K01/178

Lorraine Atherton
2009 Arpdale, Austin, TX 78704

May 5, 2017

Board of Adjustment
City of Austin
Re: Reconsideration of variance requests C15-2016-0084, 2003 Arpdale

Dear Chairman Burkhardt and Board Members,

As a nearby homeowner and resident on Arpdale since 1983, I am an interested party in the case at 2003 Arpdale. Because the case does not meet the Board's requirements for variances (reasonable use, hardship, and neighborhood character), I registered my opposition to the variances on August 5 and 8 last year, in January and February of 2017, and in March and April. I have also opposed the various postponements of the case this year. I supported the Board's denial of the variances on April 10 because the applicant has presented no hardship. The new information in the reconsideration request speaks only to the possibility of a special exception; there is still no information regarding a hardship. And so once again, I urge the Board to deny the request.

In this letter, I outline why I believe that variances cannot be used to grant the change of use to "Two-Family Residential" requested in this case, and I list six conditions that might allow Mr. Jacobs to maintain the accessory structure without a variance.

The applicable sections of code are:

Determination of Use
LDC 25-2-2(C), the owner may request "that the director issue a formal use determination stating how the use is classified under existing use regulations." That use determination may be appealed to the Board of Adjustment, but it is separate from any variance requests.

Definitions of Uses, "Single-Family Residential" versus "Two-Family Residential"
LDC 4-14-2 and 25-2-3(B), 25-2-774

Nonconforming Uses
Article 7, 25-2-941, 25-2-942, 25-2-945 (A) and (C) "A person may not resume an abandoned nonconforming use."

Noncomplying structures
Article 8, 25-2-961

Short-term rental regulations
25-2-788, a Type 1 use "is owner-occupied or is associated with an owner-occupied principal residential unit" and may not "include the rental of less than an entire dwelling unit" or "include a secondary dwelling unit or secondary apartment."

I. A variance is not an option in this case.

A. Hardship. No qualifying hardship has been presented to support the seven variances requested at 2003 Arpdale. Without a hardship, the Board cannot grant any of the variances. The only hardship claimed by Mr. Jacobs is his own ignorance of the condition and status of the property, although the problem with the lot size is noted in his mortgage documents, and his mortgage includes an owner-occupancy clause. It is his attempt to use the property in a manner

not allowed in the code that has led to his variance requests (for instance, operating a commercial short-term rental, without owner occupancy, under a license that requires owner occupancy). A desire to operate in violation of the code does not constitute a hardship and does not qualify for variances.

B. Reasonable Use. The question of short-term rentals is relevant here because the Type-1 STR license issued for this property in August 2014 is evidence that Mr. Jacobs was allowed reasonable use of the property under the same terms as the previous owners going back to at least 1990. Remember, in 2014, the minimum lot size for a second dwelling was 7,000 square feet.

The license was issued for the property as one unit with two sleeping rooms. The STR code (25-2-788) requires that a Type 1 use "is owner-occupied or is associated with an owner-occupied principal residential unit." You have heard from Mr. Jacobs that he is not willing to maintain his owner occupancy and that he has never occupied the "principal residential unit" himself. Also, a Type 1 use may not "include the rental of less than an entire dwelling unit" or "include a secondary dwelling unit or secondary apartment." Again, you have heard from Mr. Jacobs that he is not willing to continue to treat the property as a single dwelling unit. Rather, he was attempting to rent the property as though he had a commercial STR Type 2 license. Last year, the City Council amended the STR ordinance to eliminate Type 2 licenses. Given that the Type 2 use is no longer allowed in the City, Mr. Jacobs cannot claim that his desired use is reasonable.

When the owner was issued the Type 1 license in 2014, he was effectively allowed to maintain the existing structures as a single-family unit, without variances. But in 2016, around the time the property was being inspected for violations of those STR Type 1 regulations, he was also cited for the sewer work without a permit. Rather than comply with the code regarding the existing Single-Family use and his Type 1 STR license, he chose to ask the Board to grant him a change of use to Two-Family. In effect, he is seeking a spot zoning change through the Board of Adjustment to facilitate a use that the City Council has recently prohibited.

