

Zilker Neighborhood Association

Zoning Committee ♦ zilkerneighborhood@gmail.com ♦ Austin, TX 78704

December 5, 2021

Re: 1003 Kinney, lot-size variance, Case C15-2021-0100

December 13 Agenda item E2

To: Board of Adjustment

c/o Elaine Ramirez, Development Review Dept., City of Austin

via email Elaine.Ramirez@austintexas.gov

Chair and Board Members:

Thank you for allowing the zoning committee of the Zilker Neighborhood Association (ZNA) to review the variance request for 1003 Kinney (to decrease the minimum lot size from 5750 to 5464 square feet) and to share our recommendations with the applicants.

City of Austin Supervisor Eric Thomas has now dated the parcel to September 1947, confirming that the minimum lot requirement of 5750 sf applies. His email of November 17 appears on page 9 of this letter. It eliminates the applicants' argument that "At one time previously, it was likely this lot was larger, and would have met the minimum 5750sqft area for SF-3 and to not be considered a substandard lot." Documents submitted by the applicants show that the alley has existed in its current configuration since 1896, and the dimensions of the parcel have always been approx. 62 ft × 88 ft—beginning in 1947, through 1962 when a house was built under the previous code, through March of this year when the applicants demolished the house, and up until today.

That takes us back to the demolition question raised by ZNA at the hearing on November 8. The ZNA zoning committee believes that the "non-complying structure" regulations apply in this case (see 25-2-963 and 964, on page 7). This code allows an owner to rebuild or maintain an existing structure that does not comply with current code, as long as 50% of the supporting structure is preserved. Clearly, the zoning regulations allowed reasonable use before the house was demolished. ZNA is aware of two similar variance requests, at 1107 Kinney and 1516 Kinney, where lots were scraped without regard to 25-2-963. Both variances were denied for lack of a qualifying hardship.

At 1003 Kinney, we now know that the entire structure was demolished sometime this year, and it was the applicants' responsibility to verify before demolition that new construction would be

allowed. Evidence submitted by the applicants confirms that they were aware of the substandard lot size as early as January 2021, before they purchased the property. (A chronology appears on page 6.) Their survey in February 2021 shows a lot size of 5461 sf. The erroneous TCAD number is not a factor. Nevertheless, they ignored the City's instructions for demolitions. Step 1 of the City's demolition application process is prominently displayed on the City web site:

"Before you apply for a Demolition permit, verify with the [Development Assistance Center](#) (Zoning/Site Plan/Change of Use) that new construction will be permitted at the site."

The applicants have produced no evidence that they submitted the verification question to Development Assistance in connection with the demolition application, even though they knew that the parcel was below the minimum lot size. The demolition eliminated the only use allowed under the code, and it eliminated their claim to a qualifying hardship. Their own failure to comply with code does not qualify as a hardship.

Our detailed critique of the applicants' findings begins on page 3.

The ZNA zoning committee has concluded that there is no hardship in this case that meets the Board of Adjustment criteria, and that the applicants had a reasonable-use option had they just followed the code. Finally, the requested variance would grant special privileges that are not available to other properties in the area. As in other nearby cases, ZNA has recommended that the applicants pursue other remedies to allow reasonable use or to increase the area of the parcel. These are listed on page 5. We therefore request that the Board of Adjustment deny the variance.

Sincerely yours,
Lorraine Atherton
on behalf of the Zoning Committee
of the Zilker Neighborhood Association

P.S.: A similar letter explaining our decision was emailed to the applicants on November 22, to give them time to revise their application. We asked them to let us know after Thanksgiving if they intended to provide any new evidence that might support their findings. As of December 5, they have not done so. L. Atherton

Dec. 13 item E2, Critique of findings, 1003 Kinney, lot-size variance, Case C15-2021-0100

Reasonable use:

Applicants' finding: "The property is currently surveyed as 5,464sqft (TCAD shows 5,740sqft) and currently zoned for SF-3. SF-3 minimum lot size is 5,750sqft, resulting in this being a substandard lot. Previously it was occupied with a single-family home and detached artisan's studio. We intend to build a new single family home with a pool."

