



Portland City Auditor

Hearings Office

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DECISION OF THE HEARINGS OFFICER

I. GENERAL INFORMATION

File Number: LU 18-118937 CU (Hearings Office 4190011)

**Accessory Short-Term
Rental (ASTR) Operators:** Raymond M. Burse, Sr.
Raymond Burse, Jr.
2946 NE 9th Avenue
Portland, OR 97212

Property Owners: Raymond Burse, Sr.
Raymond M. Burse, Jr.
2946 NE 9th Avenue
Portland, OR 97212

Hearings Officer: Gregory J. Frank

Bureau of Development Services (BDS) Staff Representatives: Marguerite Feuersanger and
Justin Lindley

Site Address: 2946 NE 9th Avenue

Legal Description: BLOCK 101, LOT 15, IRVINGTON

Tax Account Number: R420422790

State ID Number: 1N1E26BD 05800

Quarter Section: 2731

Neighborhood: Irvington

Business District: Soul District Business Association

District Neighborhood Coalition: Northeast Coalition of Neighborhoods

Zoning: R5, Single Dwelling Residential 5,000 Zone

Land Use Review: Modified Type III, with a public hearing before the Hearings Officer. The decision of the Hearings Officer can be appealed to City Council. However, the Type III reconsideration procedure does not require a pre-application conference and does not require submittal of a fee or an application.

BDS Staff Recommendation to Hearings Officer: Revocation.

Public Hearing: The hearing was opened at 1:03 p.m. on May 15, 2019 in the third floor hearing room, 1900 SW 4th Avenue, Portland, Oregon, and was closed at 3:55 p.m. The record was held open until 4:00 p.m. on May 22, 2019 for new evidence; until 4:00 p.m. on May 29, 2019 for responsive evidence from anyone; and until 4:00 p.m. on June 5, 2019 for final rebuttal from the Burse's only - no new evidence. The record was closed at 4:01 p.m. on June 5, 2019. On June 5, 2019, Marguerite Feuersanger requested the Hearings Officer re-open the evidentiary record. The Hearings Officer denied that request as outlined in the Interim Order dated June 6, 2019.

Testified at the Hearing:

Marguerite Feuersanger
Justin Lindley
Raymond Burse
Raymond Burse Jr.
Barbara Nagle
Robert Dobrich
Jim Barta

II. ANALYSIS

Summary of Events/Steps Leading to this Case:

Some time prior to May, 30, 2018, Raymond Burse, Sr. ("Burse, Sr.") and Raymond Burse, Jr. ("Burse, Jr.") (collectively referred to as the "Operator") submitted an application to the Bureau of Development Services ("BDS") requesting approval of a Type B - Three Bedroom Accessory Short-Term Rental ("ASTR") facility to be located at 2946 NE 9th Avenue, Portland, Oregon (the "Subject Property"). BDS considered and eventually approved (with conditions) the Operator's application for a Type B - Three Bedroom ASTR at the Subject Property (the "Administrative Decision"). The Irvington Neighborhood Association ("ICA"), the Operator, and Subject Property neighbors appealed the Administrative Decision to a City of Portland Hearings Officer ("Hearings Officer Turner"). Hearings Officer Turner affirmed the Administrative Decision of approval but added and modified the Administrative Decision conditions of approval (Exhibit I.5). The decision of Hearings Officer Turner became "final and effective on July 27, 2018 (Exhibit J.32).

Based upon evidence in the record, the Operator has operated an ASTR business at the Subject Property. The "running" of the ASTR business at the Subject Property, following Hearings Officer Turner's approval, generated complaints from neighbors and the ICA. In response to the complaints, BDS mailed a *Notice of Violation* to the Operator (and others) on or about November 30, 2018 ("1st Notice") and a subsequent Notice of Violation to the Operator (and others) on or about December 7, 2018 (See I. Exhibits). A *Notice of Public Hearing Regarding the Reconsideration of a Land Use Approval for a Type B Accessory Short-Term Rental (ASTR) Use* was mailed to the Operator (and others) on or about April 15, 2019 (Exhibit J.1). A public hearing was held on May 15, 2019 to consider evidence and arguments related to the BDS reconsideration request. BDS, in a Staff Report (Exhibit J.6), requested that Hearings Officer Frank (the "Hearings Officer"), upon reconsideration, revoke the LU 18-118937 CU land use approval.

Overview of the Portland City Code "Reconsideration" Process:

The Portland Zoning Code, or Portland City Code (hereafter the "PCC"), in the Administration and Enforcement Chapter (PCC 33.700), includes a section titled Reconsideration of Land Use Approvals (PCC 33.700.040). This case involves a BDS request to reconsider the LU 18-118937 CU land use approval. PCC 33.700.040 is the controlling section of the PCC in this case.

PCC 33.700.040.A, the Purpose Section, provides an important perspective of why there is such a process called "reconsideration." PCC 33.700.040.A grants BDS the right to initiate a process to review a prior land use approval, modify it, or revoke it. The Hearings Officer finds the underlying purpose of the reconsideration process is to act as a supplemental enforcement tool.

PCC 33.700.040.B describes situations where the "reconsideration" process can be used. In summary, the City may use the "reconsideration" process if (1) there is a land use approval and (2) one or more of the land use approval conditions was/were violated. The "reconsideration" process can also be used if the use at an approved location has substantially changed its activities or the intensity of the uses has substantially increased.

If a prior land use approval is a situation where the reconsideration process is appropriate (per PCC 33.700.040.B), then PCC 33.700.040.C describes how the "reconsideration" process is initiated. PCC 33.700.040.C allows BDS to initiate a "reconsideration" of a land use approval if "there is substantial evidence that one of the situations described in Section B. above applies." Further, if "reconsideration" is appropriate, PCC 33.700.040.C requires BDS to wait at least 60 days after the first notice of violation is given to the "operator" to initiate the reconsideration process. It should be noted that "failure of the operator to receive the notice of violation does not invalidate any enforcement actions taken by the City" (PCC 33.700.030.B).

The "reconsideration" process/procedure is set forth in PCC 33.700.040.D. In summary, the process to be followed is a "Type III" procedure (but no application, pre-application, or fees involved). PCC 33.700.040.D requires the operator (and others) be mailed a notice at least 30

days prior to the public reconsideration hearing. The review body assigned to preside over the reconsideration hearing is the same review body that issued the prior decision (the decision that is subject to the reconsideration hearing).

The review body is authorized, by PCC 33.700.040.E, to take a variety of actions. PCC 33.700.040.E operates similarly to approval criteria in most land use cases. PCC 33.700.040.E requires the review body to make certain findings, and based upon those findings, the review body is given a number of options. Generally, the options will result in a decision by the review body to (1) allow the approved use to continue to operate with no changes to the original approval or, (2) modify conditions or add conditions of approval to the original approval or, (3) revoke the original approval.

PCC 33.700.040.E.1 outlines the actions that may be taken by the review body if the review body determines that the operator has not fulfilled one or more condition or that the operator has violated one or more condition of approval found in the original land use approval. Specifically, PCC 33.700.040.E.1.a says that the review body, after considering evidence placed in the case record, may determine that the development is "complying" with its conditions of approval. In that case, the review body will issue an order allowing the operator to continue to operate under the original approval.

PCC 33.700.040.E.1.b also deals with the situation where there has been an allegation that the operator has not complied or violated conditions of approval. This section applies where a review body determines that the operator has not "fully" complied: *"with the conditions of approval butthe violations are not substantial enough to warrant revocation, and that the use can comply with the original approval criteria if the conditions are met."*

If the review body finds that "the violations are not substantial enough to warrant revocation," then the review body is given the authority to modify the existing conditions of approval and/or add conditions of approval to ensure the operation is in compliance with the original approval criteria. PCC 33.700.040.E.1.b also gives a review body the opportunity to refer the case to the City Code Hearings Officer for enforcement proceedings.

PCC 33.700.040.E.1.c. also authorizes the review body to determine whether or not there have been "substantial violations" of conditions of approval or if the operator failed to implement conditions of approval that resulted in the original approval criteria not being met. If the review body finds "substantial violations," the land use approval may be revoked. If the review body finds there was a failure to implement conditions such that the original criteria are not being met, the land use approval may be revoked.

PCC 33.700.040.E.2 grants a review body similar authority as described for PCC 33.700.040.E.1 excepting that the review body in this instance is authorized to determine whether or not the operation actually occurring at a property is "consistent with what was approved" or whether

or not the use of the property is substantially different (use/intensity) as compared to what was approved.

Legal Application of the Reconsideration PCC sections to this Case.

BDS, in Exhibit J.6, alleged that the Operator of the ASTR at the Subject Property (1) violated conditions of approval, and (2) engaged in activities at Subject Property ASTR that were substantially different and/or were at an increased level of intensity as compared to what was approved. BDS requested the LU 18-118937 CU land use approval be revoked. BDS argued that both PCC 33.700.040.E.1.c and PCC 33.700.040.E.2.c are applicable to this case. BDS is requesting the Hearings Officer revoke the original land use approval.

The Hearings Officer finds that PCC 33.700.040.E.1 requires the Hearings Officer to consider whether or not the Subject Property ASTR Operator complied, partially complied, or substantially did not comply with conditions found in the original land use approval. Restated, PCC 33.700.040.E.1 requires the Hearings Officer to make the following determinations:

- Step 1:** Did the operator comply with the conditions of approval found in the original land use decision (LU 18-118937 CU); and
- Step 2:** If the Operator did not comply with one or more condition(s), determine the level of non-compliance.
 - Is/are there violations that can be considered "substantial?"
 - Is/are there violations that result in a failure to meet the original approval criteria?

Based upon the Hearings Officer's findings for Steps 1 and 2, the Hearings Officer may revoke the LU 18-118937 CU land use approval or may modify the approval (changing or adding conditions of approval).

The Hearings Officer finds that PCC 33.700.040.E.2 involves a somewhat different analysis than required for PCC 33.700.040.E.1 described above. PCC 33.700.040.E.2 requires the Hearings Officer to determine if the use of the Subject Property ASTR is consistent with the use approved in LU 18-118937 CU. To determine consistency, the Hearings Officer must determine if the use of the Subject Property is substantially different than what was approved. Also, the Hearings Officer must determine if the "intensity of the use has increased over what was approved." Restated, PCC 33.700.040.E.2 requires the Hearings Officer to make the following determinations:

- Step 1:** Is the *use* of the Subject Property following the land use approval
 - Different from what was approved and if the answer is yes, then is it substantially different?
 - At a greater intensity level than what was approved?

Step 2: Does the Operator's use of the Subject Property, following land use approval, comply with the original approval criteria?

Step 3: Can the Hearings Officer reasonably impose conditions to assure compliance with the approval and original approval criteria?

Based upon the Hearings Officer's findings for Steps 1, 2, and 3, the Hearings Officer may revoke the LU 18-118937 CU land use approval or may modify the approval (changing or adding conditions of approval).

Evidentiary Findings related to PCC 33.700.040.B (Situations when land use approvals may be reconsidered):

The Hearings Officer finds that the LU 18-118937 CU land use decision is a quasi-judicial land use approval. The Hearings Officer finds that the Operator admitted that at least one condition of approval imposed in the LU 18-118937 CU land use decision was violated (Exhibits J.35¹ and J.41²). PCC 33.700.040.B.1 allows the reconsideration process to be used if "one or more conditions of approval of the land use approval have not been implemented or have been violated." The Hearings Officer finds, based upon the evidence in the record, that one or more violations of conditions of approval imposed in LU 18-118937 CU occurred. The Hearings Officer finds that this case involves a situation when a land use approval may be reconsidered. The requirements of PCC 33.700.040.B are met.

Evidentiary Findings related to PCC 33.700.040.C (Initiating for reconsideration):

PCC 33.700.040.C authorizes BDS to initiate a reconsideration action if "there is substantial evidence that one of situations described in Subsection B applies..." As noted in the findings immediately above, the Hearings Officer found that PCC 33.700.040.B.1 did apply. The Hearings Officer found that one or more violations of the LU 18-118937 CU land use approval occurred at the Subject Property ASTR. The Hearings Officer finds that the Operator's admission of one or more violations of the conditions of approval constitutes substantial evidence. The Hearings Officer finds that that BDS appropriately, under PCC 33.700.040.C, initiated the reconsideration action in this case.

Evidentiary Findings related to PCC 33.700.040.D (Procedure for reconsideration):

PCC 33.700.040.D.2 requires that the review body for a reconsideration action be the same review body that made the original land use decision. Hearings Officer Turner, the LU 18-118937 CU decision maker, was acting in the capacity of a City of Portland Hearings Officer. The current case has been assigned to the City of Portland Hearings Office and Hearings

¹ Exhibit J.35, page 2: "Operators have admitted as to B.1. that in spite of house rule that no more than six people can be in a rental group at one time, its rental agent rented the property out on four occasions to more than 6 people, in the period from August 1 to the date of the Operator's February 7, 2019 letter response. (See Exhibit 1 to that letter response). It allowed the basement bedroom to be assigned and possibly used on 13 instances when the rules provided otherwise. This was a violation but was not consistently done..."

² Exhibit J.41, page 1: "Owners/Operators have acknowledged that violations occurred but never that they were substantial."

Officer Frank is acting on behalf of the City of Portland Hearings Office. The Hearings Officer finds that this reconsideration action was assigned to the correct review body.

PCC 33.700.040.D.3 sets out the notice requirements for a reconsideration action. This section requires the "operator" to be notified by mail "at least 30 days prior to the scheduled hearing." Evidence in the record shows that BDS mailed the Operator a *Notice of Violation* ("1st Notice") on November 30, 2018 and mailed a subsequent Notice of Violation ("2nd Notice") on December 7, 2018. A *Notice of Public Hearings Regarding the Reconsideration of a Land Use Approval for a Type B Accessory Short-Term Rental (ASTR) Use* was mailed to the Operator (and others) on or about April 15, 2019 (Exhibit J.1). The Hearings Officer finds, based upon the evidence in the record, that the PCC 33.700.040.D notice requirements were satisfied.

Preliminary Matter: Interpretation of "Substantial/Substantially" and "Substantial Evidence"

The interpretation of the terms "substantial/substantially" and the phrase "substantial evidence" are very important to making a decision in this case. The term "substantially" is used throughout PCC 33.700.040. The term "substantially" is important because proof of "substantial violations" is required before the Hearings Officer may order revocation of the land use approval (LU 18-118937 CU). Before revocation can be ordered, the Hearings Officer must find that either the Operator violated PCC 33.700.040.E.1 (by committing "substantial" violations) or the Operator violated PCC 33.700.040.E.2 (by conducting activities at the Subject Property ASTR that were "substantially" different from what was approved).

Burse, Sr., in Exhibit J.41 (page 3) stated the following:

"The term 'substantial' according to Webster's New Collegiate Dictionary and Black's Law Dictionary includes as part of the definition 'considerable in quantity, significantly large'. To measure size and/or impact the whole must be considered, not just a subset of the whole. In this case the entire time period or days available must be considered, not selected days for the purpose of a demonstration, for emphasis or to exaggerate the numbers."

The Hearings Officer notes that PCC 33.700.070.D states that "words used in the zoning code have their dictionary meanings unless they are listed in Chapter 33.910, Definitions. The Hearings Officer notes that the terms "substantial/substantially" are not defined in the PCC. Therefore, the Hearings Officer sets out relevant sections found in two widely recognized online dictionary definitions of "substantial":

Merriam-Webster Online Dictionary

<https://www.merriam-webster.com/dictionary/substantial>

Definition of Substantial:

- Consisting of or relating to substance
- Not imaginary or illusory; real, true

- Important, essential

Cambridge Online Dictionary

<https://dictionary.cambridge.org/us/dictionary/english/substantial>

Definition of Substantial:

- Large in size, value or importance
and,
- Relating to the main or most important things being considered

The Hearings Officer finds, based upon the dictionary definitions referenced by the Operator and Hearings Officer above, that the word "substantial" means "important," "large in importance," and "relating to the main or most important things being considered." The Hearings Officer finds that "substantial" and "substantially" are used as modifiers. For example, in PCC 33.700.040.E.1.c, the word "substantial" modifies the word "violations." In PCC 33.700.040.E.2, the word "substantially" modifies the word "different."

PCC 33.700.040.E.1.c grants the Hearings Officer authority to revoke a land use approval if the Hearings Officer finds there are "substantial violations of conditions" of approval of a land use decision. Using the dictionary definitions referenced above, PCC 33.700.040.E.1.c would be interpreted to mean "important violations," or "large in importance violations," or "violations that relate to the main or most important things being considered." Using Burse's above-quoted definition of "substantial," PCC 33.700.040.E.1.c can be interpreted to mean "considerable in quantity violations" or "significantly large violations."

