



Legislation Text

File #: RES 18-512, **Version:** 1

Memorializing the City Council's February 28, 2018 decision denying an appeal of a decision of the Board of Zoning Appeals regarding the establishment of a use at 79 Western Avenue North.

WHEREAS, on November 8, 2017, under Zoning File No. 17-214989, John Rupp ("Appellant"), owner of that property commonly known as 79 Western Avenue North (the "Property") and legally described as "Woodland Park Addition to St Ex S 101 84 Ft; The E 14.34 Ft Of Lot 17 & The W 10.25 Ft Of Lot 18 Also Ex W 10. 25 Ft & Ex S 85 Ft Lot 18 & Ex S 85 Ft; Lot 19 & The E 2.35 Ft Of S 85 Ft Of Lot 19 & Ex Ne Tri Part; The W 31.25ft Of Lot 20 All Lying Below Pla," duly filed an appeal from an October 30, 2017 administrative decision of the Zoning Administrator ("Administrator") in which the Administrator determined that an area of the Property, described generally for the purposes of this appeal as the "West Addition" was, for zoning purposes, never legally established as "restaurant" space; and

WHEREAS, on December 4, 2017 and pursuant to Leg. Code § 61.601, the Board of Zoning Appeals ("BZA") duly conducted a public hearing on the said appeal where any person interested in the matter was afforded an opportunity to be heard; and

WHEREAS, the BZA, upon the close of the public hearing and based upon all the files and records in this matter including the Administrator's October 30, 2017 decision, the BZA's staff report dated December 4, 2017, and all the oral and written testimony presented during the public hearing, as substantially reflected in the BZA's adopted minutes, duly moved to deny the appeal and uphold the Administrator's October 30, 2017 decision, based upon the following findings set forth in BZA Resolution No.17-214989 which is incorporated herein by reference:

- “1. Appellant is the current owner of the Property.
2. The Property is located in an RM3 residential zoning district.
3. Certain uses at the Property, including the “restaurant” and “bar” uses at issue here, appear to qualify as legal nonconforming uses provided the uses were established prior to the enactment of the 1975 zoning code amendments which no longer allow these uses as permitted principal or accessory uses in RM3 districts and the uses did not lose their nonconforming status due to discontinuance.
4. When the West Addition was constructed in 1976, the Property was owned by an entity which, for purposes of this appeal, is described herein as the “Squash Club.”
5. The Squash Club's 1976 plans labeled the West Addition as a “future dining room.”
6. Uncontroverted testimony indicated that the West Addition remained “unoccupied and vacant” following its construction until 1987.
7. In 1987 the Squash Club obtained a building permit to install windows on the exterior wall of the West Addition. The Club's approved building permit plans relabel the West Addition space previously identified as “future dining room” to “exercise room.”
8. City records indicate that the “exercise room” contained exercise equipment on February 11, 2000

consistent with the Squash Club's building permit plans.

9. Appellant obtained ownership of the West Addition in 2001.

10. No evidence was provided indicating that the West Addition was ever established, used, occupied, or converted by the Squash Club into a "dining room" at any time pursuant to building permits issued prior to Appellant's ownership in 2001.

11. Appellant contends that he "incorporated" the West Addition into the Property's restaurant space after he obtained ownership of the West Addition space in 2001. As noted above, since 1975, a restaurant or bar is a nonconforming use in an RM3 zoning district.

12. Because the West Addition was never established, used, occupied, or converted into a "dining room" pursuant to building permits, Appellant cannot through self-determination "incorporate" the West Addition into "restaurant" space, especially when a restaurant use is a nonconforming use.

13. Appellant contends that a building permit issued for an existing nonconforming restaurant and bar located in the Property allowed him to "expand" the nonconforming restaurant and bar into the West Addition. The City's Building Official disagrees with Appellant's claim and has determined that the building permit in question is not applicable to the West Addition.

14. The opinion of the City's Building Official notwithstanding, the authority to approve the expansion of any nonconforming use is vested exclusively in the City's planning commission. Building permits cannot be used as a substitute for the City's zoning regulations. Likewise, the issuance of a building permit does not supersede the City's zoning regulations. Appellant's contention that the building permit constituted approval to expand a nonconforming use has no legal basis because Appellant has never obtained the planning commission's approval to expand a non-conforming use at the Property into the West Addition.

15. Appellant finally contends that the West Addition was established for use as a restaurant or bar based upon a 1976 liquor license. As noted under Finding no. 14, the authority to regulate and approve nonconforming uses lies exclusively with the planning commission. A liquor license cannot be used as a substitute for the City's zoning regulations. Likewise, the issuance of a liquor license does not supersede the City's zoning regulations. Appellant's contention that the liquor license constituted an approval to expand a nonconforming use has no legal basis because Appellant has never obtained the planning commission's approval to expand a non-conforming use at the Property into the West Addition."

WHEREAS, on December 14, 2017, pursuant to Leg. Code § 61.702(a) and under Zoning File No. 18-015901, Appellant duly filed with the City Clerk an appeal from the determination made by the BZA and requested a hearing before the City Council for the purpose of considering the actions taken by the said Board; and

WHEREAS, on February 21, 2018, pursuant to Leg. Code § 61.702(b), and upon notice to all interested parties, the City Council conducted a public hearing on the matter where all interested parties were given an opportunity to be heard and, upon the close of the public hearing and following deliberation on the matter, the Council moved to lay the matter over without making a decision on Appellant's appeal to February 28, 2018 in order to allow more time to examine the record in the matter; and

WHEREAS, on February 28, 2018, the matter of Appellant's appeal from the Administrator's determination was again taken up by the Council and follow discussion, the Council made the following decision; NOW, THEREFORE,

BE IT RESOLVED, having considered the variance application, the report of staff, BZA Resolution No. 17-217989 and having heard all the statements made and having reviewed the records in the matter, the Council

hereby upholds the decision of the BZA and finds that the Appellant has failed to demonstrate error in the facts or findings of the BZA in its decision to uphold the Administrator's October 30, 2017 determination that the "West Addition" of the subject property was, for zoning purposes, never legally established as "restaurant" space and that the Council hereby adopts the findings set forth in BZA Resolution No. No.17-214989 as its own in support of this decision.

AND BE IT FURTHER RESOLVED, for the above stated reasons, Appellant's appeal in this matter is hereby denied; and,

BE IT FINALLY RESOLVED, that the City Clerk shall immediately mail a copy of this resolution to Appellant John Rupp, the Zoning Administrator, the BZA and the Planning Commission.