

MINUTES

**The Lexington Board of Zoning Appeals
Monday, March 21, 2022 – 6:00 p.m.
Community Meeting Room – City Hall
300 East Washington Street**

Board of Zoning Appeals:

Presiding: Jim Gianniny, Chair
Present: Gail MacLeod, Vice-Chair
Mary Harvey-Halseth
Ross Waller (arrived 2 minutes late)

City Staff:

Arne Glaeser, Planning Director
Kate Beard, Planning Admin. Asst.
Jared Jenkins, City Attorney

Absent: Robert Hull

CALL TO ORDER:

A. Glaeser called the meeting to order at 6:00 p.m.

MINUTES:

The September 9, 2019 Board of Zoning Appeals Minutes were approved (3-0) as presented (M. Harvey-Halseth / G. MacLeod).

NEW BUSINESS:

A. Election of Chair

G. MacLeod moved to nominate J. Gianniny as Chair of the BZA. M. Harvey-Halseth seconded and the motion carried (4-0).

B. Election of Vice-Chair

M. Harvey-Halseth moved to nominate G. MacLeod as Vice-Chair of the BZA. R. Waller seconded and the motion carried (4-0).

C. BZA 2022-01 – An appeal request for the property located at 30 Edmondson Avenue.

1. Staff Report – A. Glaeser provided background, as follows:

The appellant wishes to renovate an accessory structure on his property and is appealing the Zoning Administrator's January 5, 2022 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 detached from the main building. He directed the Board's attention to the definitions provided in the staff report and indicated they would be the focus of much of the evening's discussion. He read the current definition for *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," and stated that *accessory dwelling* is a by right use in the R-1 zoning district which is where the subject property is located. He oriented the Board to the location of the property and subject structure and provided a brief history of relevant definitions and permitted uses provided in the Zoning Ordinance over time. He admitted an inconsistency in nomenclature exists in the current Zoning Ordinance whereby the *accessory*

dwelling use listed in the Use Matrix is not defined in the definitions section but argued the definition provided for *accessory apartment* was intended to define the *accessory dwelling* use. He provided a cursory overview of the statutes the Board should rely upon in making its decision and explained the Board was being asked to determine whether the Zoning Administrator was correct in his determination that the requested use is not in accordance with the Zoning Ordinance because it is not within the main building.

Board Questions – R. Waller asked for confirmation that guest houses are prohibited in Lexington. A. Glaeser confirmed a guest house that is separate from the main building would be prohibited unless it was a nonconformity that existed before 1957 and had been in continuous use since that time. He indicated he believed there were likely examples of such legal, nonconforming structures in Lexington and clarified that a legal nonconformity is determined to be abandoned if it is unused for a period of two years. R. Waller asked if the use would be allowed if the structure was on a separate tax parcel. A. Glaeser responded that in that circumstance, provided all lot requirements were met, the structure would be the main structure on the property and a single-family dwelling is a by right use in the R-1 district.

2. **Applicant Statement** – Sam Crickenburger, consultant, emphasized that words matter. He said the Board was considering the words *accessory* and *dwelling*, terms defined in the Ordinance, and noted that the Use Matrix provides *accessory dwelling* as a by right use in the R-1 zoning district. The appellant, Joe Small, stated the subject building was used as a dwelling from about 1954 until 1982 and has water, gas, electric and sewer service. He argued that though currently unoccupied, the building is a dwelling, that the Use Matrix lists *accessory dwelling* as a by right use in his zoning district, and that a common sense reading should allow him to use it as such. He argued that he simply wants to renovate an existing dwelling on his property. He asserted that Administrator Glaeser’s determination was a legal determination and not a determination of fact and was therefore not entitled to deference. He then made assertions about how the Board should determine his burden of proof. He argued that the public would differentiate between a “dwelling” and an “apartment” and asked the Board to apply the common meaning of the language.

M. Harvey-Halseth asked for clarification of the abandonment issue and Mr. Small provided his understanding of that provision of the Code. R. Waller asked the appellant if the subject building currently contains a kitchen. Mr. Small replied the building has a kitchen with no fixtures, but with electrical wiring and a drain. R. Waller suggested that was not persuasive evidence of a kitchen, saying a garage could be similarly equipped. R. Waller asked Administrator Glaeser if the renovation project would be allowed to proceed without a kitchen. A. Glaeser responded that the Ordinance does not define what is necessary to qualify as a “dwelling” and that a project involving additional sleeping space, without a kitchen, would likely be acceptable. Mr. Small asserted this line of inquiry was not relevant and argued the main issue was whether the structure had been designed for residential use, claiming it had been. A. Glaeser stated he had not been inside the structure, but it did not appear to him to have been designed for residential use. G. MacLeod provided examples of uses that would be allowable in an accessory building as they met the definition requirement of no housekeeping. Mr. Small pointed out that the zoning ordinance contains a definition for *building accessory* which prohibits housekeeping as well as one for *accessory use or building* which does not prohibit housekeeping. He argued the inconsistencies are confusing at a minimum and any finding based on such inconsistencies should be decided in the land owner’s favor.

