LEXINGTON BOARD OF ZONING APPEALS
Monday, March 21, 2022 - 6:00 P.M.

First Floor Meeting Room (Community Meeting Room)
Lexington City Hall
300 E. Washington Street, Lexington, Virginia

AGENDA

1. **CALL TO ORDER**

2. **APPROVAL OF MINUTES**

   A. Board of Zoning Appeals minutes from Monday, September 9, 2019*

3. **NEW BUSINESS**

   A. Election of Chair
   - Nominations
   - Motion & Vote

   B. Election of Vice-chair
   - Nominations
   - Motion & Vote

   C. **BZA 2022-01:** An appeal request for the property located at 30 Edmondson Avenue.
   1) Staff Report*
   2) Applicant Statement
   3) Public Comment
   4) Board Discussion & Decision

4. **ADJOURN**

*indicates attachment

Draft

MINUTES

The Lexington Board of Zoning Appeals
Monday, September 9, 2019 – 6:00 p.m.
First Floor – Community Meeting Room
Lexington City Hall

Board of Zoning Appeals:
Presiding: Jim Gianniny, Chair
Present: Gail MacLeod, Vice-Chair
Robert Hull (arrived 5 minutes late)
Ross Waller
Absent:

City Staff:
Arne Glaeser, Planning Director
Bonnie Tombarge, Planning Admin. Asst.

CALL TO ORDER:

J. Gianniny called the meeting to order at 6:00 p.m.

MINUTES:

The 11-12-18 Board of Zoning Appeals Minutes were approved (3-0) as presented (R. Waller/G. MacLeod).

NEW BUSINESS:

A. Election of Chair

- R. Waller moved to nominate J. Gianniny as Chair of the BZA. G. MacLeod seconded and the motion carried (3/0).

B. Election of Vice-Chair

- R. Waller moved to nominate G. MacLeod as Vice-Chair of the BZA. J. Gianniny seconded and the motion carried (3/0).

BZA 2019-01 – A variance request for the property located at 206 South Randolph Street.

- **Staff Report** – A. Glaeser provided background, as follows:
  - The applicants desire to build a noncommercial greenhouse up to 11 inches from the side property line that is shared with the parcel located at 204 S. Randolph Street. The lot requirements table in Section 420-4 of the Zoning Ordinance requires a minimum 10 foot side yard setback for all structures in the R-1 zoning district.
  - Board Questions to Staff – G. MacLeod asked if there was another board that could possibly take on this request. A. Glaeser said that it was not possible. Planning Commission only had the authority to approve Conditional Use Permits.
  - Applicant Statement – Mr. Shank started with stating his appreciation for the Board considering their application. He addressed the areas where staff said the application was non-compliant. First he says that it would not unreasonably restrict usage of the property if it were to be denied. He says that while there is physical

space elsewhere are the property that is the space that they are trying to benefit by having the greenhouse. That area is where they have gardens and receive the best sunlight, so there would be no purpose to having the green house in that space. They did have a sunlight study done on their property which looked at the different available areas for the greenhouse. The primary spot is where the garden is already located. The other areas would not receive sufficient sunlight to make the greenhouse practical. The neighbors are completely satisfied with the location of the greenhouse and it does not impede their property. There was a former structure there, and that has since been taken down. R. Hull asked for clarification on the difference between the former structure and the proposed greenhouse, and Mr. Shank pointed out a few pictures included in the application. The second point was that this was not so general or recurring of a request that a change in the zoning ordinance would not make sense. Mr. Shank said that, in his view, putting a building back where a structure was does not require changing the zoning regulations. R. Waller said that that could be the change. Allowing the rebuilding of a structure within a certain period of time after the pervious structure has been taken down. Mrs. Shank said that this would not be a commercial greenhouse. It would be a small private greenhouse, and they have made efforts to ensure that it would be very attractive to see. All of their neighbors have been pleased with the idea, as it should show off nicely for the whole neighborhood. G. MacLeod asked if the easement on the property goes all the way to the greenhouse, and Mr. Shank confirmed that was so. G. MacLeod then verified that the neighbor would have some rights to the land under the greenhouse, and Mr. Shank said that was correct. He also mentioned that the neighbors had written a letter in support of the greenhouse as it does not impede their ingress or egress onto their property. That letter is included in the application. R. Waller said that while the current neighbor might not mind the greenhouse, a future neighbor may not feel the same. Mr. Shank said that if that were to happen, they could negotiate with the neighbor to change the easement. R. Waller asked who owned the easement. Mr. Shank said that the easement is on their property. G. MacLeod asked if the previous structure was possibly built under any sort of permit. A. Glaeser said that that was unknown as the City only has building permit records going back approximately ten years.