The Hearings Officer disagrees with Burse's statement that "to measure size and/or impact the whole must be considered, not just a subset of the whole." The Hearings Officer finds that Burse's argument can be interpreted to mean that violations cannot individually be considered "substantial." The Hearings Officer finds that a plausible interpretation of the phrase "substantial violations" is one that looks at each individual violation to determine whether that violation is "important," "large in importance," and "significantly large." The Hearings Officer also finds that considering a larger time frame to judge the "importance" can be relevant. However, the Hearings Officer finds that an individual violation can, at least theoretically, be considered "substantial."

PCC 33.700.040.E.2.c grants the Hearings Officer authority to revoke a land use approval if the Hearings Officer finds the use or intensity of use approved is "substantially different" from that actually occurring at a property. Here the word "substantially" modifies the word "different." Using the dictionary definitions in the PCC 33.700.040.E.2.c section can be interpreted to mean "important differences," "large in importance differences," or "considerable in quantity differences."

The Hearings Officer, as stated above, disagrees with Burse's statement that "to measure size and/or impact the whole must be considered, not just a subset of the whole." The Hearings

Officer finds it is appropriate to consider individual differences as well as "the entire time period" differences.

Burse, in Exhibit J.41 (page 2), stated that PCC 33.700.040.E.1 and E.2 "place the focus on whether the violations are 'substantial', not whether there is 'substantial evidence' that the violations occurred." The Hearings Officer feels the need to respond to this statement. As noted above, the word "substantial" is very important in this case because it is terminology used in relevant sections of the PCC. However, the legal concept of "substantial evidence" is also important in this case.

It is blackletter law that a land use decision maker's decision must be supported by "substantial evidence." *Younger v. City of Portland*, 305 Or 346, 752 P2d 262 (1988). This legal concept and case were referenced by Dean Gisvold in Exhibit J.33. "Substantial evidence" is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor ad Ind.*, 298 Or 104, 690 P2nd 475 (1984).

Often, in land use cases, there is conflicting evidence in the record. For example, in some cases there is evidence supplied by "experts" that contains different "facts" or "conclusions." Another example commonly occurring in land use cases has a person or group saying "x" happened and another person saying that "x" did not happen. A land use decision maker, such as the Hearings Officer in this case, must consider all evidence submitted and then make a decision based upon the Hearings Officer's assessment as to the credibility of the person(s) offering the testimony and the credibility of the evidence being offered. The Oregon Land Use Board of Appeals ("LUBA"), the body that reviews local land use decisions in Oregon, has said that "where there is conflicting believable expert testimony, which is the case here, the choice between that believable expert testimony is for the hearings officer, and LUBA will not second guess that choice." *Tonquin Holdings, LLC v. Clackamas Cty*, 64 Or LUBA 68 (2011).

PCC 33.700.040.E.1 (violations of conditions of approval): As noted above, the Hearings Officer finds PCC 33.700.040.E.1 requires the undertaking of two steps:

- Step 1: Did the operator comply with the conditions of approval in the original land use decision (LU 18-118937 CU); and
- Step 2: If the Operator did not comply with one or more condition(s) then it is necessary to determine the level of non-compliance.
 - Is/are there violations that can be considered "substantial?"
 - Is/are there violations that result in a failure to meet the original approval criteria?

Step 1. The Hearings Officer found (see findings for PCC 33.700.040.B), that at least one violation of an approval condition of the LU 18-118937 CU land use approval occurred at the Subject Property ASTR during a period of time relevant to this case. The findings in PCC 33.700.040.B relied upon admissions made in Exhibits J.35 and J.41. One of the admitted

violations related to condition of approval B.1 (greater than six guests during a single rental and use of the basement). Burse, Sr. testified at the Hearing that the Operator's rental company "did not follow" the six-person maximum rule. Operator did not dispute that one or more violations of condition of approval B.3 (parking of guest vehicles not allowed within 10 feet of the front property line) had occurred. Operator argued that condition B.3 is unfair and also that it was regularly violated by neighbors.

Burse, Sr. and Burse, Jr. both testified at the Hearing that condition of approval B.7 (guests required to enter front door) had been violated because the historic status of the Subject Property restricted the Operator's ability to modify the front entrance (adding lockbox or some other access device). Burse, Sr. and Burse, Jr. both testified at the Hearing that for some period of time following receipt of the land use approval (LU 18-118937 CU), that the published house rules were not in conformance with condition of approval B.8. Burse, Jr. testified that the property manager was given instructions to include the information required to be included in the house rules but for a period of time the "web" available listing for the Subject Property ASTR did not include the required information.

Burse, Sr. and Burse, Jr. testified that they attempted to comply with condition B.9 (house rules). Burse, Sr. and Burse, Jr. testified and provided documentation that showed their attempts to have their management company publish and distribute house rules reflecting the land use approval conditions. Burse, Sr. and Burse, Jr. admitted that for a time the house rules that were available to guests were not in strict compliance with the land use conditions of approval. Burse, Sr. acknowledge that for a short time the web advertisements did not include the three bedroom and six-person limit imposed by condition of approval B.10 (advertisements).

In summary, the Hearings Officer finds the Operator either admitted to, or did not dispute, that conditions of approval B.1, B.3, B.7, B.8, B.9, and B.10 had been violated one or more times after the Subject Property ASTR received land use approval (LU 18-118937 CU).

BDS asserted, in Exhibit J.6, that in addition to those violations admitted (or not disputed by Operator), the Operator violated conditions of approval B.2 (Quiet Hours – Use of Driveway/Front Walkway) and B.5 (Smoking). Neighbors claimed that the Operator had also violated conditions of approval B.9 (House Rules), B.10 (Advertisements), B.13 (Notification of ICA and others), and B.14 (Notification of residents whenever resident was away for more than three consecutive days).

BDS created a table displaying information related to alleged violations of condition B.2 (Quiet Hours – Use of Driveway/Front Walkway). The Hearings Officer also reviewed Exhibits J.3b, J.3c, J.3d, J.4, J.29, J.30b, J.30c, and J.30d. References to violations of condition B.2 occurring at the Subject ASTR are contained in those exhibits.

Burse, Sr. and Burse, Jr. offered no evidence related to most of the alleged violations set forth in the BDS Table (Exhibit J.6). Burse, Jr. did state that on occasion he, his family, and/or friends have socialized at the Subject ASTR and that they have used the deck after the start of quiet hours and may have smoked outside of the residence. Burse, Sr. and Burse, Jr. suggest that many, if not of all of, the Citizen Complaint Log entries are from one person who may have unclear motives.

The Hearings Officer finds the testimony and evidence presented by BDS Staff, the neighboring property owner, and others related to violations of condition B.2 is generally credible. The Hearings Officer finds that even if some of the alleged violations of condition B.2 did not occur (i.e. Burse, Jr., family and/or friends was/were on the rear porch/deck and/or Burse, Jr., family and/or friends used the driveway in ways not permitted by condition B.2), most of the violations alleged by BDS staff and neighbors did occur.

The Hearings Officer finds evidence related to alleged violations of condition B.5, offered by BDS Staff and the neighboring property owner, is generally credible. The Hearings Officer finds that it is possible that Burse, Jr., his family and/or friends were observed smoking outside the Subject Property ASTR building. The Hearings Officer finds that the smoking restrictions apply only to ASTR guests. However, the Hearings Officer finds that most of the alleged violations related to condition B.5 involved ASTR guests or guest invitees.

ICA and a neighbor alleged the Operator violated land use condition of approval B.13 (Notification of ASTR contact information). The Hearings Officer finds, based upon Exhibit J.34 (letter from ICA President), that "ICA has not received any notice from the operator."

ICA and a neighbor also alleged that the Operator violated land use condition of approval B.14 (notify residents whenever resident away for more than three consecutive days). Burse, Sr and Burse, Jr. argued that this condition of approval is unfair, an invasion of privacy, and possibly a violation of the constitution. No evidence was submitted by the Operator related to the violation of condition B.14. ICA (Exhibits J.5 and J.34) and a neighbor (Exhibit J.5) asserted that the resident was regularly away from the Subject Property ASTR for more than three consecutive days and notification was not provided as required by condition B.14. A neighbor provided extensive documentation of the "comings and goings" of the "resident" (i.e. Exhibits J.3, J.28, J.30, and J.37). Burse, Jr. stated that he resides at the Subject Property and does occasionally travel. Burse, Jr. did not deny being away from the Subject Property, on occasion, for more than three consecutive days. Burse, Jr. did not provide any evidence that he provided the condition B.14 notification when he was away from the Subject Property for more than three consecutive days.

In summary, the Hearings Officer finds there is credible evidence in the record that the Operator violated LU 18-118937 CU conditions B.1, B.2, B.3, B.5, B.7, B.8, B.9, B.10, B.13, and B.14. The answer to Step 1 is "yes" there are violations of the land use approval conditions of approval.

Step 2: If the Operator did not comply with one or more condition(s) then it is necessary to determine the level of non-compliance.

- Is/are there violations that can be considered "substantial?"
- Is/are there violations that result in a failure to meet the original approval criteria?

The Hearings Officer, for the purposes of making these findings, will utilize the definition of "substantial" described above to determine if one or more of the violations of land use approval conditions B.1, B.2, B.3, B.5, B.7, B.8, B.9, B.10, B.13, and B.14 can be legally characterized as "substantial." The Hearings Officer will review each land use condition of approval individually and also consider the alleged violations together (cumulatively).

The Hearings Officer takes note that Hearings Officer Turner imposed land use condition of approval B.16.³ The Hearings Officer finds this condition is not typical for ASTR conditional use approvals. Despite condition of approval B.16 being atypical for conditional use land use approvals, it is a condition that should be considered in this case.

The Hearings Officer also takes note that Burse, Sr and Burse, Jr. argued that one or more of the LU 18-118937 conditional use approval are unfair or in some other way objectionable. This argument is not persuasive. Burse, Sr. and Burse, Jr., in the LU 18-118937 CU decision by Hearings Officer Turner, were notified of their right to appeal/contest the decision. There is no evidence in the record that any appeal of Hearings Officer Turner's decision was filed by Burse, Sr., Burse, Jr., or any other party with standing. The Hearings Officer finds that any attack, in this proceeding, against the validity of any condition contained in Hearings Officer Turner's LU 18-118937 CU decision is not timely and shall be considered an unlawful collateral attack. The Hearings Officer finds that Hearings Officer Turner's LU 18-118937 CU decision is final. The Hearings Officer considers all conditions contained in Hearings Officer Turner's LU 18-118937 CU decision be lawful and enforceable by the City of Portland.

The Hearings Officer takes note that PCC 33.700.040.E.1.c requires that any decision regarding "substantial" violations be made by taking into consideration the "original criteria for the use." The "original criteria for the use" are found in PCC 33.207.050.A.2. PCC 33.207.050.A.2 requires all Type B accessory short-term proposals undertake conditional use review. The relevant original approval criteria for an ASTR conditional use review include those found in PCC 33.815.105. Particularly relevant to this case are approval criteria requiring the analysis of the "intensity and scale of the proposed use" and "livability."

"Intensity and scale," in this case, relates to condition of approval B.1 (number of persons allowed to be occupied) and B.10 (advertisements limiting number of persons and number of rooms to be occupied). "Livability," in this case, relates to conditions of approval B.2, B.3, B.4,

³ LU 18-118937 CU Condition of Approval B.16: "If City staff obtains evidence that one or more of the situations described in 33.700.040.B exist for this proposal or site, the Bureau of Development Services may initiate a *Reconsideration of this Land Use Approval* per 33.700.040. Given the site's history of violations and non-compliance, any but the most minor violations should be grounds for revocation of this approval."

B.5, B.7, B.8, B.9, B.13, B.14, B.15, and B.16. These conditional use approval criteria make it clear that impacts created by a proposed ASTR are investigated, analyzed, and considered in making a decision to approve/deny the ASTR application. These approval criteria are important for a review body considering an ASTR application in determining what conditions of approval are required.

Condition B.1:

Condition B.1 relates to the maximum number of guests per night and the maximum number of rooms that may be occupied per night. The maximum number of guests and rooms for the Subject Property ASTR are six and three respectively. In addition, condition B.1 prohibits guest use of the resident's bedroom in the basement. The Hearings Officer finds that the Operator (Exhibit J.35) admitted to violations of condition B.1 (see footnote 1). In summary, the Operator admitted that on four occasions, greater than six guests occupied the Subject Property ASTR during a single overnight rental. The Operator also admitted that on "possibly 13 instances," the basement bedroom was occupied by guests during a Subject Property ASTR stay. BDS alleged (Exhibit J.6) that the Operator violated condition B.1 a total of 14 times between August 24, 2018 and March 2019. One instance, based upon the Operator's Guest Log, indicated a total of 10 guests occupied the Subject Property ASTR during a single stay (per the Guest Log the Subject Property was "reserved" for 11 persons).

The purpose of limiting the number of guests and number of rooms to be rented at an ASTR is to satisfy the requirements of PCC 33.815.105.A. The underlying basis for PCC 33.815.105 is set forth in PCC 33.815.010 (the Purpose Statement – not an approval criterion) which states, in part, that: *"a review of these uses [conditional uses] is necessary due to the potential individual or cumulative impacts that they may have on the surrounding area or neighborhood."*

The Hearings Officer finds that limiting the use (number of nightly guests and occupied rooms) of an ASTR facility that is located in a residentially zoned area helps assure that the negative neighborhood impacts created by the ASTR are minimized. The Hearings Officer finds guest and room limits are important factors in assuring that the relevant approval criteria in the original land use approval are being met. The Hearings Officer finds that one violation of a guest/room limit condition is significant. The Hearings Officer finds that 13 or 14 guest/room limit violations greatly exceeds the PCC 33.700.040.E.1.c "substantial violation of conditions" standard.

Condition B.2:

Condition B.2 requires the Operator of the Subject Property ASTR to adhere to stated quiet hours on decks, porches and other outside areas. Condition B.2 also requires the Operator of the Subject Property ASTR assure that guest access is via the front door. The Operator did not directly contest evidence offered by BDS and neighbors related to this approval condition. Burse, Jr. did testify that he believed that some of the alleged violations of condition B.2 did not involve ASTR guests but rather Burse, Jr., his relatives, and/or friends. Burse, Jr. stated he,

family, and/or friends did enter the property from a side entrance (front entry required for guests) and did use the outside porches (decks) and yard beyond hours allowed for guests. Burse, Sr. and Burse, Jr. accused neighbors of unreasonably "spying" on the Burse family and ASTR guests.

BDS, in Exhibit J.6, listed 22 instances of alleged violations of condition B.2. A neighbor submitted a chart/table with additional alleged violations occurring after the public hearing in this case (Exhibit J.29). Neighbors submitted extensive documentation of the Operator's violation of condition B.2.

The Hearings Officer takes note of two specific allegations of the violations of condition B.2. Based upon the Table included in J.6, the entry for August 25, 2018 is identified as arising from a Citizen Complaint Log. This entry states: *"loud party on back deck Photo 3 guests arrive after 10 pm. Noisy drop off of 2 guys at 2:30 AM wakes us. Another group dropped off at 3:30 AM. At 4:30 AM 3 guys on back deck smoking and drinking."*

Another entry from the Exhibit J.6 table is for September 23, 2018. This entry states: *"All day party and BBQ starting at 10am and extending into the night and to the next morning of the 23rd – Photo at 10 pm of the party on the side deck. Another photo at 12:34 am of the party on the side deck."*

The Hearings Officer's review of the BDS Table in Exhibit J.6 and Citizen Complaint Logs (i.e. Exhibits J.3d, J.30b, J.30d, and J.38b) indicated that many of the condition B.2 violations relate to entry into the Subject Property ASTR by a side door and not the required front door. However, a large number of the BDS Table and Citizen Complaint log entries relate to use of the Subject Property outside spaces. These entries often refer to loud noise, smoking, and partying.

The Hearings Officer finds condition B.2 was included in the LU 18-0118937 CU approval because of potential impacts of the ASTR upon neighboring properties. The PCC 33.815.105.A approval criteria require taking into consideration such potential impacts as the intensity and scale of a proposed ASTR use. The PCC 33.815.105.C approval criteria require consideration of noise, glare from light, late-night operations, and privacy issues. It is clear to the Hearings Officer that condition B.2 was included in the LU 18-118937 CU approval because of the decision maker's concerns about the impacts an ASTR operation could make upon neighboring properties.

