that the property has been operated to facilitate: disturbances of the peace, illegal drug activity, drinking in public, excessive noise including between the hours of 11:00 pm and 7:00 am, harassment of passers-by, vandalism, littering, noxious fumes or smells and police detentions and arrests. Thus, the property has been operated as a nuisance on both bases.

### **Attachment 1:**

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| Exhibit 1 | 1/27/92 ZAB Staff Report      |
| Exhibit 2 | Use Permit A1931              |
| Exhibit 3 | 1/26/11 Deed Restriction      |
| Exhibit 4 | NOVs from Building and Safety |



- Exhibit 5      Fireworks calls for service
- Exhibit 6      Screaming and yelling calls for service
- Exhibit 7      Loud music calls for service
- Exhibit 8      Fighting calls for service
- Exhibit 9      Public drinking call for service
- Exhibit 10     Using illegal substances in public call for service
- Exhibit 11     Working on and parking cars in sidewalk and backyard calls for service
- Exhibit 12     12/8/09 police report
- Exhibit 13     12/11/10 police report
- Exhibit 14     6/24/11 police report
- Exhibit 15     6/27/11 call for service
- Exhibit 16     6/27/11 police report
- Exhibit 17     8/9/11 police report
- Exhibit 18     7/14/11 Pinole police report
- Exhibit 19     2/9/12 Neighbor testimony
- Exhibit 20     2/10/12 Neighbor testimony
- Exhibit 21     1/16/12 Neighbor testimony
- Exhibit 22     2/15/12 Neighbor testimony
- Exhibit 23     2/15/12 Neighbor testimony
- Exhibit 24     2/15/12 Neighbor testimony
- Exhibit 25     2/15/12 Neighbor testimony
- Exhibit 26     2/15/12 Neighbor testimony
- Exhibit 27     2/16/12 Neighbor testimony

Attachment 2: Draft Resolution