



**Board of Adjustment Meeting  
118 Arizona Street  
Bisbee, Arizona 85603**

**February 24, 2015, 6:00 pm**

**Agenda**

***THE ORDER OR DELETION OF ANY ITEM ON THIS AGENDA IS SUBJECT TO MODIFICATION AT THE MEETING.***

**CALL TO ORDER**

**Roll Call:**

**Rick Corley  
Keith Dennis  
Jeff Harris  
Peter Von Gundlach**

**City Staff**

**Ron Oertle, Mayor  
Jestin Johnson, City Manager  
Anne Carl, City Attorney  
Joel Ward, Building Inspector**

**CALL TO THE PUBLIC** – Any member of the public may speak about Board of Adjustment Issues, subject to reasonable time limitations.

**NEW BUSINESS**

**Item 1.** Application by Johnny McAlpin regarding a variance of Section 1.5.1 of the Zoning Code (“Nonconforming Use of Building or Land”); Improper application of the Zoning Code; Other factors (see 6 page attachment)

- A. Call of the Docket**
- B. Summarization of the issues and relevant data by the Planning Director or his designee.**
- C. Presentation by the Appellant**

- D. Comments by other persons in favor of the Appellant's position.**
- E. Comments by other persons opposed to the Appellant's position. The Planning Director or his designee may respond to the substance of this appeal at this time.**
- F. Rebuttal by the Appellant.**
- G. Closure of the comments from the public.**
- H. Discussion of the issues among the Board members.**
- I. Call for motion and decision by the Board.**

## **COMMISSIONER'S COMMENTS**

## **ADJOURNMENT**

Anyone needing special accommodations to attend this meeting should contact the City Clerk, Ashlee Coronado (520) 432-6012 at least twenty-four hours before the meeting.

Public documents referred to herein may be viewed during regular business hours at the City Clerk's Office at 118 Arizona St., Bisbee.

Pursuant to A.R.S. § 38-431.03(A)(3), the Council may vote to enter executive session at any point during this meeting for discussion or consultation for legal advice with its attorney(s).

ZONING CODE VARIANCE APPLICATION OR APPEAL FORM for THE CITY OF BISBEE

OCT 30 2014

To be considered by the Board of Adjustment, this form must be accompanied by:

CITY OF BISBEE  
FINANCE DEPARTMENT

1. Plans and description sufficient to indicate the nature of the project involved and the proposed use. Original records will not be returned.
2. A complete explanation of the reasons that the variance is required and the specific variance of the regulations that is being requested.
3. Evidence satisfactory to the Board of Adjustment of the intention of the applicant to proceed with actual construction work in accordance with the plans within six months after issuance of variance.
4. A non-refundable filing fee per City of Bisbee fee schedule.

From the time this application is filed until the time of the hearing, this application and all maps, plans and other accompanying data shall be available for public inspection during office hours at City Hall.

A variance is a request for an exception to the regulations governing the zoning district. Submittal of this application does not guarantee a variance will be granted. The Board of Adjustment may grant a variance only as authorized by Section 2.4 of the Zoning Code. A variance may be granted only if, because of special circumstances applicable to property, including its size, shape topography, location, or surroundings, the strict application of the Zoning Code will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district. Any variance granted is subject to such conditions as will assure that the adjustment authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which the property is located. Also, the Board may not grant a variance if the special circumstances applicable to the property are self-imposed by the property owner.

PART A – APPLICANT INFORMATION

Date of Submittal of Variance Request: 10/30/14

Applicant/Owner Name (print): Johnny McAlpin Phone: 520-481-4192 (cell); 520-432-3578 (home)

Mailing address: P.O. Box 520, Bisbee, AZ 85603 email: jsmcalpin@gmail.com

Street Address for VARIANCE: 25 Sowles Ave Parcel Number (if known): 103-62-201

Has any previous or separate variance been granted to applicant? (Circle one.) YES  NO  UNKNOWN

Has any similar variance been requested by applicant? YES  NO  UNKNOWN

If YES, to either question above, please provide details \_\_\_\_\_

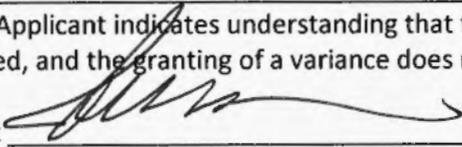
PART B – BRIEF BASIS OF VARIANCE REQUEST

Please briefly describe the basis of your request, but note that your attached documentation must completely explain the reasons that the variance is required and the specific variance of the regulations that is being requested.