3. **Public Comment** – Michael Gilmore, 19 Edmondson Avenue – said he and his wife Mary Ann have lived at 19 Edmondson Ave., in full view of the subject property, since 1985. He stated he and his wife have no objections to the applicant’s proposal. He suggested it would appear to be within the historical use of many properties, it would improve the condition of the property, and that he and his wife are generally in favor of allowing accessory dwellings on appropriately sized lots.
4. **Board Discussion and Decision** –G. MacLeod offered that while the definitions and omissions are confusing and disconcerting, the existing definitions for *building accessory* and *accessory apartment* specify either a prohibition against housekeeping or a requirement of being attached to the main building. She said that if there is a difference between an accessory dwelling and an accessory apartment, the building in question would fall under *building accessory* definition which specifies no housekeeping. Mr. Crickenburger commented that the Zoning Ordinance also has a definition for *accessory use or accessory structure* which does not contain the prohibitive language. Mr. Small posited that the definition to which Mr. Crickenburger referred was likely added more recently and should therefore be considered the controlling definition. J. Gianniny pointed out that the entire code was adopted in 2017. He explained that he was on City Council at the time the *accessory apartment* use was adopted. He said that at that time the requirement was that it be a part of the main building and there was no *accessory dwelling* use. Following a discussion of the zoning ordinance prior to 2017 and its reorganization in 2017, J. Gianniny suggested the Board needed to decide what an accessory dwelling is and whether housekeeping is allowed in it. R. Waller added that, apart from intent, consideration should be given to what can be inferred from the existing text. He said that made a decision difficult as the text is unclear. J. Gianniny said he believed the intent was to allow an *accessory apartment* in the matrix, but agreed the text is unclear and suggested the Board make a recommendation to Council to fix the inconsistent language. He added that the Board also needed to decide whether the Zoning Administrator’s determination was reasonable and factually based or unreasonable and factually incorrect. Jared Jenkins, City Attorney, pointed out that the statute clearly states the determination is presumed to be correct and the question is whether the appellant has presented enough evidence to overcome that presumption. Mr. Small argued the standard to overcome presumption was a preponderance of the evidence. Mr. Crickenburger urged the Board to focus on the plain meaning of the words used in the matrix. **G. MacLeod moved to find Administrator Glaeser’s determination to be reasonable and factually based. The motion died for lack of a second. M. Harvey-Halseth moved to approve this BZA request and to ask that the issue of definitions be reviewed by the Planning Commission and City Council.** Chair Gianniny asked if the motion included a finding that the Zoning Administrator’s determination appears to be unreasonable and factually incorrect. M. Harvey-Halseth responded it did not. A. Glaeser cautioned the Board that its decision must include a finding of fact and any motion must provide a clear record of the reasons for the decision. M. Harvey-Halseth said she was uncomfortable saying the Zoning Administrator made an error in his decision as his decision was based on flawed definitions. R. Waller agreed and asked Mr. Jenkins how the Board should evaluate how the Zoning Administrator’s determination was made. Mr. Jenkins responded that the fundamental issue was whether the determination was correct. He said the Zoning Administrator had acknowledged the inconsistencies in the definitions and had stated the basis of his determination which pursuant to City Code is presumptively correct. He indicated that the question would be whether the evidence presented by the appellant was sufficient to overcome that presumption. Any motion


to overturn the determination would have to state the determination was incorrect and cite specific reasons. G. MacLeod offered an argument that the determination was correct noting that while the governing words in the use matrix are not defined, there are other definitions which specify that an accessory building cannot be used for housekeeping and an accessory apartment must be attached to the main building. She said the fact that these rules have been applied in this manner for at least a couple decades was persuasive in deciding the determination was correct. She added that this has been the expectation of property owners and if the Board should start applying the rules in different ways there was a risk of property owners being unable to rely on the consistency of the application of the rules. She said she believed the City had been consistent for a number of years in requiring accessory dwellings/apartments to be attached to the main building, noting that was how it was discussed and applied when she was a Planning Commissioner. **G. MacLeod moved to find Administrator Glaeser's determination reasonable and correct. J. Gianniny seconded.** There was discussion about procedural matters should the vote result in a tie and the appellant was advised of his right to request the matter be held over to a meeting of the entire board. Chair Gianniny called for a vote **and the motion carried (3-1) with M. Harvey-Halseth voting against.**

OTHER BUSINESS

G. MacLeod requested the Board refer this to the Planning Commission and City Council to tidy up the language as soon as possible. A. Glaeser said he would bring up the matter with the Planning Commission at its next meeting.

ADJOURN:

The meeting adjourned at 7:13 pm with unanimous approval. (M. Harvey-Halseth / R. Waller)


Jim Gianniny, Chair, Board of Zoning Appeals