The Hearings Officer finds the imposition of quiet hours and placing restrictions on the use of the entry and driveway are important factors in assuring that the relevant approval criteria in the original land use approval would be met. The Hearings Officer finds that even one violation of the condition B.2 quiet hour restrictions can be considered significant. The Hearings Officer finds that even if Burse, Jr., his family, and/or friends were involved in some of the alleged violations of condition B.2, it not reasonable to conclude that all of the

violations related to Burse, Jr.'s use. Therefore, the Hearings Officer finds, based upon the record, that most of the violations listed in the BDS Table (Exhibit J.6) were not use by Burse, Jr. The Hearings Officer finds that virtually all of the alleged violations of condition B.2 that were listed in Exhibit J.6 involved ASTR guests. The Hearings Officer finds the "party" related violations of condition B.2, quoted above, did occur. The Hearings Officer finds that the majority of the alleged violations of condition B.2 meet the PCC 33.700.040.E1.c "substantial violations" standard.

Condition B.3:

Condition B.3 relates to driveway parking. Specifically, condition B.3 restricts the number of motor vehicles that may be parked on the driveway to two vehicles. Condition B.3 further restricts Subject Property ASTR parking as follows: "Parking is not allowed within 10 feet of the front property line." The Operators did not dispute that Subject Property ASTR guests did, on occasion, park within 10 feet of the front property line. The Operator's primary arguments related to condition B.3 was that it was unfair and that other property owners in the neighborhood parked their vehicles within 10 feet of their property lines.

The Hearings Officer previously discussed the Operator's "unfairness" argument. The Hearings Officer found that Hearings Officer Turner's decision was subject to being appealed. There is no evidence in the record to indicate the Operators, or any other party with standing, appealed the LU 18-118937 CU Hearings Officer Turner decision. As noted above, the Hearings Officer found the conditions as set forth in Hearings Officer Turner's land use approval decision are lawful and final.

The Hearings Officer finds the Operator's argument that other neighbors park their vehicles on their driveways within 10 feet of their property line lacks any merit. The Operator is subject to the land use approval in LU 18-118936 CU. Neighboring property owners are not subject to the land use approval conditions set forth in LU 18-118937 CU. The Operator's property must follow the approval conditions set forth in LU 18-118937 CU because the Operator filed an application to operate a Type B ASTR on the Subject Property; the neighboring property owners made no such application. The Hearings Officer is not aware of any citywide law requiring that vehicles cannot be parked within 10 feet of a property line.

BDS Staff, in Exhibit J.6, alleged seven violations of condition B.3. A neighbor asserted that an additional violation of condition B.3 occurred on May 10, 2019 (Exhibit J.38b). The Hearings Officer finds condition B.3 was included in the LU 18-0118937 CU approval because of potential impacts upon neighboring properties. PCC 33.815.105.A approval criteria require taking into consideration such potential impacts as the intensity and scale of a proposed ASTR use. The PCC 33.815.105.C approval criteria require consideration of noise and privacy issues. It is clear to the Hearings Officer that condition B.3 was included in the LU 18-118937 CU approval because of the decision maker's (Hearings Officer Turner) concerns about the impacts driveway parking at the ASTR could have upon neighboring properties.

The Hearings Officer finds a single violation of condition B.3 is likely not important enough or significantly large enough to be considered "substantial" under PCC 33.700.040.E.1.c. However, the Hearings Officer finds that repetitive violations of condition B.3 could, as suggested by Burse, Sr. (Exhibit J.41), be "considered in quantity" under the PCC 33.700.040.E.1.c "substantial" threshold test. In this instance, eight condition B.3 violations were alleged and no evidence is in the record to dispute that evidence. The Hearings Officer finds repeated violations of condition B.3 significantly impact neighboring properties by increasing noise, glare from lights, and privacy. The Hearings Officer finds the cumulative impacts of repeated violations of condition B.3 are adequate to meet the "substantial violations" test under PCC 33.700.040.E.1.c.

Condition B.5:

Condition B.5 prohibits smoking "on the Property, including indoor and outdoor spaces." Burse, Jr. testified that he, family, and/or friends did smoke on the Subject Property. Burse, Jr. argued that condition B.5 does not apply to non-guests at the Subject Property. There is no persuasive evidence in the record indicating that *all* of the alleged B.5 violations involved him, his family, and/or friends. BDS Staff provided evidence of 14 alleged violations of condition B.5. An additional alleged violation was included in Exhibit J.29.

The Hearings Officer finds the imposition of smoking restrictions at the Subject Property is important to assure that the relevant approval criteria in the original land use approval are being met. The Hearings Officer finds the original PCC 33.815.105.A and C approval criteria focus on minimizing potential impacts created by the operation of an ASTR. Minimizing odor impacts upon neighboring properties is one of the PCC 33.815.105.C impacts that must be minimized.

The Hearings Officer finds that it is reasonable to conclude that Burse, Jr., his family, and/or friends were involved in one or more of the alleged condition B.5 violations. However, the Hearings Officer also finds it is reasonable to conclude, based upon the evidence in the record, that most of the alleged violations of condition B.5 involved Subject Property ASTR guests or invitees of the guests.

The Hearings Officer finds a single violation of condition B.5 is likely not important enough or significantly large enough to be considered "substantial" under PCC 33.700.040.E.1.c. However, the Hearings Officer finds that repetitive violations of condition B.5 could be "substantial" under the definition provided by Burse, Sr. ("considerable in quantity") (Exhibit J.41). In this instance, 15 condition B.3 violations were alleged. The Hearings Officer finds that of those 15 violations, it is reasonable to estimate five of the alleged violations involved Burse, Jr., his family, and/or friends and the balance of 10 represent violations by Subject Property ASTR guests or invitees of the guests. The Hearings Officer finds that 10 violations of condition B.5 does reach the PCC 33.700.040.E.1.c threshold and therefore are considered "substantial violations."

Condition B.7:

Condition B.7 requires Subject Property ASTR guests to access the residence via the front door. Condition B.7 expressly prohibits guest entry from any door "between the driveway and the rear yard." Burse, Sr. and Burse, Jr. testified that it was their intent and desire that Subject Property ASTR guests enter the front door. Burse, Sr. and Burse, Jr. testified that their intent was frustrated because of "historic designation" restrictions placed on the Subject Property residential building. Burse, Sr. and Burse, Jr. did not dispute that the initial entry point for virtually all Subject Property ASTR guests was a side door and not the front door.

The Hearings Officer finds that condition B.7 was imposed because a neighbor expressed noise and privacy concerns related to the side-entry. The neighbor testified that her residence is adjacent to the Subject Property ASTR driveway and that guests rolling/dragging baggage on the hard driveway surface creates serious noise issues. In addition, the next-door neighbor stated that people walking on the driveway to the side entry creates much more noise than if they would enter the front door.

BDS Staff, in Exhibit J.6, alleged violations of condition B.7. The Operator offered no persuasive evidence that condition B.7 had not been violated on numerous occasions. The Hearings Officer finds, based upon the evidence in the record, that the Operator violated condition B.7 32 times. The Hearings Officer finds the large number of violations of condition B.7 meets the Burse, Sr. definition of "substantial" (Exhibit H.41) ("considerable in quantity"). The Hearings Officer finds the Operator's violations of condition B.7 meet the PCC 33.700.040.E.1.c threshold of being "substantial violations of conditions."

Condition B.8:

Condition B.8 requires the Operator to have House Rules that include conditions set forth in the decision. Burse, Sr. and Burse, Jr. stated that they employed a property/ASTR management company and that they instructed the management company to publish House Rules consistent with the LU 18-0118937 CU land use decision. Burse, Sr. and Burse, Jr. testified that the management company did not, in a timely manner, follow their House Rules instructions. Burse, Sr., and Burse, Jr. stated that they terminated the contract with the management company. The Hearings Officer finds that the Operator is responsible for complying with all LU 18-118937 CU conditions of approval. The Hearings Officer finds the "management company didn't follow our instructions" to be a hollow argument. The Hearings Officer finds the Operator cannot use the management company's actions, or inactions, as an excuse for not complying with the conditions of approval in LU 18-118937 CU.

The Hearings Officer, based upon the evidence in the record, finds that for some indeterminate period of time, the Operator did not take the necessary actions to satisfy condition B.8.

The Hearings Officer finds that published House Rules are critical to communicate the required behavioral expectations to potential and actual Subject Property ASTR guests. Failing to publish House Rules allows guests occupying the Subject Property ASTR to

establish their own rules of behavior. Allowing guests to establish their own rules of behavior at the Subject Property ASTR is likely to lead to behavior that conflicts with the conditions of approval found in LU 18-118937 CU. The Hearings Officer finds that guest behavior not conforming to the conditions of approval can be anticipated to cause negative impacts upon the neighborhood. The Hearings Officer finds the Operator's failure to timely draft, create, publish, and disseminate House Rules that are consistent with the approval conditions in LU 18-118937 CU constitutes a "substantial" violation under PCC 33.700.040.E.1.c.

Condition B.9:

The Hearings Officer incorporates the findings for condition B.8 above as additional findings for condition B.9. The Hearings Officer finds that since, for some period of time, House Rules were not modified to reflect the conditions of approval for LU 18-118937 CU, the Operator (for some period of time) did not comply with condition B.9 requirements. The Hearings Officer finds the Operator's failure to timely draft, create, publish, provide guests and display at least one copy of the House Rules at the Subject Property ASTR is a "substantial" violation under PCC 33.700.040.E.1.c.

Condition B.10:

Condition B.10 requires the Operator to include (display) in all advertisements that the Subject Property ASTR has an occupancy limit of six people and that no more than three bedrooms may be occupied during an ASTR overnight stay. The operator admitted that the occupancy and room limits had been violated at the Subject Property. The operator also testified that problems with the management company resulted in a short period of time where advertisements included a fourth bedroom (the basement bedroom). The Hearings Officer finds, based upon the evidence in the record, that at least for some limited period of time, condition B.10 was violated.

The Hearings Officer finds it reasonable and logical to connect the failure to properly advertise the occupancy and room limits to instances where the Subject Property was rented to too many people (more than six) and too many rooms (including the basement). The Hearings Officer has found (findings for condition B.1) that renting to more than the number of permitted guests has negative impacts upon the neighborhood.

The Hearings Officer finds that the decision in LU 18-118937 CU specifically addressed the impacts created by renting to more than six persons at the Subject Property ASTR. The Hearings Officer finds that Hearings Officer Turner made specific findings that limited the number of guests to six. The Hearings Officer finds that Hearings Officer Turner would have denied an application that requested an occupancy limit of more than six persons and more than three bedrooms because to do so would have failed to satisfy the PCC 33.815.105.A and C approval criteria. The Hearings Officer finds that the condition limiting the number of guests to six and the number of occupied rooms to three is "important" and "relate[s] to the main or most important things being considered." The Hearings Officer finds that every

advertisement of the Subject Property ASTR that did not include the condition B.10 occupancy/room limitation is a "substantial violation" under PCC 33.700.040.E.1.c.

Condition B.13:

Condition B.13 requires the Operator to notify the ICA and identified neighboring properties of certain information. Condition B.13 requires the Operator to maintain paper copies of the required notifications. There is no evidence in the record showing that the Operator met its condition B.13 obligations.

This condition is typical of conditions included in ASTR land use decisions. The purpose of this type of condition is to make sure that neighbors have current Operator related contact information. The Operator contact information provides a means for neighbors to contact the Operator, or a representative of the Operator, to ask questions, raise concerns, and submit complaints. A common reason that a neighbor may wish to contact the Operator or Operator representative is if nuisance type behavior is occurring at an ASTR. The contact information gives the neighbor someone to call and expect some response.

The Hearings Officer finds that a violation of condition B.13 is significant and important. Without current contact information, the neighborhood association and/or neighbors have no accessible person/entity to raise concerns about an ASTR. The Hearings Officer finds violation of condition B.13 is a "substantial violation" under PCC 33.70.040.E.1.c.

Condition B.14:

Condition B.14 was added by Hearings Officer Turner to the BDS proposed conditions of approval for the Subject Property ASTR application. Condition B.14 states: *"The ASTR operator shall notify the Association and residents of properties adjacent to and across the street from the site whenever the resident will be away from the site for more than three consecutive days."*

The language of this condition is rather atypical for ASTR related land use decisions. Burse, Sr. and Burse, Jr. argued that this condition was an invasion of their personal privacy and may be "unconstitutional." The Hearings Officer cannot address the "constitutional" argument as Burse, Sr. and Burse, Jr. failed to set forth, with adequate specificity, the particular "constitutional" issues that may have been violated. The Hearings Officer also cannot address the "privacy" issue as Burse, Sr. and Burse, Jr. did not identify what "privacy law" they were contending was being violated by the language in condition B.14. Finally, as noted in the findings above, Burse, Sr. and Burse, Jr. had the right to appeal Hearings Officer Turner's decision, but they did not. The LU 18-118937 land use decision is final and the Hearings Officer considers the "privacy" and "constitutional" claims, made at this time, to be inappropriate and collateral to the case at hand.

There is no evidence in the record that Burse, Sr., Burse, Jr., or the Operator met the requirements of condition B.14. The Hearings Officer finds that there is no persuasive

evidence in the record to connect condition B.14 to a relevant approval criterion. The Hearings Officer finds that the notice requirements of B.13 are "important" but the notice requirements of B.14 are not "important" in the context of the PCC 33.700.040.E.1.c "substantial violation" test. The Hearings Officer finds the Operator's violation of condition B.14 is not a "substantial violation" under PCC 33.700.040.E.1.c.

PCC 33.700.040 E.2 requires the Hearings Officer to make the following determinations:

- Step 1: Is the use of the Subject Property, following the land use approval
- Different from what was approved and if the answer is yes, then is it substantially different?
 - At a greater intensity level than what was approved?
- Step 2: Does the Operator's use of the Subject Property, following land use approval, comply with the original approval criteria?
- Step 3: Can the Hearings Officer reasonably impose conditions to assure compliance with the approval and original approval criteria?

Step 1: Is the use of the Subject Property, following land use approval

- Different from what was approved and if the answer is yes, then is it substantially different?
- At a greater intensity level than was approved?

BDS, in Exhibit J.6, argued that the Operator's actual use of the Subject Property was at a higher or greater intensity than that approved in the LU 18-118937 CU decision. BDS Staff cited the Operator's violations of conditions B.1 (limit on number of guests and limit on number of rooms) and B.2 (quiet hour provisions) as examples of how the Operator's use of the Subject Property ASTR was at a higher or greater intensity level as compared to what the LU 18-118937 CU approval allowed.

The Operator provided the following comments regarding the BDS Staff "increased intensity" argument:

"...there has been no increase in intensity of activities nor any substantial noncompliance. An increase in intensity would assume an increase in rentals beyond what had taken place prior to the approval. Attached is a chart (Attachment 5) which shows that for comparable periods to which BDS spoke during the hearing the number of rental nights is down 14% for the comparable period. Similarly the rental revenue is down 12%, further demonstrating that activity on the property is down. Thus indicating no increased intensity in the use or difference in the use. As provided in Zoning Code Section 33.700.040 B.2, in no instance has BDS and the complaining neighbors provided any substantial evidence by, 'Examples of increase in intensity'...such as '...an increase in the number of members, students,

employees, visitors, or vehicle trips per event, per year, or per other comparable period of time; an increase in the hours of operation; or an increase in the number of events per year...’ There has been no substantial increase in intensity. No qualitative data has been provided to show this other than what Operators’ Attachment 5 shows.

The second prong of the BDS argument is that either the activities of the use or the use itself are substantially different. The use permit was for an accessory short term rental. That is what all documentation presented by the operators, BDS and the neighbors show and demonstrate. Documentation from the rental company shows the use of the property as an ASTR. The use of the property and the activities of the use of the property are not substantially different than what was approved in the conditional use. Recitation that it is different without more is insufficient. Operators are using the premises as previously presented and have not changed the use, the appearance, or function of the residence.” (Exhibit J.35. See also Exhibit J.41.)

The Hearings Officer finds that the use conducted at the Subject Property, following approval of LU 18-118937 CU, is as a short-term rental. The Hearings Officer finds the “use” of the Subject Property is not different from that approved in LU 18-118937 CU.

The Hearings Officer finds that the Operator’s above-quoted reference to “examples of increase in intensity” arises out of PCC 33.700.040.B.2. The Hearings Officer agrees that PCC 33.700.040.B.2 does give examples of what is meant by the phrase “increase in intensity.” However, PCC 33.700.070.D.4 states that “lists are intended to provide examples, but not to be exhaustive of all possibilities.”

