

**BEFORE THE APPEAL AUTHORITY
BOUNTIFUL CITY, UTAH**

<p>In the Matter of:</p> <p>APPEAL FROM DENIAL OF CONDITIONAL USE PERMIT RE:</p> <p>1253 Northridge Drive Bountiful, Utah Larry Simper/Adam Kerr</p>	<p style="text-align:center">FINDINGS, CONCLUSIONS AND ORDER</p>
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The undersigned Appeal Authority for Bountiful City (“**City**”) received evidence and heard testimony and argument in the above-captioned matter at the hearing on January 30, 2020 (the “**Hearing**”). Mr. Larry Simper appeared as the agent of the asserted land owner Adam Kerr, appealing the City’s denial of an application for a conditional use permit regarding real property located at 1253 Northridge Drive, Bountiful, Utah (the “**Property**”). Mr. Simper also represented, and is a member of, LGI Properties, Inc., which is the entity holding title to the Property. Mr. Simper, as the agent of Mr. Kerr and of LGI Properties, Inc., is referred to herein as the “**Appellant**.” The City was represented by Mr. Francisco Astorga, the Planning Director and Administrative Committee Chair. Mr. Clinton Drake, the City Attorney, was also present. Based on the evidence and arguments presented at the Hearing, including the Conditional Use Permit Application (“**Application**”), the Appeal and supporting materials, and the City’s Staff Report, the Appeal is hereby denied as follows:

FINDINGS AND CONCLUSIONS

(1) On May 28, 2019, the City received a complaint from a neighboring land owner that the dwelling at the Property was being operated as an unpermitted duplex.

(2) The home on the Property is of a fairly typical rambler design, with a basement and a main level.

(3) The Property is zoned Single-Family Residential, subzone R-3.

(4) On May 28, 2019, the City sent a certified letter to the Property owner, LGI Properties, Inc., regarding the use of the Property.

(5) On June 17, 2019, the City received an additional complaint regarding the Property and informing the City that a unit at the Property had been rented out.

(6) Having received no response to its previous letter, on June 17, 2019 the City sent a second certified letter to the Property owner. Again receiving no response, on July 29, 2019 the City sent two additional letters (one certified, one regular mail) to the land owner inquiring as to the use of the Property.

(7) On August 28, 2019, Mr. Simper visited the Planning Department at the City and discussed the possibility of obtaining a conditional use permit (CUP) to allow an Accessory Dwelling Unit (ADU) (commonly known as an "In-Law Apartment" or "Mother-in-Law Apartment") in the basement of the Property.

(8) On September 10, 2019, the Appellant submitted an Application for an ADU CUP for the basement of the Property. The Application included a floor plan for the basement.

(9) After reviewing Mr. Simper's Application, on September 23, 2019, the City's Administrative Committee tentatively approved the Application conditioned upon the establishment of several conditions, including:

4. The ADU shall meet all the criteria in 14-14-124 of the City Land Use Ordinance.

...

6. Staff to verify that the square footage is accurate through a site inspection. (Per Bountiful City Land Use Code § 14-14-124(D)(1)).

(10) On October 1, 2019, members of the City staff inspected the Property. During the inspection, the City discovered that the basement floor plan that was submitted as part of the original Application was inaccurate. Among other things, the City learned that the bedroom/bonus room wall was not accurately depicted on the original plan submitted with the Application.

(11) The City also observed that to facilitate the home as two separate units, Mr. Simper had eliminated use of the stairway connecting the main level and basement level. The only entrance to the basement is now through a single door on the basement level from the side yard. Mr. Simper also so testified at the Hearing.

(12) On October 3, 2019, Mr. Simper submitted an updated floor plan for the basement in support of the Application. The new floor plan showed a slightly different alignment of walls for the bedroom and bonus room. The updated floor plan also showed altered (reduced) dimensions for several of the rooms (other than the bedroom and bonus rooms), the configurations of which did not change on the updated floor plan. For example, the kitchen went from 12.5 feet by 21.5 feet to 11 feet by 20 feet; the dining area went from 10 feet by 15.5 feet to 8 feet by 15 feet; the master bath went from 8 feet by 15.5 feet to 6 feet by 15 feet; and the second bathroom went from 10 feet by 8.5 feet to 8 feet by 8 feet.

