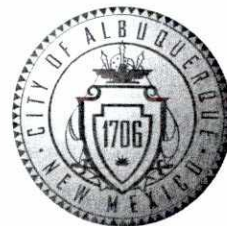


CITY OF ALBUQUERQUE



Planning Department

David S. Campbell, Director

Urban Design & Development Division

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Albuquerque, NM 87102

CITY OF ALBUQUERQUE BOARD OF APPEALS NOTIFICATION OF DECISION

Paul Padilla requests a special exception to Zoning Code Section 14-16-2-6(B)(1): a Conditional Use to allow an accessory living quarters for all or a portion of Lot 36, Regina Addition, zoned R-1, located at 501 49th St. NW (J-11)

Appeal No:..... 18BOA-20001
Special Exception No: 17ZHE-80259
Project No:..... 1011425
Hearing Date:..... 02/27/2018

In the matter of **18BOA-20001**, the Zoning Board of Appeals (BOA) voted to **GRANT** the Appeal of the Zoning Hearing Examiner's (ZHE's) decision based on the following findings:

FINDINGS:

1. This is an APPEAL of the Zoning Hearing Examiner's (ZHE) DENIAL of a CONDITIONAL USE pursuant to Zoning Code §14-16-4-2(C)(1), Special Exception: A conditional use to allow an existing accessory dwelling unit on an R-1 zoned property [Zoning Code §14-16-2-6(B)(1)].
PO Box 1293
2. The subject site is described as Lot 36, Regina Addition, containing approximately 0.35 acre and located at 501 49th St. NW (the "subject property"). The subject property is within the boundaries of the Westside Strategic Plan and the West Mesa Sector Development Plan.
Albuquerque
3. The subject property is zoned R-1 and is developed with a single-family home and an accessory dwelling. It is surrounded by single-family residential properties and vacant land, which are all zoned R-1.
NM 87103
4. The Albuquerque/Bernalillo County Comprehensive Plan, the Westside Strategic Plan, the West Mesa Sector Development Plan, and the City of Albuquerque Zoning Code are incorporated herein by reference and made part of the record for all purposes.
www.cabq.gov
5. Zoning Code §14-16-1-5, Definitions, contains the following relevant definition:
Living quarters, accessory. Living quarters within an accessory building having no kitchen.
The Code Enforcement Division considers the terms "accessory dwelling" and "living quarters, accessory", to be the same. These are types of accessory buildings.
6. Zoning Code §14-16-1-5, Definitions, contains the following, relevant definition:
Kitchen. An area of a dwelling where there is a sink and a significant cooking appliance, including but not limited to a range, oven, microwave oven, or hot plate, in close proximity.

Pursuant to this definition, a kitchen must contain a sink and a significant cooking appliance. Without the cooking appliance, it is not considered to be a kitchen. The appellant states that the accessory dwelling has a kitchenette consisting of a sink with no stove. A furnace and a water heater are allowed (Record, p. 20). Therefore, based on testimony at the ZHE hearing, the accessory dwelling does not have a kitchen.

7. Pursuant to Zoning Code §14-16-3-3(B)(2)(e), Supplementary Height, Area, and Use Regulations, an accessory building is required to be at least 10 feet from any dwelling or accessory living quarters. The primary house on the subject site is approximately 6 feet from the accessory living quarters (Record, p. 30). A variance to the 10 foot requirement would be needed if the conditional use is approved.
8. Zoning Code §14-16-4-2(C)(1), Special Exceptions, states that a conditional use shall be approved, if and only if, in the circumstances of the particular case and under conditions imposed, the use proposed:
 - (a) Will not be injurious to the adjacent property, the neighborhood or the community;
 - (b) Will not be significantly damaged by surrounding structures or activities.

The applicant believes that the conditional use would not be injurious to adjacent property, the neighborhood, or the community because the subject property has been used as accessory living quarters for at least 10 years prior to his owning the property. The home and the accessory living quarters have been renovated and rented. Squatters and thieves are no longer attracted to the area, which will help improve property values in the neighborhood [§14-16-4-2(C)(1)(a)]. The proposed conditional use would not be significantly damaged by surrounding structures or activities because the use has existed for more than 10 years and the accessory living quarters are in good repair, having passed relevant utility inspections. [§14-16-4-2(C)(1)(b)].