The Hearings Officer finds that another example of “increase in intensity” could include an increase of number of guests or rooms used over what was approved in a land use decision. The Hearings Officer finds, in this case, that the Operator’s allowing the Subject Property ASTR to be used by more than the allowed number of persons and more than the allowed number of rooms to be occupied does represent an increase in intensity under PCC 33.700.040.E.2.c. The Hearings Officer finds Operator’s increase in intensity is not, in the context of PCC 33.700.040.E.2, “substantial.”

Step 2: Does the Operator’s use of the Subject Property, following land use approval, comply with the original approval criteria?

The Hearings Officer incorporates the findings for PCC 33.700.040.E.1.c as additional findings for the “Step 2” findings.

The Hearings Officer finds that the Operator's *use* of the Subject Property, by renting to more than the allowed number of persons (condition B.1) and not enforcing quiet hour requirements (condition B.2), does not comply with the original approval criteria.

Step 3: Can the Hearings Officer reasonably impose conditions to assure compliance with the approval and original approval criteria?

The "cannot be reasonably conditioned to come into compliance" language of PCC 33.700.040.E.2.c grants the Hearings Officer broad discretionary power. The Hearings Officer believes that another Hearings Officer or review body could arrive at a totally reasonable decision that is contrary to the findings below.

At its core, this case involves allegations that the Operator failed to follow the rules set forth in the LU 18-118937 CU conditions of approval. If the Operator did not follow the rules (conditions of approval) in the past, what evidence is there that the Operator will follow new rules (conditions of approval)? That being said, evidence is in the record that the Operator has made some, albeit late and not enough, effort to address the condition violations. The Operator did make some effort to get a property manager to include required information in advertisements and when that effort was unsuccessful, terminated the property manager. The Operator has also made some effort to provide access to the front door.

Based solely on the facts and evidence in this case, the Hearings Officer finds that new, additional, or modified conditions could be imposed to force the Operator into compliance. The Hearings Officer takes note that the findings for PCC 33.700.040.E.1 concluded that the LU 18-118937 CU land use approval will be revoked. Therefore, the Hearings Officer finds it unnecessary to issue findings for PCC 33.700.040.E.2.b.

Summary of Findings for PCC 33.700.040.E.1 and PCC 33.700.040.E.2.

The Hearings Officer found, based upon substantial evidence in the record, that the Operator had committed substantial violations of LU 18-118937 CU conditions of approval. LU 18-118937 CU relates to the Subject Property ASTR. In addition, the Hearings Officer found that the Operator's failure to follow conditions contained in LU 18-118937 CU resulted in use of the Subject Property that is contrary to the original approval criteria. The Hearings Officer found the requirements of PCC 33.700.040.E.1.c were met. The Hearings Officer found that the land use approval LU 18-118937 CU must be revoked.

The Hearings Officer found, based upon substantial evidence in the record, that the Operator's *use* of the property, following approval of LU 18-118937 CU, was not different from the use approved. The Hearings Officer found that Operator's *use* resulted in an increase in intensity over that approved in LU 18-118937 CU. The Hearings Officer found that Operator's *use* of the Subject Property after the land use approval did not comply with the original approval criteria. The Hearings Officer, reluctantly, found that it may be possible to impose

conditions of approval to force the Operator into compliance. The Hearings Officer found that land use approval LU 18-118937 CU cannot be revoked under PCC 33.700.040.E.2.c.

III. CONCLUSIONS

The Hearings Officer found that LU 18-118937 CU is a final decision. The Hearings Officer found that the Operator of the Subject Property ASTR is legally obligated to follow conditions of approval set forth in LU 18-118937 CU.

The Hearings Officer, based upon a review of all of the evidence in the record, found substantial violations of conditions of approval (B.1, B.2, B.3, B.5, B.7, B.8, B.9, B.10, B.13, and B.14) had occurred during times relevant to this case. The Hearings Officer also found that the Operator's violation of conditions of approval (B.1, B.2, B.3, B.5, B.7, B.8, B.9, B.10, B.13, and B.14) constituted a failure to implement conditions such that the original approval criteria would not be met.

The Hearings Officer found the code requirements of PCC 33.700.040.E.1.c. were satisfied and revocation of land use approval LU 18-118937 CU is factually and legally warranted.

IV. DECISION

Revocation of the Land Use Approval LU 18-118937 CU for a Type B ASTR at 2946 NE 9th Avenue.



Gregory J. Frank, Hearings Officer

June 21, 2019
Date

Report to Hearings Officer:	May 3, 2019
Decision Mailed:	June 21, 2019
Last Date to Appeal:	4:30 p.m., July 5, 2019
Effective Date (if no appeal):	July 8, 2019

Appeal of the decision. ANY APPEAL OF THE HEARINGS OFFICER'S DECISION MUST BE FILED AT 1900 SW 4TH AVENUE, PORTLAND, OREGON 97201. Appeals can be filed at the 5th floor reception desk, Monday through Friday between 8:00 a.m. and 4:30 p.m. No appeal fee will be

charged. Information and assistance in filing an appeal can be obtained from the Bureau of Development Services at the Development Services Center.

Who can appeal: You may appeal the decision only if you wrote a letter which is received before the close of the record for the hearing or if you testified at the hearing, or if you are the property owner or ASTR operator. If you or anyone else appeals the decision of the Hearings Officer, only evidence previously presented to the Hearings Officer will be considered by the City Council.

The City Council's decision may be appealed to the Oregon Land Use Board of Appeals (LUBA).

Failure to raise an issue in person or in writing by the close of the record at or following the final evidentiary hearing before the Hearings Officer on this case may preclude an appeal to City Council or LUBA on that issue. Also, if you do not provide enough detailed information to the Hearings Officer, they may not be able to respond to the issue you are trying to raise. In such a situation an appeal to City Council or LUBA based on that issue may not be allowed.

Enforcement of revocation. Per 33.700.040.F, in the event that the land use approval is revoked, the use or development becomes illegal. The use or development must be terminated within 21 days of the date the revocation decision is filed with the City Auditor, unless the decision provides otherwise. Enforcement is the responsibility of BDS.

Recording the final decision.

If this Land Use Review is approved, the final decision will be recorded with the Multnomah County Recorder.

- *Unless appealed*, the final decision will be recorded by the Bureau of Development Services at least 14 days after **the Hearings Officer issues a decision**.

The applicant, builder, or a representative does not need to record the final decision with the Multnomah County Recorder.

For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

EXHIBITS
Not Attached Unless Indicated

- I. Reconsideration Documents (through April 30, 2019)
 1. Initiation of Code Compliance Case File #17-204765 CC, July 17, 2017
 2. Initiation of Code Compliance Case File #17-250573 CC, October 3, 2017
 3. Type A ASTR (2-bedroom, Administrative Process) File #18-118947 HO, cancelled on February 7, 2018
 4. Initiation of Code Compliance Case File #18-186735 CC, June 13, 2018
 5. Decision of the Hearings Offer on Appeal of Administrative Decision, July 27, 2018
 6. Notes from Meeting with Raymond Burse, Jr., M. Feuersanger, BDS, August 16, 2019
 7. Airbnb Advertisement, Guest Reviews and Calendar, October 4, 2018
 8. Airbnb Advertisement and House Rules, October 5, 2018
 9. Citizen Complaint Log, October 26, 2018
 10. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, October 29, 2018
 11. Citizen Complaint Log, November 6, 2018
 12. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, November 29, 2018
 13. Notice of Zoning Violation, Enforcement Program of BDS, November 30, 2018
 14. Notice of Zoning Violation, Enforcement Program of BDS, December 7, 2018
 15. Letter from Raymond Burse, Jr. to Justin Lindley, BDS, December 30, 2018
 16. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, January 8, 2019
 17. Notes from Phone Conversation with Yasmine Barghouty, Justin Lindley, BDS, January 14, 2019
 18. Notes from Phone Conversation with Raymond Burse, Jr., Justin Lindley, BDS, January 15, 2019
 19. Notes from Meeting with Raymond Burse, Jr., Mike Liefeld, BDS, and Justin Lindley, BDS, January 18, 2019
 20. Citizen Complaint Log, January 21, 2019
 21. Citizen Complaint Log (1 of 2) January 23, 2019
 22. Citizen Complaint Log (2 of 2), January 23, 2019
 23. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, January 23, 2019
 24. Letter to Raymond Burse, Jr., Request for Administrative Review, January 24, 2019
 25. Letter to Michael Liefeld, BDS – Burse, Raymond M. and Burse, Raymond M. Jr., February 7, 2019
 - a. Exhibit 1, Airbnb confirmation data/transactional history of guest stays August 1, 2018 through January 23, 2019
 - b. Exhibit 2, Copy of the ASTR Operator Guest Log Book
 - c. Exhibit 3, Driver's License and post office mailing address, for new resident, Raymond M. Burse, Jr., as of October 15, 2019
 - d. Exhibit 4, Email from Ray Burse, Jr., to Irvington Community Association president regarding residency change, January 15, 2019
 26. Citizen Complaint Log, March 18, 2019

27. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, March 21, 2019
28. Citizen Complaint Log, March 26, 2019
29. Citizen Complaint Log (1 of 2), March 29, 2019
30. Citizen Complaint Log (2 of 2), March 29, 2019
31. Citizen Complaint Log, March 30, 2019
32. Citizen Complaint Log, April 7, 2019
33. Mailed Notice of a Public Hearing Regarding the Reconsideration, April 15, 2019
34. Mailing List for Notice of a Public Hearing Regarding the Reconsideration, April 15, 2019
35. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, April 17, 2019
36. ASTR Operator Written Comments, including Exhibit I-23 (letter and four exhibits) – Burse, Raymond M., April 30, 2019
37. Email to Hearings Officer from Robert Dobrich, Irvington Community Association, April 30, 2019

J. Received in the Hearings Office

1. Hearing Notice - Feuersanger, Marguerite
2. Letter - Deora, Karen
3. Letter - Nagle, Barbara
 - a. Calendars - Nagle, Barbara
 - b. Chronology 2019 to 4/17/19 - Nagle, Barbara
 - c. Photos - Nagle, Barbara
 - d. Violations of Hearings Officers Decision since 8/8/18 - Nagle, Barbara
4. 4/25/19 letter - Dasher, Carolyn
5. 4/29/19 letter - Dobrich, Robert
6. Staff Report - Feuersanger, Marguerite (**attached**)
7. 5/13/19 letter - Snyder, Gregg
8. 5/13/19 Email from Raymond M. Burse, Jr. - Feuersanger, Marguerite
9. 5/15/19 Memorandum - Feuersanger, Marguerite
10. Ad Information (24 pages) - Lindley, Justin
11. PowerPoint presentation printout - Feuersanger, Marguerite
12. 5/13/19 Email to Feuersanger from Burse, Jr. - Burse, Raymond, Sr.
13. 5/13/19 Email to Lindley from Burse, Jr. - Burse, Raymond, Sr.
14. Historic Irvington Board Members (2 pages) - Burse, Raymond, Sr.
15. 7/19/18 Email, Jeffrey L. Kleinman to Burse - Burse, Raymond, Sr.
16. Emails (3 pages) - Burse, Raymond, Sr.
17. Emails between Burse, Jr. and Kleinman (2 pages) - Burse, Raymond, Sr.
18. 7/13/18 email, Burse, Jr. to Kleinman - Burse, Raymond, Sr.
19. 7/11/18 Email, Burse, Jr. to Kleinman - Burse, Raymond, Sr.
20. Photos (10 pages) - Burse, Raymond, Sr.
21. Photo - Burse, Raymond, Sr.
22. airbnb listing (4 pages) - Burse, Raymond, Sr.
23. Emails between Burse and White Spider - Burse, Raymond, Sr.
24. Emails between Burse and White Spider - Burse, Raymond, Sr.

25. Emails between Burse and White Spider - Burse, Raymond, Sr.
26. Photos (2 pages) - Burse, Raymond, Jr.
27. Emails - Burse, Raymond, Sr.
28. Written testimony (3 pages) - Nagle, Barbara
29. Citizen Complaint Logs - Nagle, Barbara
30. 4/29/19 letter - Nagle, Barbara
 - a. Calendars - Nagle, Barbara
 - b. 2019 chronology to 4/17/19 - Nagle, Barbara
 - c. Photos - Nagle, Barbara
 - d. List of violations of Hearings Officers decision since 8/8/18 - Nagle, Barbara
31. Record Closing Information - Hearings Office
32. 5/22/19 Memo - Feuersanger, Marguerite
33. 5/22/19 Written testimony - Gisvold, Dean
34. Written testimony - Dobrich, Robert
35. 5/22/19 ASTR Operators Additional Submittal - Burse, Raymond
 - a. Attachment 1 – Emails - Burse, Raymond
 - b. Attachment 2 - airbnb listing - Burse, Raymond
 - c. Attachment 3 – photos - Burse, Raymond
 - d. Attachment 4 – photos - Burse, Raymond
36. (a.-d. not used)
 - e. Attachment 5 - Rental information - Burse, Raymond
 - f. Attachment 6 – Emails - Burse, Raymond
37. Written response - Plagge, Richard
 - a. Emails - Plagge, Richard
38. Written response - Nagle, Barbara
 - a. Photos - Nagle, Barbara
 - b. Citizen Complaint Log - Nagle, Barbara
39. 5/29/19 Memo - Feuersanger, Marguerite - **Submitted After Record Closed**
40. 6/4/19 Request to Re-Open the Record - Feuersanger, Marguerite - **Submitted After Record Closed**
 - a. 5/29/19 Memo - Feuersanger, Marguerite - **Submitted After Record Closed**
 - b. Ad Information - Feuersanger, Marguerite - **Submitted After Record Closed**
 - c. Ad Information - Feuersanger, Marguerite - **Submitted After Record Closed**
 - d. Citizen Complaint Log - Feuersanger, Marguerite - **Submitted After Record Closed**
 - e. Citizen Complaint Log - Feuersanger, Marguerite - **Submitted After Record Closed**
41. 6/5/19 ASTR Operators Rebuttal Submittal - Burse, Raymond - **Received**



City of Portland, Oregon
Bureau of Development Services
Land Use Services
FROM CONCEPT TO CONSTRUCTION

Ted Wheeler, Mayor
Rebecca Esau, Director
Phone: (503) 823-7300
Fax: (503) 823-5630
TTY: (503) 823-6868
www.portlandoregon.gov/bds

**STAFF REPORT AND RECOMMENDATION TO THE HEARINGS OFFICER
REGARDING THE RECONSIDERATION OF A LAND USE APPROVAL FOR A TYPE B
ACCESSORY SHORT-TERM RENTAL (ASTR) USE**

CASE FILE: LU 18-118937 CU
PC # 17-250573
REVIEW BY: Hearings Officer
WHEN: May 15, 2019 at 1:00 pm
WHERE: 1900 SW Fourth Ave., Suite 3000
Portland, OR 97201

It is important to submit all evidence to the Hearings Officer. City Council will not accept additional evidence if there is an appeal of this Reconsideration.

BUREAU OF DEVELOPMENT SERVICES STAFF: MARGUERITE FEUERSANGER /
MFEUERSANGER@PORTLANDOREGON.GOV AND JUSTIN LINDLEY / JUSTINLINDLEY@PORTLANDOREGON.GOV

GENERAL INFORMATION

ASTR Operator: Raymond M. Burse, Jr.
2948 NE 9th Avenue, Portland, OR 97212

Owners: Raymond Burse, Sr. and Raymond M. Burse, Jr.
2948 NE 9th Avenue, Portland, OR 97212

Site Address: 2946 NE 9th Avenue

Legal Description: BLOCK 101, LOT 15, IRVINGTON
Tax Account No.: R420422790
State ID No.: 1N1E26BD 05800
Quarter Section: 2731

Neighborhood: Irvington, contact Dean Gisvold at 503-284-3885.
Business District: Soul District Business Association, contact at outreach@nnebaportland.org
District Coalition: Northeast Coalition of Neighborhoods, contact Jessica Rojas at 503-388-5030.

Zoning: R5, Single Dwelling Residential 5,000 Zone
Other Designations: Historic Resource Protection Overlay Zone, Contributing Structure within Irvington Historic District

Original Case Type: CU, Conditional Use, Type II Procedure
Procedure: Modified Type III, with a public hearing before the Hearings Officer. The decision of the Hearings Officer can be appealed to City Council. However, the Type III reconsideration procedure does not require a pre-application conference and does not require submittal of a fee or an application.