Section 1.5.1 of the Zoning Code ("Nonconforming Use of Building or Land"); Improper application of the Zoning Code;

Other factors (see 6 page attachment)

By this signature, the Applicant indicates understanding that the application for a variance does not guarantee a variance will be granted, and the granting of a variance does not permit non-compliance with any other portion of the Code.

Signature of Applicant  Date: 10/30/14

**PART C – DECISIONS OF REVIEW (for internal use by Board of Adjustment Only)**

- Having fully considered the above application for variance, the majority finds that the Applicant has NOT shown that variance requirements have been met. Based on the foregoing, a VARIANCE IS NOT granted.
- Having fully considered the above application for variance, the majority finds that the Applicant has shown that variance requirements have been met. Based on the foregoing, a VARIANCE IS GRANTED, subject to the following conditions:

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Date of Decision: \_\_\_\_\_ Signature of Board of Adjustment Chair or Designee: \_\_\_\_\_

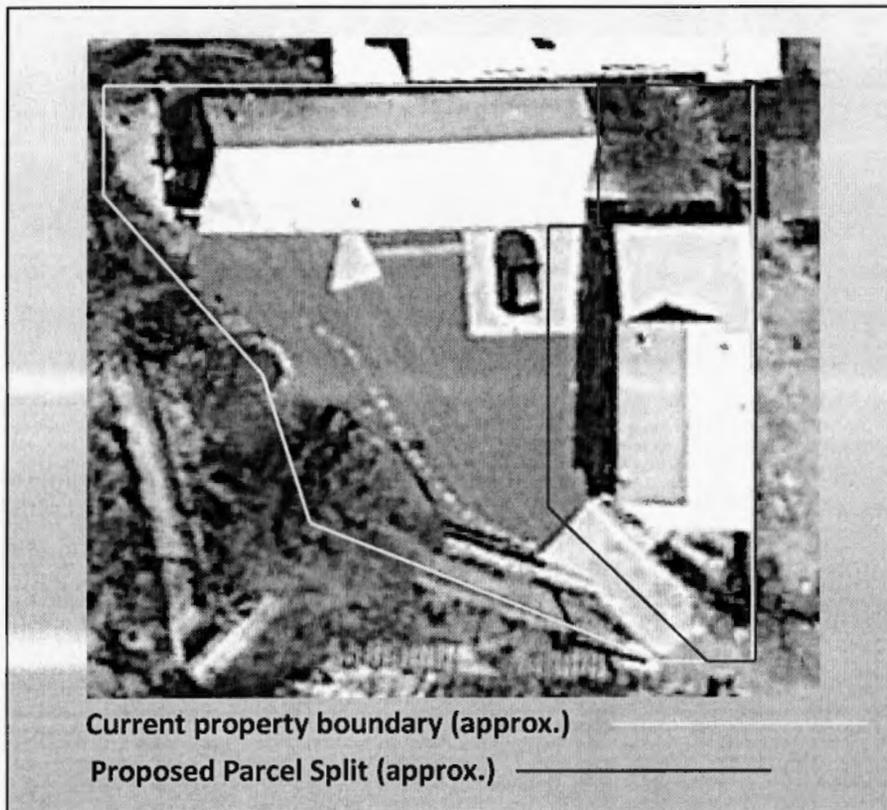
**Background.** Due to an impending job-related transfer, coupled with low demand for a two-house property, the owner is attempting to split a two-house parcel and sell the houses separately. The property owner requested approval from the City of Bisbee Building Inspector on September 30, 2014. On October 2, 2014 the Building Inspector cited the following reasons from the Zoning Code for disapproving the parcel split (with a brief description in parenthesis):

1. *Zoning Code 5.3.2 B1&2&3 (Minimum Set-Backs Between Buildings).*
2. *Zoning Code 5.3.2D1&2 (Division of Building Lots and Minimum Lot Size).*

On October 21, 2014, after the discovering the property owner would be seeking a zoning variance, the Building Inspector added the following additional reasons in disapproving the split:

3. *2012 International Residential Code Table R302.1(1) (1-hour fire resistance rating for roof overhangs for dwellings that are 5 feet from property line).*
4. *Zoning Code 8.1.2 (Parking).* \*The property owner is not seeking a variance from this requirement.