C. Special Exception. If, however, Mr. Jacobs would agree to continue the existing Single-Family use and limit any remodeling to that allowed by code, he might be able to get the same administrative approval granted the previous owner in 2007 (i.e., the building permits required to rebuild the roof were approved without variances). Or he could apply for a special exception. A special exception cannot be used for a change of use, but it is the only mechanism available to maintain an existing noncomplying structure without a qualifying hardship. Under the code, Mr. Jacobs is entitled to maintain parts of the existing structure, but he is not entitled to change its use. (By the way, the petition circulated to the neighbors last year mentions only the setback variances. When I asked why he needed a variance instead of a special exception, Mr. Jacobs did not have an answer.)

In arguing that the Board may grant him a change of use, Mr. Jacobs is conflating the regulations governing nonconforming *uses* (Article 7, 25-2-941) and those governing noncomplying *structures* (Article 8, 25-2-961). The language posted in the notifications focuses on the change of use to "Two-Family Residential Use" (25-2-774) with a "second dwelling." In his applications, however, Mr. Jacobs focuses on the existence of the building and fails to address the difference between Single-Family and Two-Family uses.

The code is clear that the determination of a use classification is an administrative decision of the Director of Development Review. Under LDC 25-2-2(C), Mr. Jacobs may request

"that the director issue a formal use determination stating how the use is classified under existing use regulations." That use determination may be appealed to the Board of Adjustment, but it must be separate from any variance requests.

II. The "Two-Family" use does not qualify as nonconforming.

The code is clear that "Single-Family Residential" is a different use from "Two-Family Residential" [see Definitions in LDC 4-14-2 and 25-2-3(B)]. The property at 2003 Arpdale does not currently meet the requirements for "Two-Family Residential" use, so the question becomes, can it meet the requirements for an existing nonconforming use, or is the use only accessory to the Single-Family use?

Even if the Two-Family use were shown to be conforming on March 1, 1984, as required in 25-2-942, the new information confirms that the Carrasco-Millers occupied the property as a Single-Family use for several years, well beyond the 90 days that would constitute "abandonment" of the nonconforming use under 25-2-945 (A). "25-2-945 (C) A person may not resume an abandoned nonconforming use."

Beyond the 90-day criterion, the new information provided by Mr. Jacobs appears to confirm that the principal structure was owner-occupied for about 25 years, up until the Carrasco-Millers sold it in 2006, regardless of the living arrangements they may have had with roommates, house-sitters, friends, and family.

The bottom line is: the change of use from Single-Family to Two-Family Residential is not a question for the Board of Adjustment, unless Mr. Jacobs wishes to appeal a formal use determination by the Director of Development Review in a separate proceeding.

III. At least part of the structure should qualify as noncomplying.

This question is best considered in the context of a special exception, where the Board can focus on the parts of the building that existed at least 10 years ago and that may be allowed to continue to encroach on the setbacks. Other characteristics of the property, such as impervious cover, must comply with the code. After reviewing the new survey and the "Development plan & coverage calculations" submitted by Mr. Jacobs, I suggest that the Board ask Mr. Jacobs to apply for a special exception after he has resolved the following discrepancies and met these conditions:

- **Measure the setbacks to the walls** The rear and side setbacks should be measured to the walls of the garage. The concrete skirt may be described and permitted to remain, but the setback reductions should clearly reference the position of the walls, not the flatwork or the deck. The new survey submitted by Mr. Jacobs does not resolve this discrepancy. It appears that he is changing his request for the west (not east) setback from 4.4 feet to 4 feet and the rear setback from 5.5 feet to 6 feet.
- **Reduce the size of the covered deck** The structure should be limited to the dimensions seen in the 2006 photos. The photos confirm that the covered deck was smaller in 2006 than the current deck. As a condition of any variance or special exception, the deck should be reduced at least to the width in the 2006 photo, and the deck should not be allowed to encroach on the rear setback or in the 10-foot space required between the two structures.
- **Specify impervious cover to be removed** Any variance or special exception should include a detailed list of the impervious cover that must be removed. Much of the impervious cover is not shown on the new survey (the concrete skirt, the AC pad, the

back porch, the trash bin pad between the house and the driveway, the walkways behind the house, the side stoop, the steps to the back deck, the 24sf extension on the deck), and so it is not possible to determine precisely what should be removed or whether the "Development plan & coverage calculations" submitted by Mr. Jacobs will reduce the impervious cover to less than 45%.