- Public Comment – None
- **Commission Discussion and Decision –**R. Hull said that he feels that the Board goes into these applications with the intent to strike them down, and that is doing a disservice to the community. He does not see how the greenhouse will have any negative impact on the property. He believes that it will enhance the value of the property and the neighborhood. While this does not check all the boxes for approval, there have been previous applications approved that did not check those boxes either. He is in support of approving the application. G. MacLeod said that she agrees with the staff analysis that the strict application of the terms of the ordinance would not unreasonably restrict the utilization of the property. She is not sure why having the greenhouse back with the garden is not viable. The sunlight there would grow plants in the greenhouse as well as the garden. Mr. Shank said that if that happened, there would be no space to plant what was grown in the greenhouse. G. MacLeod said the easement is also concerning to her. R. Waller

said that he feels there is possibly a remedy through the ordinance, that is was should be done. The board is there to apply the rules, so the board should go by the rules. J. Gianniny said that being 11 inches from the property line when the ordinance requires ten feet is concerning. He asked if it was possible to move the garden to the proposed spot for the greenhouse. He said that he is aligned with the staff on their recommendations in this application. Mrs. Shank said that it would look terrible for the neighbors to move the garden to a more visible spot. The greenhouse would look much more aesthetically pleasing. Mr. Shank said that swapping the two would mean that they would lose the ability to keep the garden beautiful as they would have to contend with shade from trees on other properties. If the greenhouse was narrow and longer it would block their garage doors, and if it were smaller it would not be useful. Mrs. Shank said that they planned it to look beautiful from all angles of viewing the property. Mr. Shank also pointed out that it would increase the property value which would increase the tax revenue to the City. **G. MacLeod moved to deny the variance request as it does not meet the requirements for approval. R. Waller seconded and the motion passed (3/1) with R. Hull voting against.** R. Waller reiterated that he thought a zoning ordinance amendment could be formulated.

BZA 2019-02: A variance request for properties located at 104 Tucker Street and 116 East Henry Street.

- Staff Report – The owners of 104 Tucker Street have their parcel listed for sale and it was discovered that a portion of their dwelling encroaches over the property line shared with 116 E. Henry Street. The requested yard setback variances are needed prior to a boundary line adjustment to correct the building encroachment and the boundary line is proposed to be moved seven (7) feet to the south. With the proposed boundary line adjustment, the relocated property line will be three (3) feet from the dwelling located on 104 Tucker Street and will be sixteen and 4/10 tenths (16.4) feet from the deck that is attached to the dwelling located on 116 E. Henry Street. A seven (7) foot reduction of the required 10 foot side yard setback is therefore requested for 104 Tucker Street and a eight and 6/10 tenths (8.6) foot reduction of the required 25 foot rear yard setback is requested for 116 E. Henry Street. The lot requirements table in Section 420-4.7 of the Zoning Ordinance requires a minimum ten (10) foot side yard setback and a minimum twenty-five (25) foot rear yard setback for main structures in the R-1 zoning district. Decks are accessory structures that cannot be located in the yard setbacks while stairs are specifically exempted from setback requirements and can therefore be located in the setbacks.
- Board Questions to Staff – J. Gianniny asked if either of the property owners were involved in the encroachment on the property line. A. Glaeser said that he did not know the history of the property. R. Waller verified that no new violation was being created, this would just change the nature of the violation. J. Gianniny said that often in the older neighborhoods the zoning ordinances don't work due do how the lots are. A. Glaeser said that is part of the variance criteria as it references things that existed before the adoption of the current zoning ordinance. He said it is quite likely that the house and the addition were building before the current ordinance.
- Applicant Statement – Pierson Hotchkiss said that there is a property line going through the house, and this is a house being managed by David Stull at Sterling Properties. It was

used as a rental. The house next door belongs to Mildred Anderson, and currently her daughter lives there. Ms. Anderson does not want the fence or the hedge next to it, and is willing to sell that part of her property to fix the problem. Mr. Hotchkiss said that the property is in violation now, and will be in violation after the change, but this will make a bad situation slightly better.

- Public Comment – None
- Board Discussion and Decision – R. Hull moved to approve the variance application, and R. Waller seconded. The motion passed unanimously (4/0).

OTHER BUSINESS

None

ADJOURN:

The meeting adjourned at 6:34 p.m. with unanimous approval.

_____

Jim Gianniny, Chair, Board of Zoning Appeals

STAFF REPORT

To: Board of Zoning Appeals
Case Number: BZA 2022-01
Date:

Staff: Arne Glaeser
Tax Map: 28-1-1

General Info: The Board of Zoning Appeals is scheduled to hear this request at 6:00 pm on Monday, March 21, 2022 in the Community Meeting Room, First Floor City Hall, 300 E. Washington Street.

Applicant/Owner: Joseph T. Small, Jr. / Joseph T. Small, Jr.

Requested Action: An application appealing the Zoning Administrator's determination that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building.

The Appellant is appealing a determination made by Arne Glaeser, as Zoning Administrator, in a letter dated January 5, 2022, wherein Mr. Glaeser reviews conversations with Sam Crickenberger, consultant, and Heidi Schweizer, architect, regarding zoning requirements for accessory dwelling units found in the Lexington Zoning Ordinance.

Code Section: 420-20.1 – Definition of Accessory Apartment is "a residential use having the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than 25% of the gross floor area of the building nor more than a total of 750 square feet."