**Property Information.** The property is located at 25 Sowles Ave, in Old Bisbee, between the Oliver House and St. John's Episcopal Church. The property consists of two adobe homes, built circa 1890, which are approximately 850 square feet each. The two homes sit on a parcel, which is composed of all or parts of three individual lots, and measures approximately 5,000 square feet. Both houses are in good condition, have been continuously occupied, and were fully remodeled by a previous owner. **\*No building permits are in place, or planned, for this property.**



## **Zoning Codes and Variance Requests**

### **Bisbee Zoning Code Section 5.3.2 Special Provisions for the Historic District**

#### **B. Set Backs.**

1. *The minimum set-backs for a new single family residential structure or accessory building shall be not less than the following:*

a. *Front set back of not less than ten (10) feet.*

b. *Side set back of not less than five (5) feet.*

c. *Rear set back of not less than ten (10) feet. Accessory structures may be located within three (3) feet of the rear lot line if this will not adversely impact the adjacent property.*

2. *In those areas in which there are established front or rear set-backs for the existing developed properties within the same or adjacent blocks that are greater than or less than ten (10) feet, the Design Review Board may increase or decrease the front or rear set-back for new structures as necessary to maintain the uniform characteristics of that particular street frontage.*

3. *Renovations, repairs and additions to existing single family residential structures and accessory structures shall not reduce the existing set-backs to less than what is required for new residential structures or to less than what currently exists, whichever is the lesser distance, unless the Design Review Board makes a specific finding that this construction will be consistent with the uniform characteristics, if any, of the adjacent properties and that any such reduction will not adversely impact adjacent properties.*

#### **Variance Request for Zoning Codes 5.3.2 B1&2&3**

The property owner is seeking a variance to these sections of the zoning code based on the following reasons:

1. Section 5.3.2 B1&2 of the Zoning Code specifically addresses new construction as it continually reads “new residential structures” and “construction.” Since the owner is applying for a parcel split, and not a building permit, these sections of the Zoning Code should not apply.
2. Section 5.3.2 B3 of the Zoning Code applies to existing set-backs. The property owner is not attempting to change any existing set-backs between his or adjacent properties. Therefore, this section of the Zoning Code should not apply.
3. As with many other habitable, continuously occupied properties in Old Bisbee, section 1.5.1 of the Zoning Code (“*Nonconforming Use of Building or Land*”) should apply to this property. This section of the Zoning Code states, “*Nothing adopted into this Zoning Code shall affect the right to the continued use of any property for the purpose used at the time that any such ordinance or regulation takes effect, nor to the right to make any reasonable repairs or alterations in any buildings, improvements or property used for such pre-existing purpose.*” The purpose of section 1.5.1 was to acknowledge that the City is not trying to go back and apply current Zoning Code to 100 year old properties.

The property at 25 Sowles Ave meets the above stated criteria for non-conforming use. Given the fact that the City does not strictly apply the Zoning Code to other routine land transactions (e.g. sales or transfers), it should also not be applied to a parcel split of pre-existing non-conforming properties.

4. A property inspection by the homeowner's insurance underwriter determined no increased or unusual fire hazards, nor additional coverage requirements/provisions with regard to building materials OR set-backs between adjacent structures/out-buildings. Additionally, no hazard abatement measures for this property were noted (or recommended) to comply with underwriting requirements. Both of the homeowner's properties are constructed of adobe and have metal roofs. The closest structure to the homeowner's property is constructed of brick.

Bisbee Zoning Code Section Zoning Code 5.3.2

D. Division of Building Lots and Minimum Lot Size.

*1. Within the District, the legal descriptions, sizes and shapes of existing, adjacent lots may be adjusted, redescribed or corrected by sales or exchanges between the property owners without further approval provided that there is no net increase in the number of residential or commercial lots within the District.*

*2. The minimum lot size for any lawfully authorized and newly created building site, resulting from a split of another existing lot or parcel, within the District shall be not less than four thousand (4000) square feet.*

Variance Request to Zoning Codes 5.3.2 D1&2

The property owner is seeking a variance to these sections of the zoning code based on the following reasons:

