

MINUTES

**The Lexington Board of Zoning Appeals
Monday, September 18, 2023 – 6:00 p.m.
Community Meeting Room – City Hall
300 East Washington Street**

Board of Zoning Appeals:

Presiding: Gail MacLeod, Vice-Chair
Present: Robert Hull
Alexander Thymmons
Ross Waller

City Staff:

Arne Glaeser, Zoning Administrator
Kate Beard, Planning Administrative Assistant

Absent: Jim Gianniny, Chair

CALL TO ORDER:

Vice-Chair MacLeod called the meeting to order at 5:59 p.m.

MINUTES:

The March 21, 2022 Board of Zoning Appeals Minutes were unanimously approved as presented (R. Hull / R. Waller).

NEW BUSINESS:

A. Election of Chair

R. Waller moved to nominate J. Gianniny as Chair of the BZA. R. Hull seconded and the motion carried (4-0).

B. Election of Vice-Chair

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

C. BZA 2022-01 – An appeal request for the property located at 207 Diamond Street.

1. Staff Report

Zoning Administrator Glaeser read the advertisement for the public hearing into the record. The advertisement ran in the September 6th and 13th editions of the News Gazette and a is attached hereto and made a part of the record. This appeal stemmed from an application for a short term residential rental registration for the property located at 207 Diamond Street, in the General Residential (R-1) zoning district, which was denied based upon his determination, as Zoning Administrator, that the property was not the applicants' primary residence. Mr. Glaeser then provided background as follows:

He read the applicable code sections providing the definition for *short term residential rental*, the requirement that a short term residential rental in any of Lexington's residential districts must be the host's primary residence where he or she resides for at least 185 days of the calendar year, and the provision that the host bears the burden of demonstrating that the dwelling unit is his

or her primary residence. He pointed out the location of the subject property and noted that it and all of the neighboring properties are zoned R-1.

Noting that there is no formal or standardized set of documents required for determining residency, Mr. Glaeser provided the list of documents suggested to applicants for aiding in such a determination. In support of the subject short term rental application, applicants Stephen and Marqui Simmons submitted voter registrations, auto insurance policies, a DMV print out, an Anthem insurance printout, and a copy of a sales contract. These documents were reviewed and considered, but the determination was primarily based upon the following observations:

- The applicants were employed and deriving their income from jobs that appeared to require their presence in northern Virginia;
- Income tax forms showing the Diamond Street address as the primary residence were not provided; and
- Of the 5 vehicles registered in Lexington, none were present on the property on the day he performed an informal inspection of the property.

R. Hull asked how Mr. Glaeser had determined the applicants' presence was required elsewhere for their employment, given that so many jobs now accommodate remote work. Mr. Glaeser explained that applicant Marqui Simmons listed her job as a realtor in northern Virginia and typically realtors need to be in the location where their clients are buying and selling properties. He added that applicant Stephen Simmons, during a phone conversation, had indicated that when he had a job, he would need to be at the job location for approximately 3 days. A. Thymmons said it seemed Mr. Glaeser had based his determination on an assumption that Mr. Simmons would have a job every week and did not take into consideration that the applicants may work remotely. He added that he did not find the fact that none of the vehicles were on the property on one particular day to be convincing evidence of non-residency. He said he believed the applicants had provided adequate documentation to prove primary residency and the fact that their jobs were not local was not a sufficient basis for determining they were not primary residents. R. Waller reminded the Board that applicants for short term rentals in residential districts have the burden of proof when it comes to residency requirements and that it was not the Zoning Administrator's duty to prove anything. He said he believed the absence of a tax return was telling, as there is a special tax treatment for a primary residence.

Applicant Marqui Simmons interjected that the Diamond Street property had been their only residence at the time they applied for the short term rental registration. There was some crosstalk and A. Glaeser suggested the Board finish the staff report portion of the meeting and allow the applicants to answer questions during the applicant statement.

Finishing his thought, Mr. Waller said he thought the tax form was important. He suggested the applicants' home in Northern Virginia likely had considerably more value than the Diamond Street property and he found it unlikely, from a tax perspective, that they would claim the Diamond Street property as their primary residence for tax purposes. Mr. Thymmons pushed back against the assertion that the tax form was more relevant than the documents provided by the applicants, pointing out that the determination letter stated that there is no single document proving primary residency. He said he believed the applicants had provided adequate proof of residency. Mr. Hull suggested the Board move on to the applicant statement to allow the applicants to provide more details. G. MacLeod agreed and explained the format for the rest of the meeting.

2. Applicant Statement

Mrs. Simmons said she and her husband purchased the Diamond Street property in November of 2019 and it was the only residence they owned at the time. She said the house was uninhabitable when they bought it and they were not able to live in it until sometime in 2021. Renovations to the property were completed in 2022. Mr. Simmons added they had sold their prior residence in 2017 and had stayed with Mrs. Simmons' father when they were in Northern Virginia. He said the tax forms would not show another home because they did not own one.