420-3 – Use Matrix lists an accessory dwelling as a by-right use in the R-1 zoning district, and the subject parcel is located in the R-1 zoning district.

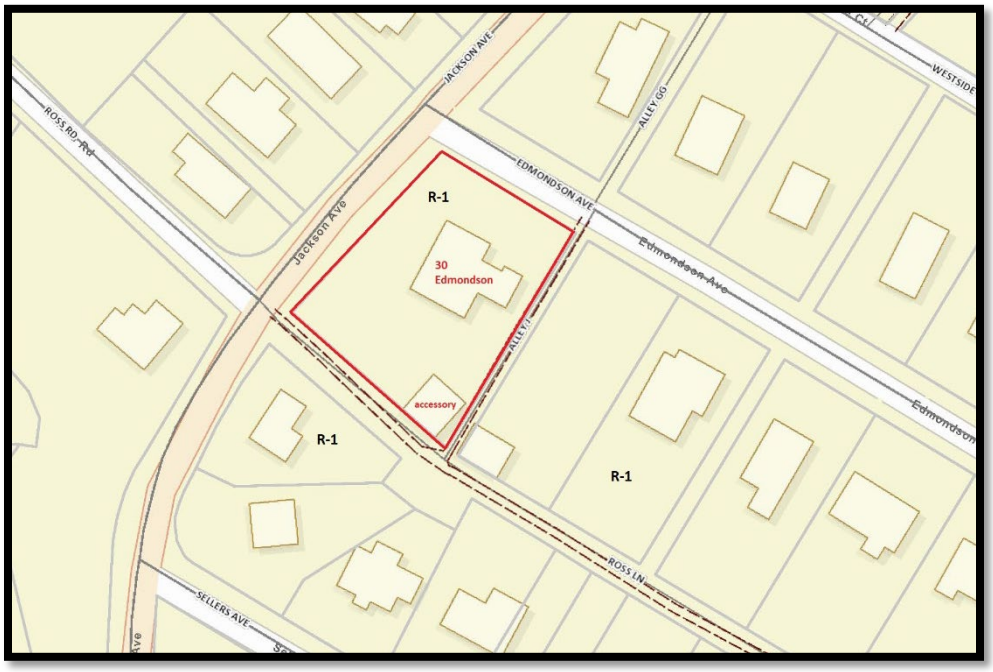
Location: The affected property is located at 30 Edmondson Avenue (Tax Map #28-1-1).

Existing Land Use: The subject parcel is currently improved with a primary dwelling unit facing Edmondson Avenue, and with a separate, accessory structure located to the rear of the property and adjacent to Ross Lane.

View of subject parcel from Edmondson Avenue

View of subject parcel from Ross Lane

Adjacent Land Use: All of the properties in the immediate vicinity are single family residences zoned R-1 (General Residential).



Comprehensive Plan: Traditional Neighborhood future land use designation.

Background:
A review of previous Lexington Zoning Ordinances revealed accessory dwelling units were never expressly permitted in accessory buildings and the following provides a short historical overview of previous relevant zoning definitions.

The 1957 Lexington Zoning Ordinance included a definition for an *accessory use or building* as follows:

> *ACCESSORY USE OR BUILDING: A subordinate use or building customarily incidental to and located upon the same lot occupied by the main use or building, provided that no such accessory building shall be used for housekeeping purposes.*

This concept that an accessory building could not be utilized for housekeeping purposes still exists in the current version of the Lexington Zoning Ordinance for the definition of a *building accessory* as follows:

> *BUILDING ACCESSORY: A subordinate structure customarily incidental to and located upon the same lot occupied by the main structure. No such accessory structure shall be used for housekeeping purposes.*

Another use that appears in the 2000 edition of the Lexington Zoning Ordinance is a *primary residence with an accessory apartment* defined as follows:

> *PRIMARY RESIDENCE WITH AN ACCESSORY APARTMENT: A residential use having the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than twenty-five percent of the gross floor area of the building nor more than a total of 750 square feet.*

A primary residence with an accessory apartment has been allowed by-right in the R-1A zoning district since 2000, and was only permitted in the R-1 zoning district with the update of the Zoning Ordinance in 2017.

In the 2017 update of the zoning ordinance, the definition of a *primary residence with an accessory apartment* was amended by simply deleting the words ~~*primary residence with an*~~ *accessory apartment* and the current definition for an accessory apartment is as follows:

> *ACCESSORY APARTMENT: A residential use having the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than 25% of the gross floor area of the building nor more than a total of 750 square feet.*

Admittedly there is an inconsistency in the nomenclature used in the 2017 Zoning Ordinance update whereby the use is called an "accessory dwelling" in the Use Matrix (Article III) while the definition included in the Definition section (Article XX) is for an "accessory apartment." Staff maintains the update in 2017 intended to allow an accessory dwelling unit in the R-1 zoning district where it had not been permitted previously, and this addition is evidenced by the new listing of "accessory dwelling" in the Use Matrix. Staff also maintains the amended definition for "accessory apartment" was intended to describe the "accessory dwelling" use that was added to the Use Matrix for R-1 zoned properties.