**REC'D HEARINGS OFFICER
FR, MAY 3 '19 PM 1:35**

Reconsideration Purpose

The ability to publicly reconsider a land use approval provides an opportunity to determine if the use or development is in compliance with Title 33 (Portland Zoning Code). It also allows for clarification of prior land use approvals. As part of the reconsideration, the ability to add new conditions or even revoke the approval provides a strong enforcement mechanism for the Zoning Code.

Reconsideration Process

Per Zoning Code Section 33.700.040(C), reconsideration of the land use approval may be initiated by the Director of the Bureau of Development Services (BDS) any time after 60 days have passed from the date of the first zoning violation. This Reconsideration was initiated on April 15, 2019 (the mailing date of the Notice of Public Hearing Regarding the Reconsideration), 135 days from November 30, 2018, the mailing date of the first Notice of Violation.

Reconsideration Criteria

Certain land use approvals, including Conditional Uses, may be reconsidered if there is evidence that situations listed in Zoning Code Section 33.700.040.B.1-3 have occurred. These situations are the Reconsideration Criteria. For the subject site, the Conditional Use (Type B Accessory Short-Term Rental - ASTR) land use approval is being reconsidered because BDS has found substantial evidence of the following:

- One or more conditions of the land use review approval have not been implemented or have been violated (33.700.040.B.1); and
- The activities of the use, or the use itself, are substantially different or have substantially increased in intensity from what was approved (33.700.040.B.2).

ASTR Review Process and Proposal Background

Zoning Code regulations allow Accessory Short-Term Rental (ASTR) uses in residential zones, provided the relevant regulations of Zoning Code Chapter 33.207, Accessory Short-Term Rentals, are met. The Type B ASTR use allows three to five bedrooms for rent if approved through the Type II Conditional Use review procedure (Portland Zoning Code Section 33.207.050.A.2). The approval criteria for Type B ASTRs are found in Section 33.815.105.A-E, Conditional Use Approval Criteria for Institutional and Other Uses in the Residential Zones. Find full Zoning Code chapters and approval criteria online at www.portlandoregon.gov/zoningcode.

The property owner received Conditional Use approval for a Type B ASTR limited to three bedrooms and six guests, for the house on the subject site, on August 18, 2018. The Conditional Use approval (#18-119837 CU, Exhibit I-5) included Conditions A.1-A.3 and B.1 – B.16. Since that time, BDS obtained substantial evidence that shows the following conditions of the approval were violated: Conditions B.1, B.2, B.3, B.5, B.7 and B.8. Information about these conditions and the BDS evidence is found in the findings under Reconsideration Criteria.

ANALYSIS

Site and Vicinity: The 5,000 square-foot site occupies the central portion of the block bounded by NE Siskiyou and NE Stanton Streets and by NE 9th and NE 10th Avenues. The site contains a single-dwelling house. A driveway is located at the south side of the lot, which accommodates two vehicles. A wood fence, approximately 5 to 6 feet in height is located near the rear and side property lines.

The site's one and one-half story bungalow-style house (built around 1909) is identified as a contributing structure within the Irvington Historic District. Platted in the late 19th Century, the Irvington neighborhood developed generally from southwest to northeast and its growth was greatly influenced by streetcar lines that provided an easy commuting route to downtown.

The surrounding area's block pattern is strikingly consistent, characterized by 500-foot-long block faces along the numbered north-south streets, onto which the houses generally face. The named east-west street block faces are the traditional 200-foot Portland block lengths. Mature street trees are a prominent feature along all streets near the site.

Residential lots to the north, south, and east of the site contain multi-story, single-family residences. The surrounding area within several blocks of the site is similarly characterized by older homes of various architectural styles built in the 1910s and 1920s. The nearest commercial development is located along NE Martin Luther King, Jr. Boulevard to the west and along NE Fremont Street to the north. Irving Park is located approximately 550 feet north of the site. Adjacent and nearby streets of NE Siskiyou and NE Stanton Streets and NE 9th and NE 10th Avenues, are fully improved with sidewalks and landscape strips, and designated as Local Service Streets in Portland's Transportation System Plan. There are no posted parking restrictions along NE 9th Avenue near the site.

Zoning: The site is in the R5, Single Dwelling Residential Zone. The single-dwelling residential zones, including R5, are intended to preserve land for housing and to provide housing opportunities for individual households. The single dwelling zones implement the Comprehensive Plan policies and designations for single-dwelling housing.

The site is identified within the Irvington Historic District and identified as a contributing resource. The Irvington Historic District and the Historic Resource Protection Overlay zone protects certain historic resources in the region and preserves significant parts of the region's heritage. The regulations implement Portland's Comprehensive Plan policies that address historic preservation. These policies recognize the role historic resources have in promoting the education and enjoyment of those living in and visiting the region. The regulations foster pride among the region's citizens in their city and its heritage. Historic preservation beautifies the city, promotes the city's economic health, and helps to preserve and enhance the value of historic properties. *This Reconsideration process does not include changes to the exterior of the house (a contributing structure in the Irvington Historic District) or to the site. A prior building permit (18-110036 RS) approved the installation of a larger replacement basement window at the south elevation to create a new basement bedroom. Most exterior changes including replacement of windows require Historic Resource review. However, in this case the replacement basement window was exempt from Historic Resource review per Zoning Code Section 33.445.320.B.4.*

Land Use History: City records include one prior land use review for the site:

2012 - 118996 HR Historic Resource Review Approval of exterior alterations including enclosing a mudroom, building a new deck with railings, eaves extending 5 feet over the deck, and installing three double-hung windows and new door, for the existing house, designated as a contributing resource in the Irvington Historic District.

2018 - 0118937 CU Conditional Use Review Approval of a 3-bedroom ASTR with conditions. This land use decision is the subject of this Reconsideration Process.

Operator's Statement: The ASTR Operator, Raymond M. Burse, submitted a letter to the Hearings Officer on April 30, 2019 (Exhibit I-36). The following issues were raised in the April 30, 2019 letter:

1. While the Notice of a Public Hearing Regarding the Reconsideration (Exhibit I-33) included a statement that BDS obtained evidence of violation of Condition B.7, the initial Notice of Zoning Violations did not include a statement about Condition B.7.

Staff response: *Because BDS obtained additional evidence of violation of Condition B.7, the notice of this evidence was included in the Notice of a Public Hearing Regarding the Reconsideration. Raymond*

M. Burse and Raymond M. Burse, Jr., were mailed a copy of this notice and will be mailed a copy of this report which includes information about the violation of Condition B.7. An opportunity to review and respond to this evidence is provided beginning on May 3, 2019, the day this report is available to the public, up to the close of the public hearing. Note that there is nothing in Zoning Code Section 33.700.040 or the Type III notice provisions that limits the Hearings Officer's consideration to only those conditions cited in the initial notice.

2. Violations of Conditions B.1, B.2, B.3, B.5 and B.8 have been corrected by the Operator. The use and intensity of the use has not changed. The Reconsideration is premature as the corrections have not been allowed to be implemented and evaluated.

Staff response: *Although the Operator attempted to or is in the process of attempting to correct violations of conditions, the history of neighborhood complaints and reoccurring violations of the ASTR use are documented in the Code Compliance Cases (#17-204765 CC, #17-250573 CC and #18-186735 CC), the Administrative Decision (Exhibit H-3) and in the Decision of the Hearings Officer on Appeal of the Administrative Decision (Exhibit I-5). Further, Condition B-16 of the Decision of the Hearings Officer on Appeal of the Administrative Decision recommends revocation for any but the most minor of violations:*

B.16 "If City staff obtains evidence that one or more of the situations described in 33.700.040.B exist for this proposal or site, the Bureau of Development Services may initiate a Reconsideration of this Land Use Approval per 33.700.040. Given the site's history of violations and non-compliance, any but the most minor violations should be grounds for revocation of this approval."

*Evidence of violations is provided in this report under **Zoning Code Reconsideration Criteria.***

3. Attached to Raymond M. Burse's letter (Exhibit I-31) is a copy of a February 7, 2019 letter to Michael Liefeld, BDS, and four associated exhibits (Exhibit I-23). The information contained in Exhibit I-23 is discussed in this report under **Zoning Code Reconsideration Criteria.**

Agency Review: This Reconsideration does not affect city service availability or city service adequacy. Therefore, city bureau staff did not review or comment on this Reconsideration.

Neighborhood Review: A Notice of a Public Hearing Regarding the Reconsideration was mailed on April 15, 2019 (Exhibit I-31). One written response was received from the Neighborhood Association in response to the Reconsideration (Exhibit I-37). Robert Dobrich, President of the Irvington Community Association (ICA), wrote to say that the ICA has learned that the ASTR resident has been away from the site for more than three consecutive days, in violation of Condition B-14 of the land use approval.

Staff response: *Condition B-14 states:*

"The ASTR operator shall notify the Association and residents of properties adjacent to and across the street from the site whenever the resident will be away from the site for more than three consecutive days."

The statement from the Neighborhood Association and from the neighbors Barbara Nagle and Richard Plagge have confirmed that the operator has not ever provided the notification that the resident will be away from the property for a period of 3 consecutive days. The resident manager for the site was listed as Yasmine Barghouty. In her conversation with BDS in January, she stated that she would not be at the residence while guests were there. She also stated that she was not aware that she needed to notify the neighbors or the ICA if she would be gone for more than 3 days. When asked if she was gone from

the residence for more than 3 days, Yasmine had stated that she was not. This is contrary to her statement that she was not at the residence when there were guests stays. According to the log Airbnb confirmation data submitted by the operator, most of the stays were back to back stays by guests as shown in exhibit I-25.a. The log itself also shows that there were 6 occasions where guests rented the house for a period or more than 3 days during the time frame from August to October which Yasmine stated she was the resident of the site. It can be concluded that Yasmine was away from the site for periods over 3 consecutive days. The property owner, Raymond Burse Jr, sent a notification to the ICA on January 15, which was the day after Yasmine Barghouty spoke with BDS regarding her occupancy of the property. He stated that he and Andrea Rozdeba were now the permanent residents of the house. He also stated that they had been residing there since October of 2018. In the conversations with Raymond in January, he stated that he worked in South Carolina and traveled to Portland. He stated that he stays at the house while he is in Portland. He also stated that his girlfriend stays at the house. He stated that his girlfriend stays at a different location in Portland when there are guests at the house. Based on the Airbnb confirmation data in Exhibit I-25.a, there were 5 occasions between November 2018 and January 2019 that guests stayed for than 3 nights. There were also periods of back to back stays of guests during this time which would have meant that residents were not there.

BDS has obtained evidence that pertains to violations of other conditions of the land use approval. The relevant conditions and evidence are discussed in this report under **Zoning Code Reconsideration Criteria**.

ZONING CODE RECONSIDERATION CRITERIA

Section 33.700.040 Reconsideration of Land Use Approvals

Certain land use approvals, including Conditional Uses, may be reconsidered if there is evidence that situations listed in 33.700.040.B.1-3 have occurred. These situations are the Reconsideration Criteria. For the subject site, the Conditional Use (Type B ASTR) land use approval is being reconsidered because BDS has found substantial evidence of the following:

1. One or more conditions of the land use review approval have not been implemented or have been violated (33.700.040.B.1); and

Findings: A history of the land use review decisions for the proposed Type B ASTR use on the site is relevant background for this Reconsideration process:

- **Administrative Approval/Notice of a Type II Decision**, June 4, 2018 (Exhibit H-3). Leading up to the administrative decision, BDS staff considered the issues raised by those in opposition to the proposal (19 letters were received in opposition) and considered the history of neighborhood complaints on the site (refer to findings under Criterion C, Livability). Overall, staff concluded that the applicant/property owner was demonstrating good intent to comply with ASTR rules by applying for the Conditional Use Type B ASTR, establishing House Rules designed to minimize neighborhood impacts (including a proposed time limit on use of outdoor decks), and identifying a long-term resident for the property. Staff conclusions are relevant for this Reconsideration process:

“Central issues of this proposal are ensuring that the house can accommodate a long-term resident, thereby maintaining the primary household living use, and reducing the proposed intensity of a four-bedroom rental with ten guests per stay. The site is within a moderately dense single dwelling neighborhood, and the rear yard contains two outdoor decks in proximity to other backyards. Previously an ASTR was operating at the site without the benefit of a Conditional Use review or ASTR permit and was the source of multiple complaints regarding adverse impacts from noise, late-night activity, and traffic. For this request, many nearby neighbors

wrote letters of frustration about prior unpermitted ASTR activity and voiced opposition to the proposal citing similar issues identified in the prior complaints. A Type A ASTR (2-bedroom rental) is currently approved for the site but the applicant has discontinued operation of all ASTR activity pending the outcome of this review. By applying for this review, identifying a long-term resident and establishing House Rules that minimize impacts to neighbors, the applicant intends to comply with the ASTR rules. Noncompliance with the ASTR rules and conditions of this decision can be cause for BDS to reconsider this land use review approval.

Conditions are needed to minimize potential adverse impacts on nearby properties. A significant condition of this approval reduces the number of bedrooms available for ASTR use to three and the number of guests per stay to six, or two guests per room. Other conditions require that guests be informed of the House Rules and Narrative, which include time periods for quiet hours and limits the use of the outdoor decks. Neighbors will be provided with current contact information for the long-term resident and management company. The conditions are designed to work toward effectively promoting good neighbor attributes of the ASTR." (excerpts from Conclusions, p. 16 of Exhibit H-3)

- **Decision of the Hearings Officer on Appeal of Administrative Decision**, July 17, 2018 (Exhibit I-5). The adjacent property owners, the ICA and the property owner appealed the administrative decision to the Hearings Officer. While the adjacent property owners and the ICA were opposed to the ASTR use, the property owner requested that the ASTR use be expanded to reflect the original proposal of four bedrooms with groups of 10 guests. The Hearings Officer's decision reaffirmed the Conditional Use approval for a three-bedroom Type B ASTR, limited to two bedrooms on the main floor and one bedroom on the upper floor of the house, with a maximum group size of up to six guests. However, the Hearings Officer decision added conditions and made key amendments to the conditions of the Administrative Decision. The Hearings Officer's changes to the conditions were imposed in response to public testimony and in part to limit the intensity of the ASTR use, ensure that impacts on neighbor's livability were minimized and to clarify for the Operator that going forward, a Reconsideration process is the remedy for all but the most minor violations. Thus, these changes are relevant to this Reconsideration process and are listed below, with **bold** and ~~striketrough~~ print signifying the Hearings Officer's additions and changes to the Administrative Decision:

B. For the duration of operation of the Type B ASTR facility, the ASTR operator will meet the following conditions:

1. Provide rental arrangements limited to single groups only, with a maximum of 2 guests per legal bedroom at any one time, regardless of age. If the maximum number of three bedrooms are rented, ASTR group size is limited to 6 people. **The resident's bedroom in the basement of the site shall not be rented to guests at any time.**
2. **All persons on the site shall comply with** Quiet hours ~~during rental stays are~~ between 9 pm and 8 am Sundays through Thursdays and between 10 pm and 8 am Fridays and Saturdays. Use of all outdoor spaces, including the main level rear porch and 2nd story rear porch, **and yards** are prohibited **by anyone** between the hours of 7 pm and 8 am all days. **Use of the driveway and front walkway shall be limited to parking of passenger vehicles and for travel to and from the house during these hours. Gathering or waiting in the driveway is prohibited between 7 p.m. and 8 a.m. all days.**

3. No more than two tandem parking spaces are available on the driveway for ASTR guests and the on-site residents. Parking is not allowed within 10 feet of the front property line.
4. Commercial meetings and commercial events are prohibited. **PCC 33.207.050.B(8)(a) provides, "Commercial meetings include luncheons, banquets, parties, weddings, meetings, charitable fund raising, commercial or advertising activities, or other gatherings for direct or indirect compensation."**
5. Smoking **and inhalant delivery systems (vaping, etc.) is prohibited anywhere** on the property, including indoor and outdoor spaces, ~~is prohibited~~.
6. The ASTR operator will encourage guests to walk, and to use bicycles and public transportation for travel to and from the ASTR as well as side trips taken during the ASTR rental period. The applicant will provide guests with information about nearby bicycle rental and bus route locations and schedules.
7. **Guests shall be required to access the residence via the front door. No guest access is permitted between the driveway and the rear yard.**
8. The ASTR operator must amend the House Rules and Narrative included in Exhibit A-3 to comply with this decision and Conditions B1 through ~~B6~~ **B7** of this approval. The amended House Rules and Narrative must be included in all advertisements for the ASTR facility.
9. The ASTR operator must maintain the House Rules and Narrative, as required to be amended by this decision and conditions, for the duration of the operation of the ASTR facility. The ASTR Operator must email or mail copies of these House Rules to guests in advance of their visits. The ASTR Operator must ensure that at least one paper copy of these House Rules and Narrative is prominently displayed within a common area of the house.
10. All advertisements for the ASTR shall display prominently in the title of the advertisement the maximum number of bedrooms (**three**) and the maximum number of people allowed per nightly rental (**six, two per bedroom**).
11. Confirmation data from the authorized rental organization (such as Airbnb and VRBO) shall be provided to City staff upon request. Confirmation data must include the name, home address and phone number of the ASTR guests, and the dates of stay.
12. The ASTR Operator will maintain a Guest Log Book. The Guest Log Book must include the names and home addresses of guests, guest's license plate numbers if traveling by car, dates of stay, and the room assigned to each guest. The log must be available for inspection by City staff upon request.
13. On an annual basis, the ASTR operator must provide the **Irvington Community Association** and residents of properties adjacent to and across the street from the site with phone contact information for the long-term resident/onsite manager, the property owner, and the management company. Properties include: 2933, 2938, 2943, 3006 and 3007 NE 9th Avenue, and 2937, 2947 and 3007 NE 10th Avenue. The ASTR operator shall maintain paper copies of these notifications, including the list of who was notified and when, for inspection by City staff upon request. The ASTR operator is responsible to ensure that phone contact information remains current and neighbors are provided with updates.