Mr. Waller asked if the Diamond Street residence was their only residence now and Mrs. Simmons answered that they had purchased another home in Northern Virginia in July 2023. She acknowledged they both had to be in Northern Virginia for their jobs, but their presence was not necessary full time. She stated they absolutely reside at the Diamond Street property 185 days of the year, though she was confused by how that was calculated. Mr. Simmons added that he only had to be on site for work for specialty jobs which he indicated were infrequent. He said he owned his business and had teams of workers who did the majority of the day to day on site work. Mr. Hull asked if their tax forms for 2022 and 2023 would show the Lexington address as their primary residence. Mr. Simmons said he believed the Lexington address had been used as their primary residence since they purchased the property and the Northern Virginia address had only been used as a mailing address.

Ms. MacLeod said the fact of the applicants' two residences, their businesses in Northern Virginia, and the absence of a personal state income tax form showing Diamond Street to be their primary residence led her to believe the Zoning Administrator's determination was appropriate and reasonably made. Mr. Thymmons said he would also find the determination reasonable were it not for the applicants' statement that they only occasionally go to Northern Virginia.

3. Public Comment – None

4. Commission Discussion & Decision -

Mr. Hull suggested the most important factor to consider was where the applicants' primary residence would be going forward. He then asked how short term rental residency requirements are enforced. Mr. Glaeser explained that all short term rental registrations are renewed annually with a new application submitted each year in which the applicant's must certify the property is their primary residence. That being the case, once a property is deemed eligible, the renewal applications are not investigated unless a complaint is received.

There was additional discussion about the address used on the applicants' tax forms, whether it indicated residency or was simply a mailing address, and how much weight it should be given. Responding to questions from Board members, Mr. Glaeser reminded the Board that his determination had been based on the information provided to him in August, and those documents and information were included in the packet. He said he would need something more concrete than verbal assurances from Mr. and Mrs. Simmons that they spend more time at their Lexington home than their home in Northern Virginia, whether that be Mrs. Simmons' father's home or the home they recently purchased, to reconsider his determination. He added that the question at hand was whether his determination was reasonable and correct given the information he had at the time it was made.

Mr. Thymmons argued the determination was based on assumptions rather than facts. He stated Mr. Glaeser had assumed the applicants were away from Lexington 3 – 4 days per week though that was not in the information provided by the applicants. He indicated he believed the

applicants had met the burden of proof and he did not understand how Mr. Glaeser reached the conclusion he reached.

Mr. Waller requested that Mr. Thymmons identify the error Mr. Glaeser made in reaching his determination. R. Hull suggested the error was in making assumptions. Ms. MacLeod said that while the applicants may have convincingly articulated to the Board that the Diamond Street property should be considered their primary residence, the facts were that they owned two homes and split their time between those homes. Given that there was no way of truly accounting for how that time was split, the question was whether it was reasonable, based on the information initially provided by the applicants, to assume that they spend 185 days in Lexington. R. Hull said he would rather err on the side of what seems fair and equitable, especially given the applicants' explanation of their living arrangements and willingness to alter their tax filing if necessary. R. Waller pointed out that this was new information and again emphasized that if the Board intended to grant the appeal, it would need to identify the error made by Mr. Glaeser. He asked if there was support for finding Mr. Glaeser had erred in finding the evidence provided to him insufficient to establish residency. A. Thymmons indicated he believed Mr. Glaeser's concerns had been legitimate, but were based on assumptions made on incomplete data. He believed the applicants were able to give the Board the complete picture and the Board could now correct the residency determination based on the new information. Mr. Waller countered, saying the Board's duty was not to get a complete picture, but rather to determine whether Mr. Glaeser's determination was reasonable and correct based on the information he had when he made it. Ms. MacLeod said she found it reasonable to have questioned the applicants' residency and added that the fact that they have since purchased another residence in Northern Virginia made the issue even more perplexing.

R. Waller remarked that the discussion had persuaded him that the address used by the applicants for tax filing may have been a mailing address only and may not have indicated residency, suggesting the absence of the tax returns was less relevant than he had initially assumed it to be. He suggested that the Board consider whether Mr. Glaeser erred by giving too much weight to the absence of the applicants' tax returns in the documents they provided to prove residency.

R. Waller moved to grant the appeal based on the finding that the Zoning Administrator made an error in his relative weighting of the tax return to the other factors that were presented. A. Thymmons seconded and the motion passed unanimously. (4-0)

OTHER BUSINESS

None

ADJOURN:

The meeting adjourned at 6:53 pm with unanimous approval. (R. Waller / A. Thymmons)

Gail MacLeod, Vice-Chair, Board of Zoning Appeals