ZNA response: The applicants have not explained why they chose to demolish the existing "single-family home and detached artisan's studio," instead of rebuilding them as allowed under 25-2-963. Most of the email correspondence with "COA Planners" requests increased FAR and impervious cover, beyond what would otherwise be allowed. Their desire to build a larger house with a pool does not meet the definition of reasonable use.

Hardship (a, unique; b, not general to the area):

Applicants' finding:

- a) "This property's boundaries and areas have changed over time, and is unusual in that it is adjacent to a non-improved COA alley that cannot be developed privately for alley access, and will not be developed by COA (previous site plan exemption request confirmed this). At one time previously, it was likely this lot was larger, and would have met the minimum 5750sqft area for SF-3 and to not be considered a substandard lot."
- b) "While there are other substandard lots in the area that have received BOA approval (904 Ethel, about a block away, for example), not all properties in this neighborhood are impacted by an adjacent undeveloped COA alley AND slightly under the 5750sqft minimum while proposing to keep the same use, same zoning."

ZNA response: Documents submitted by the applicants show that the alley has existed in its current configuration since 1896, and the dimensions of the parcel have always been approx. 62 ft × 88 ft—beginning in 1947, through 1962 when a house was built under the previous code, and through March of this year when the applicants demolished the house. The alley was never a part of the parcel, and it has had no negative impact on the use of the property.

In addition, parcels that do not meet the minimum lot size under current code are common in this area. It is near a section of the Barton Heights subdivision that consists mostly of lots that are about 25 feet wide and do not meet the minimum lot size. These lots were designed to be sold in pairs to create a buildable lot. Much of the northern portion of the neighborhood was developed in this manner, with homeowners buying two or three or more modular lots to create home sites. Small lots where new construction has been permitted (including 904 Ethel) complied with 25-2-963 and sought their exemptions BEFORE demolition.

The parcel is not "slightly" under the minimum. It is approx. 290 sf under the minimum.

Undeveloped alleys are also fairly common, and their use for private access is not usually permitted unless the lot has no other reasonable access. With 62 feet of street frontage and an existing curb cut and driveway, this parcel has ample access. Again, the alley has had no

negative impact on the reasonable use of this property. In emails with City staff and with the ZNA zoning committee, it appears that the applicants are interested in the alley only if they can use it to build a private drive in order to increase the impervious cover on their private property. On Nov. 10, Mr. Ellis wrote: “even if they could vacate, abandon, or sell a portion of the alley to us, we would not be able to build or use it for access.” Using the alley to increase the size of the house and the amount of impervious cover is not the same as negotiating an easement that would preserve the alley as is. Acquiring 3 feet 4 inches along the alley with an easement that prohibits all construction or private use remains the best option in this case.

Neither the size of the parcel nor the presence of the alley is unique to the property, and neither condition creates a qualifying hardship.

Area character:

Applicants’ finding: “The proposed home is of reasonable size, proportion, conforms with Subchapter F, and is not striving to max out every exemption possible. It is a single-family residence with a yard and pool, strategically tucked into the corner of the site away from the adjacent COA alley and the protected Cedar Elm tree within the alley. The proposed home does not include a third story occupiable roof terrace or habitable attic, keeping the scale similar to the adjacent homes and maintaining a yard that is approachable for the walkable nature of the street.”

ZNA response: Unlike other, older parts of town, Zilker does not have small-lot amnesty, and it is generally recognized that allowing a reduction in the minimum lot size would significantly alter the established character of those subdivisions.

In the collection of email correspondence with “COA Planners,” the applicants have documented their efforts “to max out every exemption possible” and to build a new house that is larger, with more impervious cover, than would normally be permitted on a lot of this size. If one accepts the lot size of 5,464 sf (the building plans and survey give the lot size as 5,461 sf, and Supervisor Thomas mentions 5,450 sf), the FAR should be limited to 2,185.6 sf. The proposed house, however, is just shy of 2,300 sf (if 200 sf is deducted for the garage exemption), and the total building area is 2,602 sf. The plans show a wooden fence along the alley, cutting through the critical root zone of the protected Cedar Elm, and ZNA’s experience with new pool construction leads us to expect that the fence will exceed the 6-foot maximum height allowed by code. Construction of the pool and decking are also likely to encroach on the critical root zone of the Cedar Elm. Whether the attic space counts as habitable or not, the proposed house is 31 feet tall, with at least two gable exemptions, presenting a solid three-story barrier reflecting on the adjacent house. For those reasons, the requested variance would alter the character of the area and impair the use of adjacent properties. It definitely would impair the purpose of the regulations in the zoning district by rewarding violations of 25-2-963, which is supposed to preserve existing housing while bringing it up to code.