A concerted effort was made during the 2016-2017 Zoning Ordinance update to include a definition for each and every use listed in the Use Matrix because it is a best practice to have all of the uses defined. It is therefore inconsistent for the *accessory dwellings* use listed in the Use Matrix not to be defined in the definitions section of the Zoning Ordinance. Furthermore, a review of the minutes for all of the Planning Commission meetings where the zoning update was discussed and debated, reveals not one conversation expressing a desire or need for an *accessory dwelling* and an *accessory apartment* as two distinct uses. Staff maintains these inconsistencies demonstrate the amended *accessory apartment* definition was intended to describe the *accessory dwelling* use that is listed in the Use Matrix.

Zoning Determination:

Heidi Schweizer, architect, contacted the Planning and Development Office more than a year ago to determine whether the existing accessory structure at 30 Edmondson Avenue could be converted into an accessory dwelling unit. It was explained that the current Zoning Ordinance requires an accessory dwelling unit to be located within the main building, and it was also mentioned that the Planning and Development Office was in the middle of the annual zoning text amendments. Those amendments to the zoning text included fifteen smaller amendments (approved in July of 2021), and also included four, more complicated amendments requiring additional time to review, draft, and consider for approval. The Lexington Planning Commission prioritized the four remaining amendments, and the consideration of accessory dwelling units being allowed in accessory buildings (and not just limited to being located within the main building) will be the third of the more involved zoning text amendments to be considered by the City. It is possible the City will begin consideration of amendments to allow accessory dwelling units in accessory structures in late summer 2022. Staff cautioned Ms. Schweizer about the risk of drafting detailed design plans for the accessory structure on the subject parcel prior to any use and design standards being developed by the City for accessory dwelling units in detached, accessory buildings. A building permit with detailed architectural drawings was not submitted by Mr.

Small or by Ms. Schweizer as claimed in Mr. Small's appeal. To date, neither a building permit nor drawings have been submitted to the City of Lexington for the build out of the accessory structure on the subject parcel.

Sam Crickenberger, consultant, contacted the Planning and Development Office on behalf of the property owner, and Mr. Crickenberger requested the zoning determination that is dated January 5, 2022 and included in the appeal application submittal.

The zoning determination included the State required appeals procedure that any appeal must be made in within 30 days of the receipt of the zoning determination letter, and Mr. Small filed his appeal within the 30 day limit.

Request:

The applicant requests the Board of Zoning Appeals to reverse the Zoning Administrator's determination that accessory dwellings must be located within the main dwelling and cannot be located in an accessory building that is detached from the main building.

Code Requirements:

§ 15.2-2309. Powers and duties of boards of zoning appeals (Code of Virginia).
Boards of zoning appeals shall have the following powers and duties:

> 1. To hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the board's judgment of whether the administrative officer was correct. The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which the appellant has the burden of proof to rebut such presumption of correctness by a preponderance of the evidence. The board shall consider any applicable ordinances, laws, and regulations in making its decision. For purposes of this section, determination means any order, requirement, decision or determination made by an administrative officer. Any appeal of a determination to the board shall be in compliance with this section, notwithstanding any other provision of law, general or special.

§ 15.2-2311. Appeals to board.

> A. .... The appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof.
>
> D. In any appeal taken pursuant to this section, if the board's attempt to reach a decision results in a tie vote, the matter may be carried over until the next scheduled meeting at the request of the person filing the appeal.

§ 15.2-2311. Procedure on appeal

> The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and make its decision within ninety days of the filing of the application or appeal. In exercising its powers the board may reverse or affirm,

wholly or partly, or may modify, an order, requirement, decision or determination appealed from. The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance. The board shall keep minutes of its proceedings and other official actions which shall be filed in the office of the board and shall be public records. The chairman of the board, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses.

Summary of the scope of BZA review on appeal

- The issue for the BZA is whether the zoning administrator's decision was correct.
- Statements by the appellant or his attorney may further limit the scope of the appeal.
- In the consideration of an appeal, the BZA may not:
  - Determine whether a proposed use is appropriate in the zoning district.
  - Determine what is in the public interest.
  - Amend or repeal a zoning regulation.
  - Determine that a zoning regulation is invalid.

Analysis:

It is the role of the Board of Zoning Appeals (BZA) to decide if the Zoning Administrator's determination was reasonable. If the determination was not based on factual evidence or some other standard to make it seem unreasonable, then the BZA should reverse the determination. If the decision is found to be reasonable by the BZA then the determination should be upheld.

The Zoning Administrator was requested to provide a determination to the applicant regarding the applicant's request to renovate an existing accessory structure into an accessory dwelling unit. After reviewing the Use Matrix and relevant definitions in the current Zoning Ordinance, as well as recalling the amendments made in 2017, a determination was made that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building.

An accessory use cannot automatically be assumed to mean in an accessory building as the applicant asserts. For example home occupations are allowed in the residential zoning districts as an accessory use, and home occupations are not required to be in accessory buildings. Another example is the accessory use for a brewery or distillery allowing consumption on the premises, but this accessory use to consume alcohol on the premises is not required to be located in a detached, accessory building.