- **Provide two parking spaces** The proposal to "convert the driveway to ribbon strips" is not feasible. Ribbon strips do not count toward required parking, and there is no other impervious cover on the property that could serve as parking. Before the driveway can be reduced, Mr. Jacobs must find out whether one or two parking spaces are required and then provide impervious cover in the dimensions required by code.
- **Specify building cover to be removed** Any variance or special exception should include a detailed list of the building cover that must be removed. It is not possible to determine whether the percentage of 39% given by Mr. Jacobs in the "Development plan & coverage calculations" is accurate, because there are discrepancies between the old survey and the new survey. Notably, one of the measurements along the front is now 9.3' instead of 9.7'; either this new surveyor or the old surveyor made a mistake of 4.8 inches. Another problem is that Mr. Jacobs has omitted 32 sf of the back porch and about 30 sf of the deck from his calculations. Those two missing areas exceed the minimum building cover by about 30 sf.
- **Specify use conditions** Any variance or special exception should include conditions that will prevent two-family uses. In the past, the Board has prohibited the rental of accessory dwellings and limited their use to relatives.

To sum up:

- The Board's April 10 decision to deny was correct because there is no qualifying hardship. No new hardship has been presented, and so the reconsideration request should be denied.
- The change of use from Single-Family to Two-Family Residential is not a question for the Board of Adjustment, unless Mr. Jacobs wishes to appeal a formal use determination by the Director of Development Review in a separate proceeding.
- The setback encroachments should qualify for a special exception, but the use and the other characteristics of the property must comply with code.

Thank you for your service to the community.

Sincerely yours,

Lorraine Atherton

Lorraine Atherton
2009 Arpdale
Austin, TX 78704

PUBLIC HEARING INFORMATION

Although applicants and/or their agent(s) are expected to attend a public hearing, **you are not required to attend**. However, if you do attend, you have the opportunity to speak FOR or AGAINST the proposed application. You may also contact a neighborhood or environmental organization that has expressed an interest in an application affecting your neighborhood.

During a public hearing, the board or commission may postpone or continue an application's hearing to a later date, or recommend approval or denial of the application. If the board or commission announces a specific date and time for a postponement or continuation that is not later than 60 days from the announcement, no further notice will be sent.

A board or commission's decision may be appealed by a person with standing to appeal, or an interested party that is identified as a person who can appeal the decision. The body holding a public hearing on an appeal will determine whether a person has standing to appeal the decision.

An interested party is defined as a person who is the applicant or record owner of the subject property, or who communicates an interest to a board or commission by:

- delivering a written statement to the board or commission before or during the public hearing that generally identifies the issues of concern *(it may be delivered to the contact person listed on a notice)*; or
- appearing and speaking for the record at the public hearing;

and:

- occupies a primary residence that is within 500 feet of the subject property or proposed development;
- is the record owner of property within 500 feet of the subject property or proposed development; or
- is an officer of an environmental or neighborhood organization that has an interest in or whose declared boundaries are within 500 feet of the subject property or proposed development.

A notice of appeal must be filed with the director of the responsible department no later than 10 days after the decision. An appeal form may be available from the responsible department.

For additional information on the City of Austin's land development process, visit our web site: **www.austintexas.gov/devservices**

Written comments must be submitted to the contact person listed on the notice before or at a public hearing. Your comments should include the name of the board or commission, or Council; the scheduled date of the public hearing; the Case Number; and the contact person listed on the notice. **All comments received will become part of the public record of this case.**

Case Number: C15-2016-0084, 2003 Arpdale St.
Contact: Leane Heldenfels, 512-974-2202, leane.heldenfels@austintexas.gov
Public Hearing: Board of Adjustment, May 8th, 2017

Lorraine Atherton
Your Name (please print)

☐ I am in favor
☒ I object

2009 Arpdale
Your address(es) affected by this application

L Atherton
Signature

4/29/2017
Date

Daytime Telephone: 512-447-7681

Comments: No hardship. The new info speaks to a special exception. Reasonable use has not been denied; a variance "to permit a 2nd dwelling" would grant a special privilege. But a special exception does not require a hardship, and it would allow the existing structures to remain as single family.