That brings us back to the first restriction on variances:

The Board cannot grant a variance that would provide the applicant with a special privilege not enjoyed by others similarly situated or potentially similarly situated.

The Board of Adjustment considered similar variance requests from the minimum lot size at 1107 Kinney and 1516 Kinney. ZNA opposed those requests, and the Board of Adjustment denied the variances in 2011 and 2013. Granting this variance at 1003 Kinney would provide this group of investors with a special privilege not available to others in similar situations.

In the absence of a qualifying hardship, the ZNA Zoning Committee does not support variances that would set a precedent for small-lot development in this area. The demolition of the previous house in violation of 25-2-963 has removed the possibility of negotiating the remodeling of an existing structure within the code. The hardship described by the applicants is self-imposed, and remedies other than a variance remain to be pursued, including:

1. It may be possible to request a retroactive variance from 25-2-963(B)1a to allow demolition of more than 50% of the structure, but that still lacks a qualifying hardship.
2. The LLC could also try to qualify under 25-2-964 by providing evidence that the destruction of the house was caused by some event beyond their control. That would need administrative approval only, and would not require a variance. ZNA's understanding of the code is that both 25-2-963 and 964 limit the reconstruction of the structure to the previous dimensions (in this case, a house of 1,188 sf).
3. The best option for the applicants remains acquisition of a strip 3 feet 4 inches wide along the alley with an easement that prohibits all private construction (including flatwork and fences) and private use (including parking). The only purpose would be to allow the owners to meet minimum lot size. They could then build a new house to the maximum FAR and impervious cover under current code without encroaching on the alley. It would not require a variance.

Chronology of the demolition and building applications at 1003 Kinney in 2021, based on documents provided by the applicants

- Jan. 28, first email in a series asking about taking access from the alley. Mr. Ellis asks Public Works, “if the house were to be renovated, a driveway could be located within the grass alley and normal residential design could occur.” Access is denied Feb. 1.
- Feb. 8, demolition application signed by previous owner McAlister. The applicant is Foursquare Builders LLC, which is also the general contractor for Mr. Ellis’s group, with the same mailing address as Mr. Ellis, 507 Walsh.
- Feb. 23, date of the survey included in the demo application, clearly showing the parcel size at 5,461 sf.
- March 1, date of photos of the house still standing, in the demo application.
- March 11, date of the demo application on City AB+C; permit approval date is March 29.
- April 2, deed for Mr. Ellis’s LLC recorded in TCAD.
- March 17, date on the “new construction” application submitted by “owner” Molly Devco, “applicant” Ian Ellis (partner), and “contractor” Foursquare Builders, all of 507 Walsh, describing the lot as “vacant.” The applicant’s signature, however, is dated Sept 10, 2021.
- June 16, first email correspondence with “COA Planners” begins with Reviewer Sandra Cano’s response to a question about attic exemptions. Ms. Cano seems to be commenting on an existing structure--she notes that the attached garage was built without a permit in 2013, but it could be retroactively permitted along with a new habitable attic “in the current scope of work.” She concludes by recommending that the architect set up a “Preliminary Plan Review Teleconference” to get detailed answers to questions on specific plans.
- June 21-24, other correspondence with City planners, asking for increased FAR and impervious cover through small-lot amnesty or some other means.

ARTICLE 8. - NONCOMPLYING STRUCTURES.

§ 25-2-961 - NONCOMPLYING DEFINED.

NONCOMPLYING means a building, structure, or area, including off-street parking or loading areas, that does not comply with currently applicable site development regulations for the district in which it is located, but did comply with applicable regulations at the time it was constructed.

Source: Section 13-2-331; Ord. 990225-70; Ord. 031211-11.

§ 25-2-962 - STRUCTURES COMPLYING ON MARCH 1, 1984.

(A) A structure that complied with the site development regulations in effect on March 1, 1984, is a complying structure notwithstanding the requirements of this chapter.

(B) A structure that complies with the site development regulations does not become a noncomplying structure as the result of a change in the use, zoning, or development of adjacent property.