14. The ASTR operator shall notify the Association and residents of properties adjacent to and across the street from the site whenever the resident will be away from the site for more than three consecutive days.

15. In the event the existing approximate 5 to 6-foot tall wood fence, located along the rear and side property lines, is removed or damaged, the property owner must replace it with a new fence that meets the F2 standard Chapter 33.248. The locations of required F2 fencing are shown on Exhibit C-1.

16. If City staff obtains evidence that one or more of the situations described in 33.700.040.B exist for this proposal or site, the Bureau of Development Services will may initiate a Reconsideration of this Land Use Approval per 33.700.040. Given the site's history of violations and non-compliance, any but the most minor violations should be grounds for revocation of this approval.

As shown in both the content of the conditions and the strict limits placed on the ASTR use, the Hearings Officer's conditions were applied to satisfy the Conditional Use approval criteria. Simply stated, the conditions minimize the impacts of the ASTR on neighbors and limit the intensity of the ASTR use within the residential neighborhood.

BDS Evidence of Violations of Conditions BDS obtained the following substantial evidence that shows the violations of Conditions B.1, B.2, B.3, B.5, B.7 and B.8:

B) For the duration of operation of the Type B ASTR facility, the ASTR operator will meet the following conditions:

- 1. Provide rental arrangements limited to single groups only, with a maximum of two guests per legal bedroom at any one time, regardless of age. If the maximum number of three bedrooms are rented, ASTR group size is limited to six people. The resident's bedroom in the basement of the site shall not be rented to guests at any time.*

Condition B1 List of Violations			
Date	Description of the Violation	Evidence	Exhibit
8/24/18	Renting to 10 guests, more than 3 guests per room, more than 4 rooms	Operator's Guest Log	I-25.b
8/30/18	Renting to 8 guests and 4 rooms	Operator's Guest Log	I-25.b
9/05/18	Renting 4 rooms	Operator's Guest Log	I-25.b
9/20/18	Renting to 11 guests, 4 rooms and 3 guests per room	Operator's Guest Log	I-25.b
10/4/19	The Airbnb ad has a review from Steven in September which mentions place accommodated 10 people. This matches the Operator's Guest Log for Steven Solis who rented the house for a group of 11 on 9/20/18.	BDS Document	I-7
10/05/18	Renting to 8 guests and 4 rooms	Operator's Guest Log	I-25.b
10/19/18	Renting 4 rooms	Operator's Guest Log	I-25.b
11/09/18	Renting 4 bedrooms	Operator's Guest Log	I-25.b
12/21/18	Renting 4 bedrooms	Operator's Guest Log	I-25.b
12/24/18	Renting 4 bedrooms	Operator's Guest Log	I-25.b
12/29/18	Renting 4 bedrooms	Operator's Guest Log	I-25.b
01/19/19	Use of 4 bedrooms	Operator's Guest Log	I-25.b
3/2019	The Airbnb review by Breanne mentions the use of the	BDS Document	I-35

Condition B1 List of Violations			
Date	Description of the Violation	Evidence	Exhibit
	Bonus space in the basement. This is the location of the 4 th bedroom		

B.2. All persons on the site shall comply with quiet hours between 9 p.m. and 8 a.m. Sundays through Thursdays and between 10 p.m. and 8 a.m. Fridays and Saturdays. Use of all outdoor spaces, including the main level rear porch and second story rear porch, and yards are prohibited by anyone between the ours of 7 p.m. and 8 a.m. all days. Use of the driveway and front walkway shall be limited to parking of passenger vehicles and for travel to and from the house during these hours. Gathering or waiting in the driveway is prohibited between 7 p.m. and 8 a.m. all days.

Condition B2 List of Violations			
Date	Description of the Violation	Evidence	Exhibit
8/23/18 Thursday	Use the outdoor spaces between 7pm and 8am There is a loud party on the two back decks, photo taken at 11pm of the guests smoking on the side patio	Citizen Complaint Log	I-9
8/25/18 Saturday	Use of the outdoor spaces between 7pm and 8am "Loud party on back deck Photo 3 Guests arrive after 10 PM. Noisy drop off of 2 guys at 2:30 AM wakes us. Another group dropped off at 3:30 AM. At 4:30 AM 3 guys on back deck smoking and drinking. "	Citizen Complaint Log	I-9
9/7/18	Gathering in the driveway for a commercial bike ride by a California bike manufacturing group Eliel at 6:59am - Use of the Driveway between 7pm and 8am.	Citizen Complaint Log	I-9
9/8/18	Use of outdoor spaces between 7pm and 8am Large group of partiers on the side porch at 7:50pm	Citizen Complaint Log	I-9
9/21/18 Friday	Use of the outdoor spaces between 7pm and 8am loud voices wake the neighbors. Two men yelling on the back deck at 1:38am photo 7	Citizen Complaint Log	I-9 and I-11
9/22/18	Use of the outdoor areas between 7pm and 8am Guests return to house at 1:37am and are on the side deck waking the neighbors.	Citizen Complaint Log	I-9
9/22/18 to 9/23/19	Use of the outdoor spaces between 7pm and 8am All day party and BBQ starting at 10am and extending into the night and to the next morning of the 23rd – Photo at 10pm of the party on the side deck. Another photo at 12:34am of the party on the side deck.	Citizen Complaint Log	I-9
10/20/18	Use of the outdoor spaces between 7pm and 8am party on back deck at 9pm	Citizen Complaint Log	I-9
1/17/19 to 1/18/19	Use of the outdoor space between 7pm and 8am Party on the back deck. There are photos of guests smoking on the side deck at 9:13pm and 9:42pm. At 12:03am neighbors are awakened by partiers from the	Citizen Complaint Log	I-20

Condition B2 List of Violations			
Date	Description of the Violation	Evidence	Exhibit
	house exiting the side door and going into the street		
1/18/19 to 1/19/19	Use of the outdoor spaces between 7pm and 8am. There are smokers on the back deck in a photo at 10:39pm. At 12:30am, the neighbors are awoken by a party on the back deck with an obscene conversation and guests smoking shown in the photo	Citizen Complaint Log	I-20
1/21/19	Use the outdoor spaces between 7pm and 8am 1:47 am Loud noises from guests dropped off at the house and accessing the side porch	Citizen Complaint Log	I-20
1/22/19	Use of the outside areas between 7pm and 8am Guests are out on the side patio at 9:58pm	Citizen Complaint Log	I-28
1/28/19	Use of outdoor spaces between 7 pm and 8am Guest smoking on the side patio at 6:59am	Citizen Complaint Log	I-28
1/29/19	Use of the outdoor spaces between 7pm and 8am 7:29pm guests partying on the back deck	Citizen Complaint Log	I-28
2/15/19	Use of the outdoor spaces between 7pm and 8am Photos of guests on the side patio at 8:51pm and 9:33pm	Citizen Complaint Log	I-29
3/7/19	Use of exterior areas between 7pm and 8am Guests using the outside are at 8:16pm.	Citizen Complaint Log	I-30
3/11/19	Use of outdoor spaces between 7pm and 8am 940pm Guests on the side patio	Citizen Complaint Log	I-26
3/14/19	Use of outdoor spaces between 7pm and 8am Guests on the side patio at 920pm	Citizen Complaint Log	I-26
3/17/19	Use of the outdoor spaces between 7pm and 8am Guests on the side deck at 11:12pm	Citizen Complaint Log	I-26
3/27/19	Gathering in the driveway between the hours of 7pm and 8am photo shows guests hangout and smoking on the driveway at 8:19pm.	Citizen Complaint Log	I-31
3/29/19	Use of outdoor spaces between 7pm and 8am Guests using the back deck to smoke at 10:16pm	Citizen Complaint Log	I-31
4/7/19	Use of the outdoor spaces between 7pm and 8am Loud noises and conversations from guests parking cars in the driveway and unloading packages from the vehicles into house through the back deck using the outdoor spaces. There are photos from 12:03 am, 1:07am, and 1:10am	Citizen Complaint Log	I-32

3. *No more than two tandem parking spaces are available on the driveway. Parking is not allowed within 10 feet of the front property line.*

Condition B3 List of Violations			
Date	Description	Evidence Document	Exhibit
10/1/18	3 cars in the driveway, parking within 10 feet of the front property line	Citizen Complaint Log	I-21
11/22/18	3 cars in the driveway, parking within 10 feet of the front property line	Citizen Complaint Log	I-21
11/23/18	3 cars in the driveway, parking within 10 feet of the front property line	Citizen Complaint Log	I-21
11/24/18	3 cars in the driveway, parking within 10 feet of the front property line	Citizen Complaint Log	I-21
1/18/19 Saturday	Parking a vehicle within 10 feet of the front property line	Citizen Complaint Log	I-20
1/26/19	3 cars in the driveway, car parking within the 10 ft of the front property line	Citizen Complaint Log	I-27
4/7/19	3 cars in the driveway	Citizen Complaint Log	I-32

5. *Smoking and inhalant delivery systems (vaping, etc.) is prohibited anywhere on the property, including indoor and outdoor spaces.*

Condition B5 List of Violations			
Date	Description	Evidence Document	Exhibit
8/20/18	Guests smoking on the site – back deck	Citizen Complaint Log	I-9
8/23/18	Guests smoking on the site – Back deck	Citizen Complaint Log	I-9
8/25/18	Guests smoking on the site – Back deck	Citizen Complaint Log	I-9
9/29/18	Group of smokers in the driveway	Citizen Complaint Log	I-9
1/17/19	Guests smoking on the site	Citizen Complaint Log	I-20
1/18/19	Guests smoking on the back deck	Citizen Complaint Log	I-20
1/19/19	Guests smoking on site	Citizen Complaint Log	I-20
1/28/19	Guests smoking on the property	Citizen Complaint Log	I-28
2/25/19	Guests smoking on the site	Citizen Complaint Log	I-29
3/17/19	Guests smoking at the site	Citizen Complaint Log	I-26
3/17/19	Guests accessing house from the side entrance at the driveway	Citizen Complaint Log	I-26
3/27/19	Guests smoking on the driveway of the property	Citizen Complaint Log	I-31
3/28/19	Guests smoking on the back deck of the property	Citizen Complaint Log	I-31
3/29/19	Guests smoking on the back deck of the property	Citizen Complaint Log	I-31

7. *Guests shall be required to access the residence via the front door. No guest access is permitted between the driveway and the rear yard.*

Condition B7 List of Violations			
Date	Description	Evidence Document	Exhibit
8/23/18	Guests using the side entrance to enter the house	Citizen Complaint Log	I-9
8/25/18	Use of the side entrance to access the site	Citizen Complaint Log	I-9
1/9/19	Guests access the residence through the side door keypad entrance at the rear patio at 9:21 pm	Citizen Complaint Log	I-21 and I-22
1/12/19	Guests access the residence through the side door keypad entrance at the rear patio at 12:38pm	Citizen Complaint Log	I-21 and I-22
1/14/19	Guests access the residence through the side door keypad entrance at the rear patio at 9:31am	Citizen Complaint Log	I-21 and I-22
1/17/19	Guests access the residence through the side door keypad entrance at the rear patio at 7:15pm	Citizen Complaint Log	I-20
1/21/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-20
1/22/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-28
1/26/19	Guests accessing the house from the side entrance at the driveway	Citizen Complaint Log	I-28
1/30/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-28
1/31/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-28
2/15/19	Guests access the residence through the side door keypad entrance at the rear patio at 8:51 and 9:33pm – guests bring the suitcases down the driveway to access the side entry.	Citizen Complaint Log	I-29
2/16/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-29
2/16/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-29
2/17/19	Guests use the side entry for all access to and from the house during the stay	Citizen Complaint Log	I-29
2/18/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-29
2/20/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-29
2/23/19	Guests access the residence through the side door keypad entrance at the rear patio – Guests are confused in the driveway about access to the house. They discuss in the driveway that they must use the side entrance to access the house.	Citizen Complaint Log	I-29
2/25/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-30

Condition B7 List of Violations			
Date	Description	Evidence Document	Exhibit
2/26/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-30
3/7/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-30
3/11/19	Guests access the residence through the side door keypad entrance at the rear patio.	Citizen Complaint Log	I-26
3/12/19	New Guests arrive at the house and attempt to enter through the front door. Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-26
3/14/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-26
3/18/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-26
3/20/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-30
3/22/19	Guests leave the site through the side door keypad entrance at the rear patio at 6:38am	Citizen Complaint Log	I-30
3/23/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-30
3/27/19	Guests access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-31
4/5/19	Guests arrive and attempt to enter the residence at the front door which does not work. Guests then access the residence through the side door keypad entrance at the rear patio	Citizen Complaint Log	I-32
4/6/19	Guests accessing the residence through the side door	Citizen Complaint Log	I-31
4/7/19	Guests accessing the house through the side entrance	Citizen Complaint Log	I-31

8. *The ASTR operator must amend the House Rules and Narrative included in Exhibit A-3 to comply with this decision and Conditions B1 through B7 of this approval. The amended House Rules and Narrative must be included in all advertisements for the ASTR facility.*

List of Violations of Condition B8			
Date	Description	Evidence Document	Exhibit
10/4/18	The Airbnb advertisement does not contain language which reflects the conditions of the CU. Five beds are advertised but bedroom photos have one bed; 3-level house is advertised. Guest review states that 10 people were accommodated very comfortably.	BDS Document	I-7
10/5/18	The Airbnb advertisement does not contain language which reflects the conditions of the CU. Under the description of the house, it states 3 bedrooms and	BDS Document	I-8

	bonus room. It also states there is private parking for 3 cars in 2 different sections of the ad. Under the policies section, it states there is an 8-guest minimum on all holidays and weekends for summer and fall months. It also states the house is non-smoking house, Ashtrays are provided for convenience, please disposed of all butts appropriately.		
10/29/18	Airbnb ad remains in violation – no conditions added to the narrative and house rules	BDS Document	I-10
11/29/18	Airbnb ad remains in violation – no conditions added to the narrative and house rules	BDS Document	I-12
1/8/19	Airbnb ad remains in violation – no conditions added to the narrative and house rules	BDS Document	I-16
1/23/19	Airbnb ad remains in violation – no conditions added to the narrative and house rules	BDS Document	I-23
3/21/19	Airbnb ad was modified – states a 6-guest minimum. language was added that addresses conditions B1, B2, B3, and B4 from the Conditional Use, but it also has conflicting language. It states 3 bedrooms available, but later in the description states that there is a bonus room which hints at 4 rooms versus the 3 allowed though B1. While the house rules sections describe that only 2 tandem car parking spots are allowed, the neighborhood description states that there is a private driveway to park 3 cars.	BDS Document	I-27
4/17/19	Same as above.	BDS Document	I-34

Summary: The above findings and evidence showing reoccurring violations of six conditions of approval is cause for revocation of the land use approval.

2. The activities of the use, or the use itself, are substantially different or have substantially increased in intensity from what was approved (33.700.040.B.2); and

Findings: The land use approval limited ASTR use to three bedrooms. That limitation and Condition B.1 (limiting the number of ASTR guests to six people) are intended to minimize the intensity of the ASTR.