1. The property at 25 Sowles Ave sits on three pre-existing lots, which have pre-existing legal rights as individual lots. Each lot is under the current 4,000 square foot minimum for "newly created building sites." Additionally, the proposed split is along the boundary of these pre-existing, individual lots. Given the fact that many houses in Old Bisbee sit on similarly small (or smaller) lots, this section of the Zoning Code should not be applied to the houses on 25 Sowles Ave.
2. The City has NOT applied section 5.3.2 D2 (Minimum Lot Size) to other parcel splits (including a two-house parcel split in 2013) in the Bisbee Historic District within the past 10 years. A cursory search at the Cochise County Tax Assessor's Office determined that there were numerous parcel splits, all of which resulted in new parcels under the minimum lot size of 4,000 square feet. **Copies of property records for four such parcel splits are included in Appendix A.** Given the fact that there were no variances for these or other parcel splits during this time period, indicates that the City either: a) did not apply this section of the Zoning Code to existing, non-conforming properties; or b) is

arbitrarily and capriciously applying it now.

3. This parcel split, which includes two historic homes, and small lots should be covered under section 1.5.1 of the Zoning Code ("*Nonconforming Use of Building or Land*") since it involves pre-existing properties, and lots, that do not conform to the current Zoning Code.

2012 International Residential Code Table R302.1(1)

*When an exterior wall of a Single Family Dwelling is located 5 feet from a property line, and the dwelling has 12 inch overhangs, the underside must be protected with a 1-Hour fire resistance rating per table R302.1(1) in the 2012 IRC.*

Variance Request to 2012 International Residential Code Table R302.1(1)

1. As with many other habitable, continuously occupied properties in Old Bisbee, section 1.5.1 of the Zoning Code ("*Nonconforming Use of Building or Land*") should apply. The purpose of section 1.5.1 was to acknowledge that the City is not trying to go back and apply current Zoning Code (to include 2012 International Residential Code standards) to historic, 100-year-old properties.
2. Given the fact that the City has not applied sections 2012 International Residential Code Standards to other to other routine land transactions (e.g. sales, transfers), it should also not be applied to a parcel split of pre-existing, non-conforming properties.
3. A property inspection by the homeowner's insurance underwriter determined no increased or unusual fire hazards, nor additional coverage requirements/provisions with regard to building materials or set-backs between adjacent structures/out-buildings. Additionally, no hazard abatement measures for this property were noted (or recommended) to comply with underwriting requirements. Both of the homeowner's properties are constructed of adobe and have metal roofs. The closest structure to the homeowner's property is constructed of brick.

Conclusions

1. The proposed parcel split encompasses two 100+ year old adobe homes on small, pre-existing lots, which are covered under section 1.5.1 of the Zoning Code ("*Nonconforming Use of Building or Land*").
2. Given a lack of variance paperwork, along with property records from the Tax Assessor's Office, it does not appear the City applied these sections of the Zoning Code to pre-existing, non-conforming properties during previous property parcel splits, sales, or transfers.
3. It appears that sections 5.3.2 B1&2&3 (Minimum Set-Backs Between Buildings) and 5.3.2D1&2 (Division of Building Lots and Minimum Lot Size) of the Zoning Code were

improperly applied to an existing, non-conforming property and were likely written to address new construction.

4. There are no benefits or advantages to the City disapproving this variance (e.g. hazard abatement, historical preservation, etc.); while the benefits to approving it include increased residency, population, and property tax revenues.

## Appendix A

**Recent Parcel Splits That Did Not Meet Section 5.3.2D2 of the Zoning Code (Minimum Lot Size)\*.** \*Note: This is only a sampling of parcel splits that took place over the past five years that did not meet minimum lot size, as outlined under section Section 5.3.2D2 of the Zoning Code. There were actually many more that were noted during research for this variance.

1. **APN 103-62-124A/B (31 Shearer Ave).** Parcel split in 2011 and a new house built. Both new parcels are about 2,500 square feet each.
2. **APN 103-62-107A/B (Temby Ave).** Parcel split in 2012. Both new parcels are about 1,000 square feet each.
3. **APN 103-63-192B/C (253 Brewery Ave).** Two-house parcel split in 2013. Both new parcels are under 3,000 square feet.
4. **APN 103-62-119A/B (43 Shearer Ave).** Multi-building parcel split in 2012. Newly created parcel 103-62-119A is under 2,500 square feet.

(Source: Cochise County Tax Assessor's Office; <http://www.findlotsize.com>).