The applicant and his architect were made aware of the current restriction that accessory dwelling units to be located within the main dwelling unit, and of the City's intent to consider an amendment to the zoning ordinance to potentially allow accessory dwelling units in accessory buildings prior to architectural plans being developed in contrast to the applicant's assertion otherwise. Additionally, the applicant's architect was cautioned about the risk of developing plans prior to the City's development of use and design standards for accessory dwelling units in accessory buildings that are detached from the main dwelling unit in contrast to the applicant's assertion otherwise.

Staff agrees that words undefined in a zoning ordinance are generally assumed to be understood by their plain meaning. There are, however, many varying definitions for the terms *accessory dwelling* and

accessory apartment, and definitions can be selectively chosen from a variety of sources to either demonstrate the similarity, or the difference between *accessory dwellings* and *accessory apartments.* An attachment is provided with a number of definitions intended to illustrate this point.

Lastly, and in support of the opinion that accessory dwellings and accessory apartments were intended as the same use, Section 12.8 of the Zoning Ordinance provides a schedule of required parking spaces for single-family dwellings, two-family dwellings, accessory dwellings and townhouses as follows:

Use	***Parking Spaces Required***
Single-family dwellings, two-family dwellings, accessory dwellings and townhouses	*2 for each dwelling unit; 1 for each accessory dwelling, 4 outdoor parking spaces maximum per residential lot*

Conspicuously absent is a parking requirement for an *accessory apartment*, and if there was not an intent to have *accessory dwellings* and *accessory apartments* be the same use, then it would be reasonable to expect *accessory apartment* to be listed in the schedule of required parking spaces separately from *accessory dwelling* which is not the case.

Suggested Motions:

I move to deny the request in BZA 2022-01 to overturn the determination made by the Zoning Administrator that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building for Tax Parcel 28-1-1. The determination appears to be reasonable and factually based.

I move to approve the request in BZA 2022-01 to overturn the determination made by the Zoning Administrator that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building for Tax Parcel 28-1-1. The determination appears to be unreasonable and factually incorrect.

Attachments:

A – Application, statement, and order from the applicant, Joseph T. Small, Jr. dated January 20, 2022
B – Letter from Zoning Administrator dated January 5, 2022
C – Supplemental definitions

Lexington Virginia
www.lexingtonva.gov

received 11/20/22

Planning & Development Department
300 East Washington Street
Lexington, Virginia 24450
Phone: (540) 462-3704 Fax: (540) 463-5310

APPLICATION FOR VARIANCE/APPEAL OF ZONING ADMINISTRATOR'S DECISION

Applicant[1]

Name: JOSEPH T. SMALL, JR Phone: 703-992-5822

Company: _____ Fax: _____

Address: 30 EDMONDSON AVENUE Email: JTSJR@ME.COM
LEXINGTON, VA 24450

Applicant's Signature: Joseph T. Small Date: 1-19-2022

Property Owner

Name: SAME Phone: _____

Address: _____ Email: _____

Owner's Signature: _____ Date: _____

Proposal Information[2]

Application Type: ☑ Appeal (attach description of appeal) ☐ Variance[3] (complete below)

Address (or location description): _____

Tax Map: 28-1-1 Deed Book and Page #: 39 Plat DB 104/180

Acreage: .47 Zoning (attach any existing zoning conditions or proffers): _____

The Applicant requests a variance from Section _____ of the City of Lexington Zoning Ordinance, in respect to the requirement for _____

in order to build _____.

1. ***Prior to submitting an application, the applicant is required to meet with staff for a pre-application meeting.***
2. ***Any application deemed incomplete by staff will not be accepted.***
3. ***See page 2 of this application for the powers and duties of the Board of Zoning Appeals in granting appeals and variances. If not specifically required in the zoning ordinance, submitting a sketch plan or other visual detail of your variance request is highly encouraged.***

1

Sam 460.5203

Lexington Virginia
www.lexingtonva.gov

Planning & Development Department
300 East Washington Street
Lexington, Virginia 24450
Phone: (540) 462-3704 Fax: (540) 463-5310

Notice to Adjacent Property Owners

For variance requests, the City will give notice of public hearings to be held on the application to those persons who own property, any portion of which abuts the subject property, and all property which is directly across the street from any portion of the subject property, as determined by the City's real property tax records. This notice will give the date, time and place of the hearing, identify the property which is the subject of the application and give a brief description of the proposed action. Notices will be mailed a minimum of ten (10) days prior to the date of the scheduled public hearings.

Posting of the Property

For variance requests, the City will place a sign provided by the City on the subject property which indicates that an action is pending. The sign will be located to be clearly visible from the street.