On at least twelve occasions over the course of five months (between August 24, 2018 and January 19, 2019), BDS has collected evidence showing that the house was either rented to groups of more than six guests or at least four bedrooms were rented for ASTR use. The evidence is in part provided in the Operator's Guest Log (Exhibit I-25.b). The log cites four occasions where the house was rented to groups of more than six guests, in violation of the land use approval and Condition B.1 (refer to the above chart citing evidence of violations of Condition B.1). The limit on the number of guests was intended to ensure that the intensity of the ASTR use would be consistent with Conditional Use Criterion 33.815.105.A.2 (Hearings Officer's findings on pp 16-21 of Exhibit I-5).

Condition B.2 in part restricted use of the outdoor spaces to a discrete daily time period, between the hours of 7 p.m. and 8 a.m. Evidence provided by Citizen Complaint Logs (refer to the chart above listing evidence of violations of Condition B.2) shows more than 20 incidents of use of outdoor spaces that extended beyond the allotted time period. This expanded time period of the use of outdoor spaces results in an increased intensity of the ASTR use beyond the land use approval and has negatively impacted neighbors.

Because the evidence shows that the intensity of the ASTR use has regularly increased beyond the approved limits, staff finds cause for revocation of the land use approval.

3. The use is subject to the conditional use or nonconforming use regulations, has not been subject to a conditional use or nonconforming use review, and has substantially changed its activities or substantially increased the intensity of its operations since it became a conditional use or a nonconforming use. Examples of increases in intensity are: an increase in the number of members, students, employees, visitors, or vehicle trips per event, per year, or per other comparable period of time; an increase in the hours of operation; or an increase in the number of events per year (33.700.040.B.3).

Findings: The ASTR is subject to the conditional use regulations but it has been subject to a Conditional Use review. Therefore, this Revocation criterion does not apply.

CONCLUSIONS

As documented in this report, BDS has obtained substantial evidence of reoccurring violations of six conditions of approval for the subject Conditional Use Type B ASTR. A central purpose of the Conditional Use review is to identify potential negative impacts of the proposed use and apply conditions to the use to ensure its operation is compatible with residential uses and neighborhood livability. In this case, those central purposes were not realized due to reoccurring violations. A significant number of conditions were placed on the initial land use approval. After a public hearing on the Appeals of the initial land use approval, the Hearings Officer upheld the initial approval but placed additional and firmer conditions on the ASTR use. The conditions were intended to reduce the intensity of use to ensure neighborhood livability and compatibility. Despite the lengthy review process, the evidence shows that the ASTR use did not operate within the limits defined by the Hearings Officer's decision.

Although the Hearings Officer applied 16 conditions to the ASTR use, one of the conditions is most relevant for this Reconsideration:

"If City staff obtains evidence that one or more of the situations described in 33.700.040.B exist for this proposal or site, the Bureau of Development Services may initiate a *Reconsideration of this Land Use Approval* per 33.700.040. Given the site's history of violations and non-compliance, any but the most minor violations should be grounds for revocation of this approval." (*Condition B.16, Exhibit I-5*)

A written response from one of the property owners, Raymond M. Burse, states that the Reconsideration process is premature and that over time, violations have been addressed or corrected (Exhibit I-36). Staff disagrees with this assessment. A Notice of Zoning Violation was issued to the property owners on November 30, 2018. A follow-up letter was issued to the property owner on January 24, 2019 which stated, "It is imperative that you and your management company immediately review the entirety of the City Code Hearings Officer's order to ensure that your property is operated in compliance with all conditions of LU 18-118937 CU (Hearings Office 4180016)." The evidence demonstrates that violations have continued even after BDS notification of the requirements. The evidence does not support the property owner's assertion that the violations have been addressed or corrected.

Continued and consistent compliance with conditions of approval for a Conditional Use is essential in ensuring that negative impacts on surrounding properties are minimized. And such conditions are inextricably tied to the approval of the Conditional Use. In this case, neighborhood complaints relate to noncompliance with approved operational limits and the conditions of the approval. The evidence collected by BDS shows that ASTR use and activity exceeded maximum limitations and

intensity on many occasions. Multiple conditions were violated prior to and immediately after the approval of the Type B ASTR at the subject site.

BDS concludes that the documented evidence of violations of the land use approval conditions is significant. Repeated violations of the conditions have resulted in an increased intensity of the ASTR use over what was approved and have had a substantial negative impact on the livability of nearby residents. Violations of the conditions have been documented since August 2018 and continued even after notification of violations in November 2018. The ongoing chronic nature of the documented violations establishes that either the property owners cannot operate the ASTR in compliance with the conditions of approval or at worst simply chose not to comply with the Hearings Officer's Order. The evidence obtained by BDS meets the thresholds of Zoning Code 33.700.040(B)(1) and (2), and of Condition B.16 of the land use approval. The land use approval should therefore be revoked.

TENTATIVE STAFF RECOMMENDATION

(May be revised upon receipt of new information at any time prior to the Hearings Officer decision)

Revocation of the Land Use Approval for a Type B ASTR at 2946 NE 9th Avenue, LU #18-118937 CU.

Procedural Information. There is no application for this Reconsideration of a Land Use Approval per Zoning Code Section 33.700.040. The first zoning violation letter was sent to the property owners on November 30, 2018. Per Section 33.700.040.C, the Reconsideration may be initiated any time after 60 days have passed from the first notice of violation.

Some of the information contained in this report was provided by the ASTR operator.

Decision Making Process. This report is not a decision. The review body for this proposal is the Hearings Officer who will make the decision on this Reconsideration case. This report is a recommendation to the Hearings Officer by the Bureau of Development Services. The review body may take any of the actions described in 33.700.040.E. The Hearings Officer will make a decision about this proposal within 17 days of the close of the record.

The staff report and recommendation is be posted on the BDS website at <https://www.portlandoregon.gov/bds/35625>. Land use reviews are listed by the District Coalition shown at the beginning of this document. The file and all evidence on this case are available for your review by appointment only. Please call the Request Line at our office, 1900 SW Fourth Avenue, Suite 5000, phone 503-823-7617, to schedule an appointment. We can provide some information over the phone (see contact information at the top of the first page of this notice). Copies of all information in the file can be obtained for a fee equal to the cost of services. Additional information about the City of Portland, city bureaus, and a digital copy of the Portland Zoning Code is available on the internet at <http://www.portlandonline.com/auditor/index.cfm?c=28197>.

The neighborhood association, listed on the first page of this notice, may take a position on this reconsideration and may have scheduled an open meeting prior to making their recommendation to the Bureau of Development Services. Please contact the person listed as the neighborhood contact to determine the time and date of this meeting.

To comment, you may write to the Land Use Hearings Officer, 1900 SW Fourth Ave., Suite 3100, Portland, OR 97201, or FAX your comments to 503-823-4347; or you may testify at the hearing. In your comments, you should address the Reconsideration Criteria cited above. Your comments must be directed at the criteria and provide enough specificity to allow all parties the opportunity to respond to the issues you raise. The Hearings Officer does not accept comments via e-mail. Please refer to the file number when seeking information or submitting testimony. Written comments must be received by the end of the hearing. Please note that all correspondence and testimony

received will become part of the public record. BDS staff will be at the hearing to answer questions and respond to comments. The general order of appearance for oral testimony at the hearing is as follows: BDS staff report, ASTR operator testimony, testimony of interested parties who wish to ask questions or testify, staff response and closing comments, and ASTR operator's closing comments. The Hearings Officer will make a decision about this Reconsideration within 17 days of the close of the record. Your comments to the Hearings Officer can be mailed c/o the Hearings Officer, 1900 SW Fourth Ave., Suite 3100, Portland, OR 97201 or faxed to 503-823-4347.

Prior to the conclusion of the hearing before the Hearings Officer, any participant may request an opportunity to present additional evidence or testimony regarding the reconsideration. If such a request is made, the record will be held open for seven days to receive the new evidence and the record shall be held open for at least an additional seven days to provide the other parties an opportunity to respond to that new evidence. Unless waived by the ASTR operator, there will be an additional seven days provided to the ASTR operator for written rebuttal to the evidence, if the ASTR operator requires that time.

You will receive mailed notice of the decision if you write a letter received before the hearing or testify at the hearing, or if you are the property owner or applicant. This Staff Report will be posted on the Bureau of Development Services website. Look at www.portlandonline.com. On the left side of the page use the search box to find Development Services, then click on the Zoning/Land Use section, select Notices and Hearings. Land use review notices are listed by the District Coalition shown at the beginning of this document. You may review the file on this case at the Development Services Building at 1900 SW Fourth Ave., Suite 5000, Portland, OR 97201.

Appeal Process. You may appeal the Hearings Officer's Reconsideration decision only if you write a letter which is received before the close of the record for the hearing, if you testify at the hearing, or if you are the property owner/ASTR operator. Appeals must be filed within 14 days of the decision. If appealed, City Council will hold an "on the record" hearing. New evidence cannot be submitted to the City Council in the event of an appeal. No fee is charged for an appeal of a Reconsideration decision to City Council (Section 33.700.040.D.1).

The City Council's decision may be appealed to the Oregon Land Use Board of Appeals (LUBA).

Failure to raise an issue in person or in writing by the close of the record at or following the final evidentiary hearing before the Hearings Officer on this case may preclude an appeal to City Council or LUBA on that issue. Also, if you do not provide enough detailed information to the Hearings Officer, they may not be able to respond to the issue you are trying to raise. In such a situation an appeal to City Council or LUBA based on that issue may not be allowed.

Enforcement of revocation. Per 33.700.040.F, in the event that the land use approval is revoked, the use or development becomes illegal. The use or development must be terminated within 21 days of the date the revocation decision is filed with the City Auditor, unless the decision provides otherwise. Enforcement is the responsibility of BDS.

Recording the final decision.

If this Land Use Review is approved, the final decision will be recorded with the Multnomah County Recorder.

- *Unless appealed*, the final decision will be recorded by the Bureau of Development Services at least 14 days after **the Hearings Officer issues a decision**.

The applicant, builder, or a representative does not need to record the final decision with the Multnomah County Recorder.

For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

Per Zoning Code Section 33.700.040(C), reconsideration of the land use approval is being initiated by the Director of BDS.

Hearing Cancellation

This public hearing will be cancelled if the City of Portland is closed due the inclement weather or other similar emergency. Check local television or the City of Portland website (www.portlandoregon.gov) for closures. Contact the Hearings Office at 503-823-7307 for immediate information regarding cancellations or rescheduling.

The hearing will be rescheduled for the earliest possible date. A renotification notice will not be sent.

To attend the hearing, public transportation is available. Tri-Met buses stop near the BDS building at SW Fifth or Sixth Ave. at SW Hall St. and SW Harrison St. Call Tri-Met at 503-238-7433 (or www.trimet.org) for routes and times. Hourly rated public parking is available a half block south of the building on Fourth Ave.

Planner's Names: Marguerite Feuersanger and Justin Lindley

Date: May 3, 2019

EXHIBITS

NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement (for initial Conditional Use Review Proposal)
 - 1. Original Submittal, February 13, 2018
 - 2. Updated Submittal, February 27, 2018, narrative addressing approval criteria, lease agreement, and resident's statement
 - 3. Updated Submittal, March 20, 2018, updated narrative addressing the proposal description, house rules, approval criteria, development standards of Chapter 33.207, and roles and responsibilities of the proposed ASTR management
 - 4. Updated Transportation Analysis, April 25, 2018
- B. Zoning Map (attached)
- C. Plans/Drawings:
 - 1. Site Plan (attached)
 - 2. Floor Plans (attached)
 - 3. Elevations (attached)
- D. Notification information (for initial Conditional Use Review Proposal):
 - 1. Mailing list
 - 2. Mailed notice
- E. Agency Responses (for initial Conditional Use Review Proposal):
 - 1. Bureau of Environmental Services
 - 2. Bureau of Transportation
 - 3. Water Bureau
 - 4. Fire Bureau
 - 5. Police Bureau
 - 6. Site Development Review Section of BDS
 - 7. Life Safety Plan Review of BDS
 - 8. Urban Forestry Division of Parks and Recreation
- F. Correspondence (for initial Conditional Use Review Proposal, February 28, 2018 - April 23, 2018):
Writing in opposition to the proposal:
 - 1. Donna Wax and Jeff Jones, February 28, 2018 and April 17, 2018
 - 2. Karen Deora, March 2, 2018
 - 3. Cary Leach, March 2, 2018
 - 4. Randy Bloom, March 2, 2018 and April 17, 2018

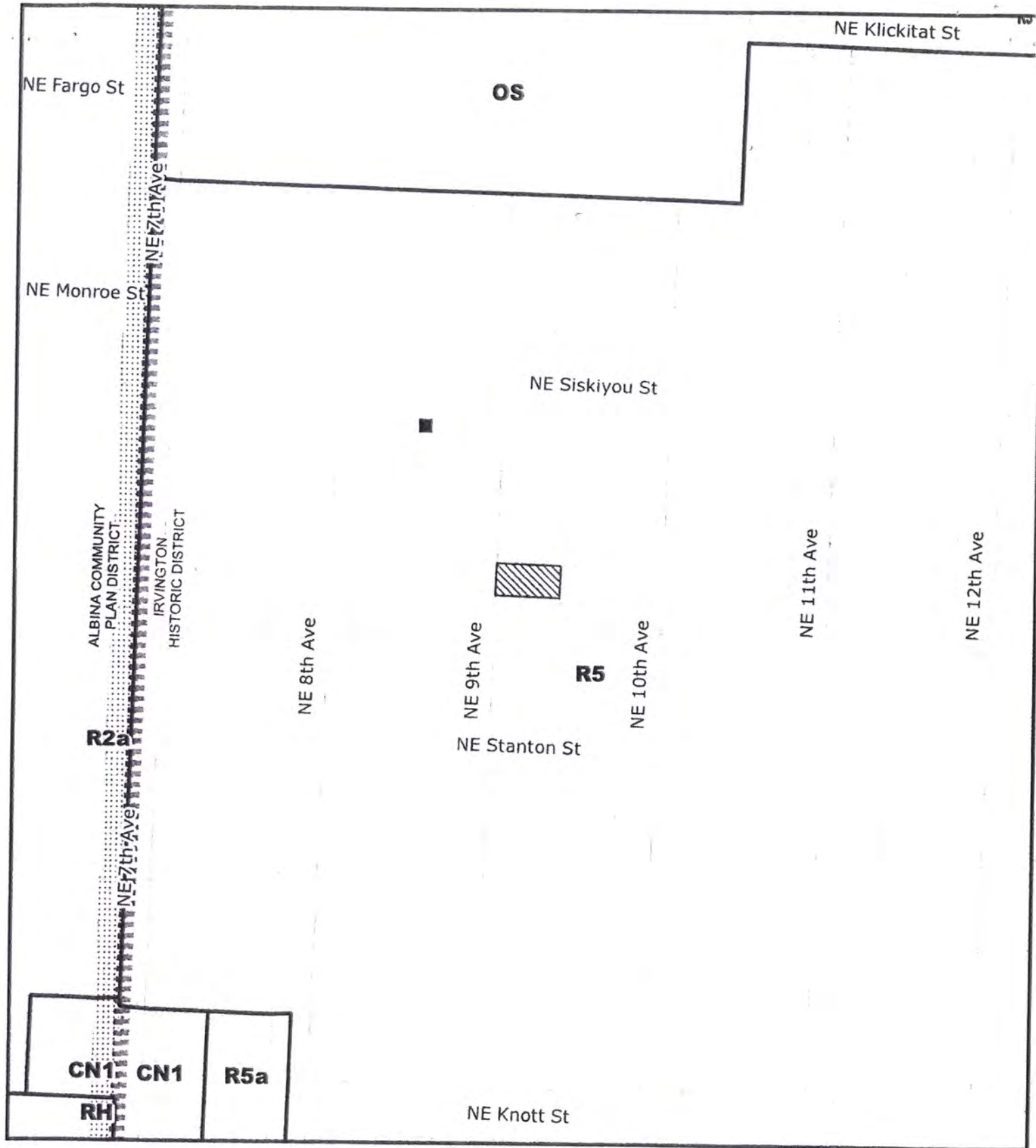
5. Barb Tillman, March 2, 2018
 6. Kay and David Reingold, March 3, 2018
 7. Virginia Green, March 4, 2018
 8. Ann Thomas, March 5, 2018
 9. Jennifer Klovee-Smith, March 6, 2018, mailing address not provided
 10. Carolyn Dasher, March 7, 2018 and April 18, 2018
 11. Peter Crabtree, March 7, 2018 and April 18, 2018
 12. David Kabat, March 8, 2018 and April 12, 2018
 13. Amy D. Valentine, March 13, 2018
 14. Dean P. Gisvold, Irvington Community Association, April 16, 2018 and April 23, 2018
 15. Tom Robbins, April 16, 2018 and April 17, 2018
 16. Tim Braun, April 18, 2018
 17. Barbara Nagle, April 19, 2018
 18. Christopher Crean, April 23, 2018
 19. Richard Plagge, April 23, 2018
 20. Jeffrey L. Kleinman, representing Barbara Nagle and Richard Plagge, April 23, 2018
- G. Other:
1. Original LU Application
 2. Applicant's signed extension of 120-day review period
 3. Map of Non-Residential Uses within the Residential Area
 4. 2017 Aerial Map of Site and Adjacent Properties
- H. Received by the Hearings Office (for initial Conditional Use Review Proposal)
1. Email Request to Schedule Hearings from BDS with Email Scheduling Reply from Hearings Office – Feuersanger, Marguerite
 2. Notice of Appeal Hearing (22 pages) – Feuersanger, Marguerite
 3. Notice of a Type II Decision On A Proposal In Your Neighborhood – Feuersanger, Marguerite
 4. Type II and IIX Decision Appeal Form Gisvold – Feuersanger, Marguerite
 5. Type II and IIX Decision Appeal Form Burse – Feuersanger, Marguerite
 6. Type II and IIX Decision Appeal Form Nagle and Plagge – Feuersanger, Marguerite
 7. Email Correspondence from Feuersanger to Hearings Office dated 7/10/18 – Feuersanger, Marguerite
 8. Letter from Tony Greiner to Feuersanger dated 7/7/18 – Feuersanger, Marguerite
 9. Email from Crabtree to Feuersanger dated 7/9/18 – Feuersanger, Marguerite
 10. 7/10/18 email from Barbara Tillman – Feuersanger, Marguerite
 11. 7/11/18 letter (2 pages) – Snyder, Gregg
 12. 7/10/18 letter from Celine Gihring – Dean Gisvold
 13. Written testimony (2 pages) with 4 additional copies – Gisvold, Dean
 14. Oversized photo – Plagge, Richard
 15. Oversized photo – Plagge, Richard
 16. Oversized photo – Plagge, Richard
 17. Oversized photo – Plagge, Richard
 18. Oversized photo – Plagge, Richard
 19. Oversized photo – Plagge, Richard
 20. Oversized photo – Nagle, Barbara E.
 21. Oversized photo – Nagle, Barbara E.
 22. Oversized photo – Nagle, Barbara E.
 23. Oversized photo – Nagle, Barbara E.
 24. Oversized calendar – Nagle, Barbara E.
 25. Written testimony (5 pages) – Nagle, Barbara E.
 26. Code compliance printout – Kleinman, Jeffrey L.
 27. 7/10/18 letter from Celine Gihring (2 pages) – Feuersanger, Marguerite
 28. 7/11/18 email from Cary Leach – Feuersanger, Marguerite
 29. PowerPoint presentation printout (34 pages) – Feuersanger, Marguerite
 30. Record Closing Information Sheet – Hearings Office
 31. 7/18/18 Memo with attachment – Feuersanger, Marguerite