(13) Additionally, on the updated floor plan, Mr. Simper re-designated the “second bedroom” as “not occupied (locked/secured)” and certain other areas as “not occupied.”

(14) Mr. Simper also represented in connection with the updated floor plan that the second bedroom would be deadlocked to prevent use. He also designated a portion of a laundry area as “unfinished area.”

(15) The footprint of the basement level (the dimensions of the exterior structure) remained the same on the original floor plan as on the updated floor plan.

(16) The City staff concluded upon inspection of the Property that the footprint of the main level (the dimensions of the exterior structure excluding the garage) is nearly identical to the footprint of the basement level, with the exception of small cantilevers on the main floor for one or more bay windows. Accordingly, the square footage of the main level is essentially the same as the square footage of the basement level.

(17) The Applicant did not submit a separate floor plan for the main level, though the plans submitted show the garage area.

(18) No evidence was submitted at the Hearing, or otherwise, indicating that the footprint of the main level differs to any material degree from the footprint of the basement. To the contrary, the floor plans Mr. Simper provided establish that the footprint of the main level (excluding the garage) is virtually identical to the footprint of the basement. The main level has a two-car garage which the basement does not have. Mr. Astorga also so testified.

(19) On October 31, 2019, the City staff conducted a second inspection of the Property.

(20) On November 26, 2019, Mr. Astorga called Mr. Simper to inform him that the ADU CUP Application would be denied.

(21) On December 3, 2019, Mr. Astorga (the Administrative Committee Chair and Planning Director) sent Mr. Simper a letter formally denying the Application (the “Denial”). The letter states in part as follows:

Regarding conditional of approval no. 6, staff inspections revealed that the site is not in compliance with Bountiful City Land Use Code § 14-14-[124](D)(1) which states:

An attached accessory dwelling unit shall be deemed unlawful and shall not be occupied unless all of the following criteria are met: (1) Shall not occupy more than forty percent (40%) of the total floor area square footage of the primary dwelling structure.

The proposal is not in compliance with the provision above as the footprint of the main level consisting of the principal unit, is essentially the same as the footprint of the lower level, consisting of the proposed ADU. The only exceptions are some small bay window/cantilevered areas that are located on the main level/principal dwelling unit that don’t add up to 60% of the total floor area square footage.

(22) The City’s Denial further stated:

The bedroom labeled as “Not Occupied (Locked/Secured)” as well as the remaining portion of the laundry area labelled as “Unfinished Area” cannot be counted as part of the principal dwelling unit[,] and the CUP application for the ADU does not meet the current Ordinance, specifically § 14-14-[124](D)(1); therefore, the application is denied.

(23) In the Appeal and Application, Mr. Adam Kerr executed a Property Owner’s Affidavit representing that he owns the Property. At the Hearing, Mr. Simper testified to his belief that Mr. Kerr owns the Property because Mr. Kerr has entered into a Contract for Deed to purchase the Property from LGI Properties, Inc. Mr. Simper further testified that he is a member of LGI Properties, Inc., and that only LGI Properties, Inc., is on title recorded with Davis County.

(24) Whether as the agent of Mr. Kerr or as a Member of LGI Properties, Inc., Mr. Simper is the agent of the owner of the Property and the Appellant here.

(25) In order to have the Appeal sustained, the “appellant has the burden of proving that the land use authority erred.” *Utah Code Ann.* § 10-9a-705.

(26) Accordingly, to prevail, Mr. Simper must establish that the Administrative Committee's Denial of the ADU CUP Application was in error.

(27) The only basis for the Denial is that the "no more than 40% requirement" was not met.

(28) As noted, the applicable City ordinance provides that:

An attached accessory dwelling unit shall be deemed unlawful and shall not be occupied unless all of the following criteria are met:

1. Shall not occupy more than forty percent (40%) of the total floor area square footage of the primary dwelling structure, ...

Bountiful City Land Use Code § 14-14-124(D)(1).

(29) Bountiful City Code further defines "floor area" to be:

The sum of the areas of one or several floors of a building, including areas used for human occupancy in basements, attics and penthouses, as measured from the exterior face of walls. It does not include cellars, unenclosed porches, or attics not used for human occupancy, or any floor space in accessory buildings or in the principal building intended and designed for the parking or motor vehicles in order to meet the parking requirements of this Ordinance, or any such floor space intended and designed for accessory heating and ventilating equipment. It shall include the horizontal area at each floor level devoted to stairwells and elevator shafts.