THIS SECTION TO BE COMPLETED BY STAFF ONLY

Application Fee: $300 Amount Paid: $300 Case Number: BZA- 2022 - 01

Date Received: 1/27/2022 Received By: KATIE BEARD

Staff Review

Planning: ✓ Public Works: _____

Police: _____ Fire/Rescue: _____

Board of Zoning Appeals

Legal Ad Dates: 3/2 + 3/9/2022 Adj. Property Notifications: 3/1/2022

Public Hearing Date: 3/21/2022 Action: _____

DESCRIPTION OF APPEAL

I own the residence at 30 Edmondson Avenue, with a detached accessory dwelling ("AD") located at the back of my property which has not been occupied since the 1980s. I would like to renovate it within the existing footprint. My lot is a little less than one half of an acre (20,561 SF), and the AD has a footprint of about 600 square feet. It has an attached carport of about 390 square feet.

In December 2021, I applied for a building permit, along with detailed architectural drawings, which was not accepted. I have since been advised, however, by Arne Glaeser, the Director of Planning and Development/Zoning Administrator, by letter dated January 5, 2022 (attached), that he will not issue a permit, because my AD is not "within" my primary dwelling. He has determined that the Lexington Zoning Ordinance requires that an accessory dwelling be attached to a primary dwelling. Specifically, he has stated that "It is my determination that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building." He advises me that the ordinance was amended on October 5, 2017, to provide for this. While he states that "there is an inconsistency in terminology," he also advises that the terms "accessory dwelling" and "accessory apartment" were intended to have the same use. He does not refer to any documentation or other substantiation for this statement.

I have reviewed Lexington's ordinance with Sam Crickenberger, Crickenberger Consulting, and I believe that Mr. Glaeser's reading is misplaced. I am, therefore, appealing his determination.

There Is No Inconsistency In The Zoning Ordinance

I am located in Zone R-1. According to Article III of the zoning ordinance (the "Matrix"), ADs in my zone have "By-right uses." The minimum lot size in this zone for a two-family dwelling is 12,000 square feet.

The only other references relating to ADs that I can find in the ordinance are in Article XX Definitions as follows:

DWELLING

Any building or portion thereof which is designed for use for residential purposes, except hotels, boarding houses, lodging houses and motels.

DWELLING UNIT

A room or group of rooms connected together containing cooking, bathroom and sleeping facilities constituting a separate, independent housekeeping unit, physically separated from any other dwelling unit in the same structure.

ACCESSORY USE OR STRUCTURE

A use or structure which is clearly subordinate and customarily incidental to the main use or structure that it is accessory to and located upon the same lot occupied by the main use or structure. Structures attached to the main building shall be considered part of the main building.

ACCESSORY APARTMENT

A residential use having the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than 25% of the gross floor area of the building nor more than a total of 750 square feet.

The crux of Mr. Glaeser's determination is that the terms "accessory dwelling" and "accessory apartment" have the same meaning within the ordinance. This is misplaced.

It is a longstanding principle of statutory construction in Virginia that when two different words are in the same statute, they are presumed to have different meanings. Klarfeld v. Salsbury, 233 Va. 277, 355 (1987); Forst v. Rockingham Poultry Marketing Cooperative, Inc., 222 Va.270, 278, 279 (1981); Barr v. Town & Country Props., 240 Va. 292 (1990). Hence, "accessory apartment" is presumed to have a different meaning than "accessory dwelling."

It also is a longstanding principle in statutory construction in Virginia that words in statutes are to be understood by their plain meanings. Roundtree Corp. v. City of Richmond, 188 Va. 701 (1949) ("Statutory words should receive their ordinary meaning"); Lawrence v. Craven Tire Co., 210 Va. 138 (1969). Virginia courts

frequently use dictionary definitions to determine such meanings. See, Farashaki, J., Va. Lawyer (Oct. 2021) ("Yes, Words Matter: Statutory Interpretation in Virginia")

An accessory dwelling is **a smaller, independent residential dwelling unit located on the same lot as a stand-alone (i.e., detached) single-family home**. Dictionary.com.

An accessory apartment is **a self-contained living area within a single-family home**, as for an aging parent. Also called in-law apartment; especially British, granny flat. Dictionary.com.

Further, it is a well known principle of statutory construction in Virginia, that statutory terms are to be read consistently with one another to avoid rendering the statute inconsistent, meaningless, or confusing. FBC Stores v. Duncan, 214 Va. 246 (1973); Paige v. Edgar, 210 Va. 54 (1969).

In this light, it makes sense to read the terms "accessory structure," "accessory dwelling," and "accessory apartment" as consistent with one another in the Lexington Ordinance.

Using the plain meaning of the words, an accessory structure is any structure incident to the main structure on a property. An accessory dwelling is a residental accessory structure. An accessory apartment is a residential accessory structure or dwelling unit of a particular size and dimension attached to or within the main structure on a property. In common English usage, a "dwelling" is a broader concept than an "apartment." The definition of accessory apartment in no way includes accessory dwellings. It defies common sense.

It is worth noting that other Virginia jurisdictions, with population densities similar to Lexington, have revised their Ordinances consistent with my reading of the Lexington Ordinance. See, Arl. Co. Zon. Ord. Sec. 12.9; Fairfax Co. Zon. Ord. Secs. 4102.7B (15)-(20).