Comments must be returned by noon the day of the hearing to be seen by the Board at this hearing. They may be sent via:

Mail: City of Austin-Development Services Department/ 1st Floor
Leane Heldenfels
P. O. Box 1088
Austin, TX 78767-1088
(Note: mailed comments must be postmarked by the Wed prior to the hearing to be received timely)
Fax: (512) 974-6305
Email: leane.heldenfels@austintexas.gov

K01/182

K01/183

Zilker Neighborhood Association May 3, 2017

Re: Case Number C15-2016-0084
2003 Arpdale, Austin Texas 78704
Request for Reconsideration

Chair William Burkhardt and Board of Adjustment Members

Our association is an interested party in the above noted case since this particular lot is within our association boundaries. As such we have reviewed the applicant's previous 7 variance requests. Having found no evidence that these requested variances meet the city requirements (Hardship, reasonable use and neighborhood character) we took a position against granting these variances at the Board of Adjustment hearing on April 10th. We thus concurred with the Board's action in denying these requested variances at that hearing. However we also stated at that hearing that some of these requested variances should have been processed as "special exceptions" which appeared to us to be a more reasonable approach to some of the setback encroachments. And we agreed to discuss our position with the applicant if he was interested in pursuing this alternative approach to remedying some of his problems by using the special exception option.

I did discuss this with Mr. Jacobs and made it clear that with regard to the setback encroachments of the existing building, ZNA felt that using the special exception provision was the appropriate way to address these issues (i.e., variance requests "A" and "B"). However , it was clear that Mr. Jacobs' reason for asking for these variances was to allow him to continue to use this building as a secondary dwelling unit in a SF-3 single family zoning district, which is not allowed by the current zoning code. The variance requests that he has asked for that are outside the scope of a "special exception" and have to meet the hardship, reasonable use, and neighborhood character requirements for granting a variance are the following.

C. Reduce minimum lot size for 5,750 sf to 5,500 sf.
D. Increase the maximum building coverage from 40% to 41%
E. Increase the maximum impervious cover from 45% to 52%

We believe Mr. Jacobs has presented no new evidence on these three variance requests that would warrant a reconsideration of the previous denials, and therefore, we oppose the reconsiderations of these variance requests.

Regarding Mr. Jacobs' last two variance requests,

F. Decrease the minimum lot area for a two-family use from 5,750 sf to 5,500 sf,
G. Decrease the minimum separation distance between the primary structure and the second dwelling unit from 10 ft. to 6 ft.

The Board of Adjustment has the authority to grant a reduction to the minimum lot size if it meets the regular variance standards (hardship, reasonable use and character) as noted in variance request C above. But again we find no new evidence to support a reconsideration of variance C. However in the posting of these last two variance requests, the staff's wording is suggesting that the change of use allowing a two-family use is somehow already permitted, simply due to the use being there for some time. But that is only possible with an amnesty certificate of occupancy for a use in existence before 1986 which he has no evidence for. It is further implied that the Board of Adjustment has the authority to confirm this change of use by granting these last two variance requests even without a valid amnesty certificate of occupancy.

As we stated in the hearing on April 10th we do not believe that such a change of use is within the authority of the city staff to make this determination and asked for city legal to provide the city code provisions that allow staff to grant use changes that are in violation of the zoning code simply because they have been in use previously. We understand that if the zoning code is changed then a use on a lot that was previously allowed becomes a non-conforming legal use, but this is not the case in this situation. The zoning code for two-family use which specifies the minimum lot size predates the date when this accessory building began to be used as a secondary dwelling unit. We have not been able to find any language in the city code that allows the city staff to grant such a change of use, that now could be used to justify this posting language. So essentially what is suggested by this posting is that the Board grant a variance to the requirements of the provisions for granting an amnesty certificate of occupancy, which neither the staff or Board has the authority to do.

Nor do we believe that the Board of Adjustment, either directly or indirectly (as it appears in these last two variance requests) has the authority to grant a change of use. The authority for granting a change of use is solely the responsibility of the City Council accomplished through their exercise of their legislative authority by changing the zoning code. In short, if the City Council had wanted to allow Two-Family Residential Use on lots smaller than 5,750 sf, they would have crafted the code that way. However, that is not the code we have today. Thus, we ask the Board to have city legal provide the code language that 1) grants the city staff the authority to change the allowed use on a property which is in violation with the current code simply because it has been a use on that property for some time and 2) grants to the Board of Adjustment the authority to (directly or indirectly) grant a change of use. We doubt any such provisions exist.