Bountiful City Land Use Code § 14-3-102(121).

(30) In connection with the Appeal, Appellant did not provide any calculation showing that the "no more than 40% requirement" was satisfied. The only calculation in the file was submitted in connection with the Application and erroneously included the garage in the total square footage for the primary dwelling structure.

(31) Based on the footprint of the floor plan which Appellant submitted, the approximate "total floor area square footage" of the home on the Property, as defined by Bountiful Code, is approximately 4,289 square feet. This total floor area square footage is comprised of 2,168 square

feet on the main level (excluding the garage and assuming no exclusion for heating equipment), and 2,121 square feet on the basement level (excluding the floor space intended for accessory heating and ventilating equipment).

(32) The floor area of the basement level then, which is the proposed ADU, is approximately 49% of the total floor area square footage of the entire structure.

(33) Even assuming that the “small bay window/cantilevered areas” that the City observed on the main level totaled 200 square feet (and Appellant submitted no evidence of the additional bay window/cantilevered areas upstairs), the ADU would still occupy approximately 47% of the total floor area.

(34) Appellant’s attempt to exclude additional areas of the basement from inclusion in the total floor area square footage analysis and his attempt to include the garage area in the total floor area of the dwelling are inconsistent with, and not permitted by, the applicable Bountiful ordinances. Specifically, Appellant’s decision to label areas within the basement as “not occupied” and/or “unfinished area,” so as to argue that the proposed ADU does not occupy more than 40% of the total floor area square footage of the structure, does not remove such areas from the square footage calculation.

(35) Similarly, Appellant’s attempt to include the garage in the total floor area square footage analysis is likewise not permitted by the applicable ordinance.

(36) In the Appeal, Appellant argues several points in an effort to attack the Denial. None of them have merit.

(37) First, no facts or ordinance suggests that Planning Director erred by having the Administrative Committee assist in the review of the Application. Similarly, no facts suggest that Planning Director or Administrative Committee Chair denied the Application “in secret.”

(38) Bountiful City Code provides in part that a “final decision” is made on applications such as a CUP when “a vote is taken on the merits of the proposal by the Administrative Committee, Planning Commission, or City Council, or when an administrative decision is issued in written form by the Planning Director or other City official.” *Bountiful City Land Use Code* § 14-1-113(A).

(39) By vote, the Administrative Committee conditionally approved the Application conditioned upon verification of the several criteria, including that the no more than 40% square footage requirement was not met. Appellant was provided the opportunity to participate in the process and provide information for the City to rely on in its investigation. Indeed, Appellant did participate, including submitting supplemental information to support his Application. I find no error in utilizing City staff to assist in fact gathering to verify compliance with the criteria of the ordinances or in the Planning Director or Administrative Committee Chair issuing a written Denial.

(40) Second, Appellant argues that the Denial is in error because Mr. Simper believes that the City failed to measure the proposed ADU. The argument has no merit. The City made two inspections of the Property and was provided with floor plans, including measurements, of the basement and the proposed ADU area. On inspection, City staff observed that, consistent with most ramblers, the main level is virtually identical in square footage and footprint to that of the basement level.

(41) Next, Appellant argues that the Planning Commission erroneously allowed a fence to be built between the Property and an adjacent property to the West.

(42) The Appellant's boundary dispute with a neighbor did not form a part of, and is irrelevant to, the Denial.

(43) Finally, without reference to any provision of either the state or federal constitutions, Appellant argues that the City's standards governing ADU's "may violate the constitutional rights of property owners." Without more than speculative argument, there is no basis to find that the Denial was in error on constitutional grounds.

(44) The Administrative Committee concluded that ADU CUP Application did not meet the requirement that the proposed ADU "[s]hall not occupy more than forty percent (40%) of the total floor area square footage of the primary dwelling structure."

(45) When the floor area square footage is properly calculated, the proposed ADU occupies more than 40% of the total area square footage of the home.


(46) The Administrative Committee did not err in denying the Application.

ORDER

After hearing and considering the Appellant's and the City's arguments, submissions, evidence and testimony in the above-captioned matter, and consistent with the above findings and conclusions, the Appeal is denied.

DATED this 4th day of February, 2020.

BOUNTIFUL CITY APPEAL AUTHORITY


Glenn R. Bronson