There Is No Ambiguity In The Ordinance

Mr. Glaeser states that it was "intended" that "accessory dwelling" and "accessory apartment" have the same use. There is no evidence of this in the ordinance. Its language is clear and unambiguous. In the absence of ambiguity, it is inappropriate for Mr. Glaeser to attempt to point to evidence outside the ordinance.[1] Herndon v. St. Mary's Hospital, Inc., 266 Va. 472 (2003); HCA Health Servs. Of Va. v. Levin, 260 Va. 215 (2000).

Lexington Is Not Served Well By Mr. Glaeser's Restrictive Determination

I have relied upon the plain meaning of the ordinance's language to retain an architect, develop plans, and consult with a building contractor, as any citizen should be able to do. It is my intention to use the accessory dwelling on my property as a guest house for friends and family. I do not intend to use it for commercial purposes. Nevertheless, I note that jurisdictions in Virginia have noticed an increased need for affordable housing. Accessory dwellings are one way to help address this need. I believe that Lexington has the same concerns. As a matter of public policy, it makes good sense to expand the number of accessory dwellings rather than to constrict them. I also note that Lexington currently has a number of existing accessory dwellings, some of which may have been grandfathered under the current ordinance. Others may not have been. By reading the ordinance restrictively, as Mr. Glaeser has, a number of existing dwellings may become subject to abandonment. Obviously, this does not make good sense. Also, as a matter of public policy, homeowners should be encouraged to renovate such buildings, rather than to let them decay and become health or fire hazards.

[1] If one looks outside the ordinance for intent, contradictory evidence may emerge. For example, it would be pointed out that Lexington has considered revising its ordinance to substitute the term "cottage" in the Matrix for "accessory dwelling." It did not consider substituting "accessory apartment" for "accessory dwelling". Clearly, the two terms were intended to have different meanings.

I have attached a proposed order for your consideration.

Sincerely,

Joseph T. Small

Joseph T. Small, Jr.

Lexington Virginia

CLASSIFIED MAIL / RETURN RECEIPT

January 5, 2022

Joseph Small
30 Edmondson Avenue
Lexington, VA 24450

RE: A DETERMINATION OF ACCESSORY DWELLING ALLOWED WITHIN A MAIN BUILDING AT 30 EDMONDSON AVENUE (TAX MAP # 28-1-1)

Mr. Small:

I am writing in response to a conversation held last week with Sam Crickenberger regarding your desire to remodel an accessory structure existing on your property at 30 Edmondson Avenue in the City of Lexington into a second dwelling unit. Mr. Crickenberger requested a zoning determination and as the City's Zoning Administrator, I am able to provide a determination.

The property at 30 Edmondson Avenue contains a primary dwelling unit facing Edmondson Avenue and a separate, accessory structure located to the rear of the property and adjacent to Ross Lane. In previous conversations with you and with Heidi Schweizer, Architect, you indicated the accessory structure contained a dwelling unit but that unit has not been inhabited for many years. The accessory dwelling unit likely would be considered nonconforming had the accessory dwelling unit been consistently inhabited, however, if any nonconforming use is discontinued for a period exceeding two years it shall be deemed to be abandoned.

The City undertook a significant update of the Zoning Ordinance in 2016 and 2017 and a) added the accessory dwelling use as a by right use in the R-1 zoning district, and b) added the following definition of accessory apartment to the definitions section of the updated Zoning Ordinance:

Accessory Apartment

A residential use having the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than 25% of the gross floor area of the building nor more than a total of 750 square feet.

Although there is an inconsistency in terminology where the use is called an "accessory dwelling" and the definition is for an "accessory apartment", I can state both were intended to be the same use when they were adopted on October 5, 2017.

Your property is located in the R-1 zoning district and an accessory dwelling is allowed by-right in the R-1 zoning district according to the aforementioned use matrix found in section 420-3 of the Lexington Zoning Ordinance. The definition of an accessory apartment found in section 420-20.1 of the Lexington Zoning Ordinance, however, requires the accessory unit to have "the external appearance of a single-family residence in which there is located a second dwelling unit that comprises no more than 25% of the gross floor area of the building nor more than a total of 750 square feet." **It is my determination that an accessory dwelling unit (a.k.a. an accessory apartment) must be located within the main dwelling unit and cannot be located in an accessory building that is detached from the main building.** The accessory structure on your property that is detached from your main residence cannot therefore contain an

accessory dwelling unit.

Under provisions of 15.2-2311 of the Code of Virginia, this letter represents an interpretation of the City's Zoning Ordinance and anyone aggrieved by this interpretation may appeal to the City of Lexington Board of Zoning Appeals within thirty days of the receipt of this letter. If an appeal is not timely filed, this determination shall be final and unappealable. The applicable fee for appeal is $300 and the application for appeal is available at https://lexingtonva.prod.govaccess.org/home/showpublisheddocument/1702/637661969384330000 . Information regarding the appeal process is located in Article XXIV, Section 420-19.4 of the Zoning Ordinance which is also available on the city's website at lexingtonva.gov.