9. At the ZHE hearing, two neighbors expressed concern about the proposed conditional use. One stated that the accessory dwelling is on his property line, that people living on the subject property park cars on the sidewalk, and that a portion of the subject property has been fenced off. Another neighbor stated that the proposed conditional use would be injurious to the neighborhood because it would change the look and feel of the neighborhood and that part of the subject property has been fenced off, making it look cramped (Record, p. 23-24).
10. The ZHE found that the conditional use would be injurious to adjacent property, the neighborhood, or the community because the accessory living quarters contains a kitchen, and it has for ten years. Continuing this violation of the Zoning Code and allowing accessory living quarters that are contrary to the Code's limitation on kitchens constitutes injury (Record, p. 14).
11. The ZHE further found that fencing off a substantial portion of the subject property from use would result in increased crowding and intensity of use, and therefore would be injurious to the neighborhood. The conditional use would expand the occupancy of the subject property, which has the potential to exacerbate parking and traffic problems. Both factors would contribute to changing the single-family character of the neighborhood, which constitutes an injurious condition (Record, p. 15).
12. The ZHE also found that the applicant did not meet his burden of providing evidence to demonstrate that the proposed conditional use would not be injurious to adjacent property, the neighborhood, or the community as required by Zoning Code §14-16-4-2(C)(1)(a).

13. Zoning Code §14-16-4-4(B)(4) states that an appellant to a special exception action shall clearly articulate the reasons for the appeal by specifically citing and explaining one or more alleged errors of the ZHE in rendering his decision:
 - (a) in applying adopted city plans, policies and ordinances in arriving at his decision;
 - (b) in the appealed action or decision, including its stated facts; and
 - (c) in acting arbitrarily or capriciously or manifestly abusive of discretion.

The appellant did not specifically claim any of the above reasons for appeal. Rather, he responded to each of the ZHE's findings one by one. In sum, the appellant states that he has no intention of using the subject property other than for a single-family dwelling and that the fenced-off area is for tenant use. He also states that the accessory living quarters does not contain a kitchen because a sink does not constitute a kitchen, and that there is no proof of on-going Zoning Code violations.

14. The BOA finds that the ZHE erred by relying on his own definition of kitchen rather than applying the Zoning Code definition of kitchen found in §14-16-1-5, Definitions. The ZHE's primary reason for denying the conditional use request was because the accessory living quarters contains a kitchen, and it has for ten years now (Record, p. 14). Though the ZHE did not specify his definition of kitchen, it appears that he considers a sink to constitute a kitchen.

15. The ZHE's interpretation is inconsistent with the Zoning Code definition and Code Enforcement practice that a kitchen consists of a sink and a significant cooking appliance.

16. Zoning Code §14-16-4-2(C)(1)(a) and (b), Special Exceptions, contains the criteria which must be met for a conditional use to be approved. The BOA finds the following:

- (a) The conditional use will not be injurious to the adjacent property, the neighborhood or the community because the property will continue to be zoned R-1 Residential. The purpose of the R-1 zone is to provide suitable sites for houses and incidental uses thereto (Zoning Code §14-16-2-6). Commercial uses, such as outdoor storage, are not allowed in the R-1 zone. The subject property is located on a corner, so there are more opportunities for on-street parking than if the lot was not on a corner.

Furthermore, the appellant has improved the subject property by cleaning it up and remodeling the structures, which has benefitted the neighborhood by driving vagrants out.

- (b) The conditional use will not be significantly damaged by surrounding structures or activities because the surrounding properties are all zoned R-1; some are occupied and some are vacant. The R-1 zone limits height to 26 feet and contains setback requirements.

17. Based on these findings, the Zoning Board of Appeals concludes that the decision of the Zoning Hearing Examiner (ZHE) in approving the conditional use request was INCORRECT. Therefore, the appeal is GRANTED and the decision of the ZHE is OVERTURNED.

If you wish to appeal this decision, you must do so by **March 14, 2018**, in the manner described below. A non-refundable filing fee will be calculated at the Planning Department's Land Development Coordination counter and is required at the time the Appeal is filed.

APPEAL TO THE CITY COUNCIL: Any person aggrieved with any determination of the Board of Appeals acting under this ordinance may file an appeal to the City Council by submitting written application on the Planning Department form to the Planning Department within 15 days of the Board of Appeals decision. The date the determination in question is issued is not included in the 15-day period for filing an appeal, and if the fifteenth day falls on Saturday, Sunday or holiday as listed in the Merit System Ordinance, the next working day is considered as the deadline for the filing of the Appeal.

The City Council may decline to hear the Appeal if it finds that all City plans, policies and ordinances have been properly followed. If it decides that all City plans, policies, and ordinances have not been properly followed, it shall hear the Appeal. Such an appeal, if heard, shall be opened within 60 days of the expiration of the appeal period.

Should you have any questions regarding this action, please call our office at (505) 924-3860.

Catalina Lehner

for David S. Campbell, Planning Director

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