Source: Section 13-2-820; Ord. 990225-70; Ord. 031211-11.

§ 25-2-963 - MODIFICATION AND MAINTENANCE OF NONCOMPLYING STRUCTURES.

(A) Except as provided in Subsections (B), (C), and (D) of this section, a person may modify or maintain a noncomplying structure.

(B) The following requirements must be met in order to modify, maintain, or alter a non-complying residential structure:

(1) Demolition or removal of walls must comply with the following requirements:

(a) No more than fifty percent of exterior walls and supporting structural elements of the existing structure may be demolished or removed, including load bearing masonry walls, and in wood construction, studs, sole plate, and top plate. For purposes of this subsection, exterior walls and supporting structural elements are measured in linear feet and do not include the roof of the structure or interior or exterior finishes.

(b) Replacement or repair of structural elements, including framing, is permitted if required by the building official to meet minimum health and safety requirements.

(2) Replacement or alteration of an original foundation may not change the finished floor elevation by more than one foot vertically, in either direction.

(3) For any residential use other than a single-family use in an SF-3 or more restrictive zoning district, the following requirements must be met in order to add square footage or convert accessory space into conditioned or habitable space:

(a) If the lot is non-complying with current lot size or lot width requirements, the cost of improvements may not exceed 20 percent of the value of the structure before the improvements.

(b) Compliance with current parking and occupancy regulations is required.

(4) If a noncomplying portion of a structure is demolished, it loses its noncomplying status and may only be rebuilt in compliance with current code.

§ 25-2-964 - RESTORATION AND USE OF DAMAGED OR DESTROYED NONCOMPLYING STRUCTURES.

(A) A person may restore a noncomplying structure that is damaged or destroyed by fire, explosion, flood,

tornado, riot, act of the public enemy, or accident of any kind if the restoration begins not later than 12 months after the date the damage or destruction occurs.

(B) Except as provided in [Section 25-2-963](#) (*Modification And Maintenance Of Noncomplying Structures*):

(1) a structure restored under this section is limited to the same building footprint, gross floor area, and interior volume as the damaged or destroyed structure; and

(2) a noncomplying portion of the structure may be restored only in the same location and to the same degree of noncompliance as the damaged or destroyed structure.

(C) This section does not apply to loss of land resulting from wave action behind a bulkhead on Lake Austin.

Source: Section 13-2-821; Ord. 990225-70; Ord. 031211-11; Ord. 20060216-043; Ord. 20060309-058; Ord. 20060622-022; Ord. 20060928-022; [Ord. No. 20140626-113, Pt. 5, 7-7-14](#).

On Wed, Nov 17, 2021 at 10:12 AM Thomas, Eric wrote:

Good morning Ian,

This email is in regards to your Residential Plan Review application #21-144210 for 1003 Kinney Avenue.

At the Board of Adjustment meeting on November 8, 2021, it was suggested that a “legal tract” determination, also known as a Land Status Determination, could negate the need for a variance from the requirements of the City of Austin’s Land Development Code (LDC) section 25-2-943 Substandard Lot. All a Land Status Determination does is exempt a particular tract from the requirement to submit a plat; it does not attest to the legality of existing or future development on the property.

The current lot contains roughly 5,450 square feet of area. 5,750 square feet is the minimum lot area for the zoning classification per LDC section 25-2-492 Site Development Regulations. Since this lot does not meet the minimum lot size requirements of 25-2-492, Residential Plan Review looks at section 25-2-943 Substandard Lot to see if the lot qualifies for the 4,000 minimum lot size.

The original plat shows two lots with a total area of 10,912 square feet. The earliest deed on record, showing the two current small lots, is from September of 1947. The date a substandard lot needs to be recorded with the County, so that it qualifies under the provisions of LDC section 25-2-943 (B)(1), is March 15, 1946. Since the earliest deed record is from September of 1947, the minimum lot area requirement is 5,750 square feet per item (B) (2) of 25-2-943. Because of this, a variance to minimum lot size is required in order to develop the property for a single family use.

Thank you,

Eric Thomas

Residential Zoning Plans Examiner Supervisor, Residential Review

City of Austin Development Services Department

6310 Wilhelmina Delco Dr,

Austin, Texas 78752

Office: 512-974-7940