Another option you have is to file an application to amend the Lexington Zoning Ordinance to allow an accessory dwelling unit in an accessory building. The applicable fee for a zoning text amendment is $350 and the application for an amendment is available at https://lexingtonva.prod.govaccess.org/home/showpublisheddocument/1726/637661969495000000. The Lexington Planning Commission is working on a number of text amendments including a review of accessory dwelling units. As relayed to Heidi Schweizer months ago, the review of accessory dwelling units was prioritized after small cell facilities and after planned unit developments. We are wrapping up the small cell facility amendment and have started the PUD discussion. The accessory dwelling unit discussion may begin in approximately 6 months, and as previously stated, you may submit an application to have that discussion started earlier.

Please let me know if you have any questions regarding this determination, or if you have questions regarding your right to appeal or to request a zoning text amendment.

Sincerely,

Arne Glaeser

Arne Glaeser
Director of Planning and Development/Zoning Administrator

Cc: Jared Jenkins, City Attorney
Jim Halasz, City Manager
Sam Crickenberger

ORDER

Whereas, Joseph T. Small, Jr., is the owner of the property located at 30 Edmondson Avenue in the City of Lexington, Virginia;

Whereas, he has sought a building permit to renovate an accessory dwelling on the property;

Whereas, Lexington's Zoning Administrator has issued a determination that any accessory dwelling in Lexington is an accessory apartment and must be located within the main dwelling on a property and cannot be located in an accessory structure that is detached from the main building and, thereby, has refused to accept Mr. Small's application;

Whereas, Mr. Small has appealed this determination on the basis that an accessory dwelling is different than an accessory apartment within the meaning of the Lexington Zoning Ordinance and refers to a detached accessory residential structure on a property entitled to "By Right" use; and

Having considered the arguments and submissions of the parties;

It is here by ordered, adjudged, and decreed that:

An accessory dwelling, within the meaning of the Lexington City Zoning Ordinance, is a residential accessory structure, which may be detached;

An accessory apartment, within the meaning of the Lexington City Zoning Ordinance, is a residential accessory structure or dwelling unit located within the main dwelling of a property.

It is further ordered, adjudged, and decreed that:

The Zoning Administrator's determination, dated January 5, 2022, is hereby overruled and vacated; and

1

It is further ordered, adjudged, and decreed that:

The Zoning Administrator shall accept Mr. Small's building permit application and treat the application as if the accessory dwelling referred to therein is entitled to "Buy Right" use.

So Ordered, This ___ Day of _____, 2022,

Signed:

For: The Board of Zoning Appeals, City of Lexington, Virginia

Lexington Virginia

CLASSIFIED MAIL / RETURN RECEIPT

January 5, 2022

Joseph Small
30 Edmondson Avenue
Lexington, VA 24450

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Please let me know if you have any questions regarding this determination, or if you have questions regarding your right to appeal or to request a zoning text amendment.

Sincerely,

Arne Glaeser

Arne Glaeser
Director of Planning and Development/Zoning Administrator

Cc: Jared Jenkins, City Attorney
Jim Halasz, City Manager
Sam Crickenberger

Supplemental definitions:

An accessory apartment is a second dwelling subordinate in size to the principal dwelling unit on an owner-occupied lot, located in either the principal dwelling or an existing accessory structure. (US Dept. of Housing and Urban Development)

Accessory dwelling units (ADUs) — also referred to as accessory apartments, second units, or granny flats — are additional living quarters on single-family lots that are independent of the primary dwelling unit. (US Dept. of Housing and Urban Development)

Accessory dwelling unit – a dwelling unit in a two-family dwelling that is accessory to the primary dwelling unit. An accessory dwelling unit provides for separate living, sleeping, eating, cooking, and sanitation facilities for one or more occupants, but may share living space, means of egress, utilities, or other components. An accessory dwelling unit fully complies with the requirements of this code for a dwelling unit except where specified otherwise. (VA Residential Code 2018) **no definition for accessory apartment*

Accessory apartment: a rental unit that is located on the lot of or within a single-family owner-occupied home. (Merriam-Webster) **no definition for accessory dwelling*

Accessory apartment: A secondary dwelling unit established in conjunction with and clearly subordinate to a primary dwelling unit, whether a part of the same structure as the primary dwelling unit or a detached dwelling unit on the same lot. (Blacksburg, VA) **no definition for accessory dwelling*

Dwelling, accessory unit/apartment. A separate and complete housekeeping unit which provides complete and independent living, sleeping, and sanitation facilities, and which may or may not include permanent cooking facilities. Such unit may be contained within or outside of a primary residence but is clearly secondary to a primary single-family dwelling located on the same lot. When in a detached structure, the presence of a habitable room or rooms, as defined by the Virginia Uniform Statewide Building Code, including a living area and a bathroom with sink, toilet and tub or shower shall be considered to constitute an accessory apartment. When such habitable space is a part of the principal structure on the property, the presence of an independent entrance, a bathroom with sink, toilet, and tub/shower, and physical separation (by walls or floors) from the principal residence shall be deemed to constitute an accessory apartment.. (York County, VA)
Accessory apartment: A rental apartment within a single-family dwelling. Also called granny flat, in-law rental. (The American Heritage Dictionary of the English Language) **no definition for accessory dwelling*