Finally we are concerned with the way in which the staff has changed the posting of variance request "G". The previous posting for this item stated " G. (C) (2) (a) to decrease the minimum distance a secondary dwelling unit must be located from the primary structure from 10 feet (required) to 6 feet (requested/existing) in order to permit **occupancy of an existing accessory structure for use as** a 2nd dwelling unit in a "SF-3" Family Residence zoning district."

The new posting for the reconsideration leaves out the bold face phrase above. Why was this changed? Was it done in response to our April 10th testimony questioning staff's authority to grant the proposed change of use? Was this posting change therefore an attempt to make it less obvious to the public that by granting this variance the Board would indeed be granting a change of use? And by changing this language it is no longer appropriate for the Board to take this up as a "reconsideration"?

To sum up,
1) Variances A and B regarding setback encroachments, should be denied reconsideration and dealt with through the special exception option and should come back to the Board as standalone requests which ZNA would not oppose if they meet the special exception provisions.
2) Variances C, D, and E should be denied reconsideration since there is no new evidence on these items
3) Variances F and G should be denied reconsideration since the city staff and the Board do not have the authority to grant a change of use, directly or indirectly or to grant a variance to the amnesty certificate of occupancy rules.

ZNA appreciates your service to our community

Jeff Jack, President of the Zilker Neighborhood Association

PUBLIC HEARING INFORMATION

Although applicants and/or their agent(s) are expected to attend a public hearing, **you are not required to attend**. However, if you do attend, you have the opportunity to speak FOR or AGAINST the proposed application. You may also contact a neighborhood or environmental organization that has expressed an interest in an application affecting your neighborhood.

During a public hearing, the board or commission may postpone or continue an application's hearing to a later date, or recommend approval or denial of the application. If the board or commission announces a specific date and time for a postponement or continuation that is not later than 60 days from the announcement, no further notice will be sent.

A board or commission's decision may be appealed by a person with standing to appeal, or an interested party that is identified as a person who can appeal the decision. The body holding a public hearing on an appeal will determine whether a person has standing to appeal the decision.

An interested party is defined as a person who is the applicant or record owner of the subject property, or who communicates an interest to a board or commission by:

- delivering a written statement to the board or commission before or during the public hearing that generally identifies the issues of concern *(it may be delivered to the contact person listed on a notice)*; or
- appearing and speaking for the record at the public hearing;

and:

- occupies a primary residence that is within 500 feet of the subject property or proposed development;
- is the record owner of property within 500 feet of the subject property or proposed development; or
- is an officer of an environmental or neighborhood organization that has an interest in or whose declared boundaries are within 500 feet of the subject property or proposed development.

A notice of appeal must be filed with the director of the responsible department no later than 10 days after the decision. An appeal form may be available from the responsible department.

For additional information on the City of Austin's land development process, visit our web site: **www.austintexas.gov/devservices**

Written comments must be submitted to the contact person listed on the notice before or at a public hearing. Your comments should include the name of the board or commission, or Council; the scheduled date of the public hearing; the Case Number; and the contact person listed on the notice. **All comments received will become part of the public record of this case.**

Case Number: C15-2016-0084, 2003 Arpdale St.
Contact: Leane Heldenfels, 512-974-2202, leane.heldenfels@austintexas.gov
Public Hearing: Board of Adjustment, May 8th, 2017

Mark Bentley
Your Name (please print)

☒ I am in favor
☐ I object

2409 Ann Arbor Ave #B2 Austin 78704
Your address(es) affected by this application

Mark Bentley
Signature

5-8-2017
Date

Daytime Telephone: 512/461-5375

Comments: I am in favor.

Comments must be returned by noon the day of the hearing to be seen by the Board at this hearing. They may be sent via:

Mail: City of Austin-Development Services Department/ 1st Floor
Leane Heldenfels
P. O. Box 1088
Austin, TX 78767-1088
(Note: mailed comments must be postmarked by the Wed prior to the hearing to be received timely)

Fax: (512) 974-6305

Email: leane.heldenfels@austintexas.gov