- a. 7/17/17 Memo from Steven Kass to Feuersanger – Feuersanger, Marguerite
 32. Record Closing Information Sheet – Burse, Raymond M.
 33. 7/18/18 final argument letter (4 pages) – Burse, Raymond M.
 34. Proposed ASTR Roles and Responsibilities – Burse, Raymond M.
 35. Narrative addressing the ASTR regulations (9 pages) – Burse, Raymond M.
 36. 6/20/18 Notice of Appeal Hearing sent to Applicant/Appellant Burse, Raymond M.
 37. 6/4/18 Notice of a Type II Decision – Burse, Raymond M.
 38. 6/4/18 Notice of a Type II Decision sent to Applicant Burse Raymond – Burse, Raymond
 39. 7/23/18 letter – Kleinman, Jeffrey L.
 - a. Exhibit H-33 with highlighting (4 pages) – Kleinman, Jeffrey L.
 40. 7/23/18 letter – Kleinman, Jeffrey L.
 - a. Exhibit H-33 with highlighting (4 pages) – Kleinman, Jeffrey L.
- I. Reconsideration Documents (through April 30, 2019)
1. Initiation of Code Compliance Case File #17-204765 CC, July 17, 2017
 2. Initiation of Code Compliance Case File #17-250573 CC, October 3, 2017
 3. Type A ASTR (2-bedroom, Administrative Process) File #18-118947 HO, cancelled on February 7, 2018
 4. Initiation of Code Compliance Case File #18-186735 CC, June 13, 2018
 5. Decision of the Hearings Offer on Appeal of Administrative Decision, July 27, 2018
 6. Notes from Meeting with Raymond Burse, Jr., M. Feuersanger, BDS, August 16, 2019
 7. Airbnb Advertisement, Guest Reviews and Calendar, October 4, 2018
 8. Airbnb Advertisement and House Rules, October 5, 2018
 9. Citizen Complaint Log, October 26, 2018
 10. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, October 29, 2018
 11. Citizen Complaint Log, November 6, 2018
 12. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, November 29, 2018
 13. Notice of Zoning Violation, Enforcement Program of BDS, November 30, 2018
 14. Notice of Zoning Violation, Enforcement Program of BDS, December 7, 2018
 15. Letter from Raymond Burse, Jr. to Justin Lindley, BDS, December 30, 2018
 16. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, January 8, 2019
 17. Notes from Phone Conversation with Yasmine Barghouty, Justin Lindley, BDS, January 14, 2019
 18. Notes from Phone Conversation with Raymond Burse, Jr., Justin Lindley, BDS, January 15, 2019
 19. Notes from Meeting with Raymond Burse, Jr., Mike Liefeld, BDS, and Justin Lindley, BDS, January 18, 2019
 20. Citizen Complaint Log, January 21, 2019
 21. Citizen Complaint Log (1 of 2) January 23, 2019
 22. Citizen Complaint Log (2 of 2), January 23, 2019
 23. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, January 23, 2019
 24. Letter to Raymond Burse, Jr., Request for Administrative Review, January 24, 2019
 25. Letter to Michael Liefeld, BDS – Burse, Raymond M. and Burse, Raymond M. Jr., February 7, 2019
 - a. Exhibit 1, Airbnb confirmation data/transactional history of guest stays August 1, 2018 through January 23, 2019
 - b. Exhibit 2, Copy of the ASTR Operator Guest Log Book
 - c. Exhibit 3, Driver's License and post office mailing address, for new resident, Raymond M. Burse Jr., as of October 15, 2019
 - d. Exhibit 4, Email from Ray Burse, Jr., to Irvington Community Association president regarding residency change, January 15, 2019
 26. Citizen Complaint Log, March 18, 2019
 27. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, March 21, 2019
 28. Citizen Complaint Log, March 26, 2019
 29. Citizen Complaint Log (1 of 2), March 29, 2019

30. Citizen Complaint Log (2 of 2), March 29, 2019
31. Citizen Complaint Log, March 30, 2019
32. Citizen Complaint Log, April 7, 2019
33. Mailed Notice of a Public Hearing Regarding the Reconsideration, April 15, 2019
34. Mailing List for Notice of a Public Hearing Regarding the Reconsideration, April 15, 2019
35. Airbnb Advertisement, House Rules, Guest Reviews and Calendar, April 17, 2019
36. ASTR Operator Written Comments, including Exhibit I-23 (letter and four exhibits) – Burse, Raymond M., April 30, 2019
37. Email to Hearings Officer from Robert Dobrich, Irvington Community Association, April 30, 2019

The Bureau of Development Services is committed to providing equal access to information and hearings. Please notify us no less than five business days prior to the event if you need special accommodations. Call 503-823-7300 (TTY 503-823-6868).

TrackIT 1272374



ZONING

NORTH ↑

THIS SITE LIES WITHIN THE:
IRVINGTON HISTORIC DISTRICT



Site



Historic Landmark

File No.	LU 18-118937 CU
1/4 Section	2731
Scale	1 inch = 200 feet
State ID	1N1E26BD 5800
Exhibit	B Feb 13, 2018

TOTAL IMPERVIOUS COVERAGE: 2700sf
TOTAL LOT SIZE: 5000 sf

xxxx-Location
of Required
fence per
Condition B.13

Approved
City of Portland

Bureau of Development Services

Planner [Signature]
 Date May 30, 2018

* This approval applies only to the
reviews requested and is subject to all
conditions of approval
Additional zoning requirements may apply

SITE PLAN

not to scale

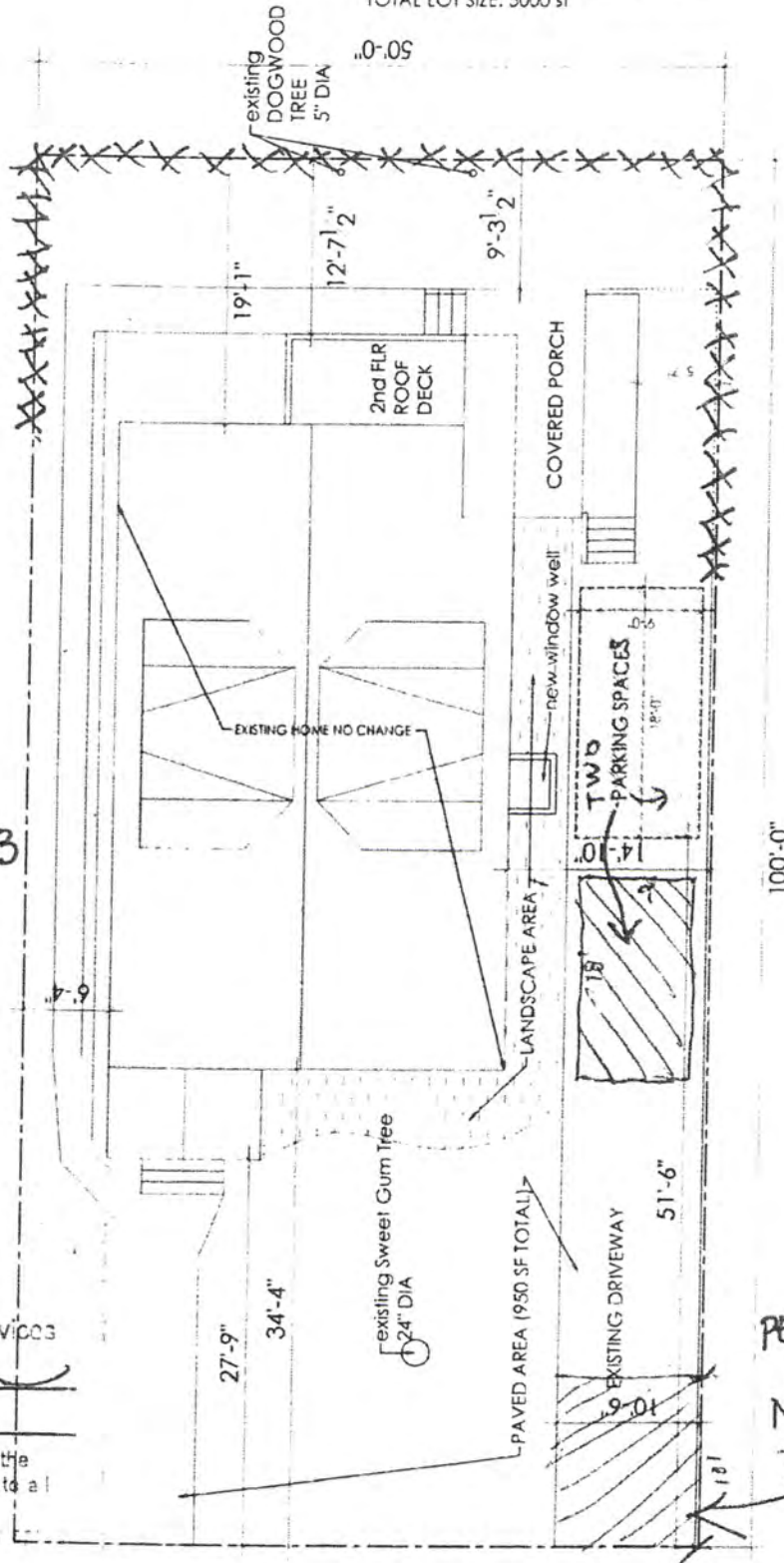
rec. 3/20/18

NE 9TH AVE

2946 NE 9th Ave

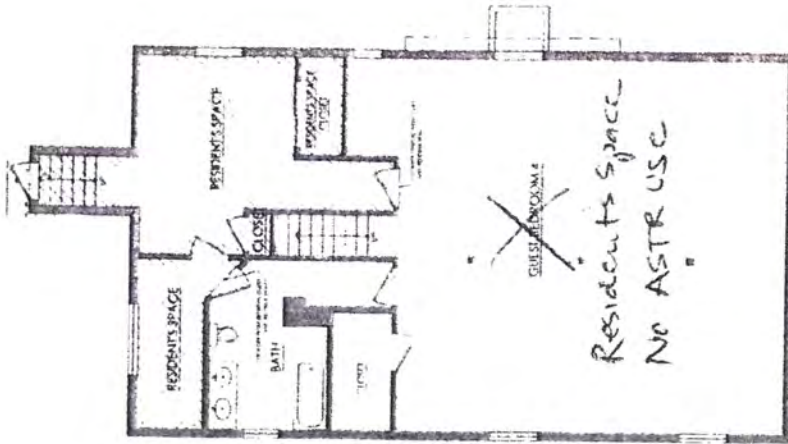


EXHIBIT C-1
18-118937-04



PER CONDITION B.3,

NO PARKING IN
THIS AREA

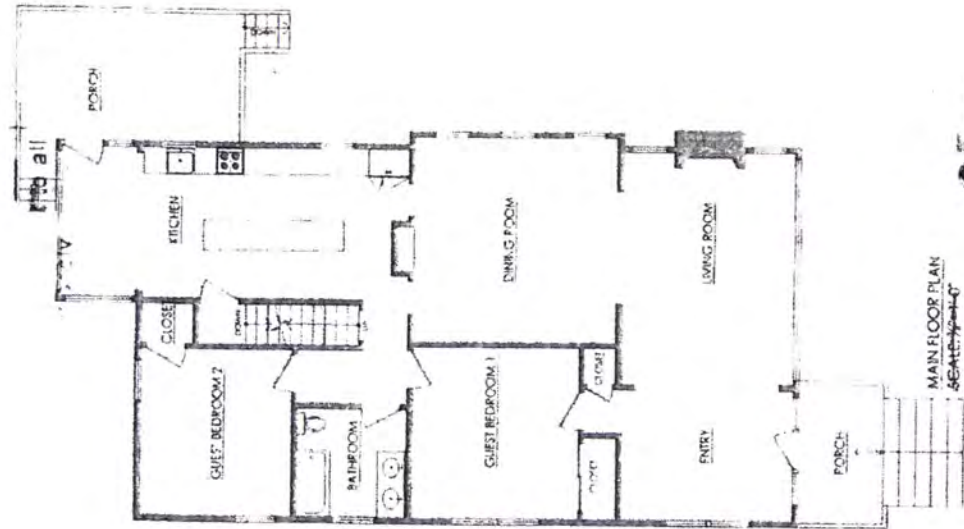


RESIDENT'S SPACE

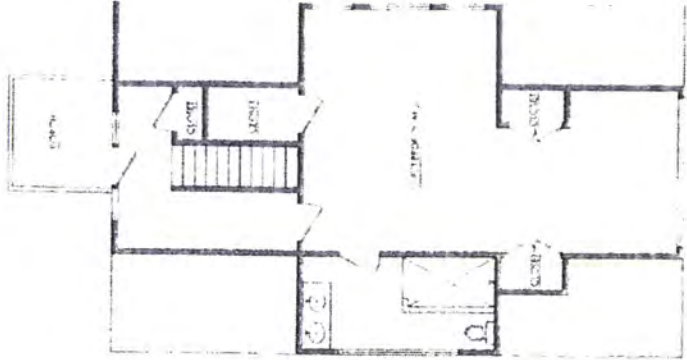
BASEMENT PLAN
SCALE: 1/8" = 1'-0"

Approved
City of Portland
Bureau of Development Services
Planner *[Signature]*
Date *May 30, 2018*

* This approval applies only to the reviews requested and is subject to all conditions of approval
Additional zoning requirements apply



MAIN FLOOR PLAN
SCALE: 1/8" = 1'-0"



UPPER FLOOR PLAN
SCALE: 1/8" = 1'-0"

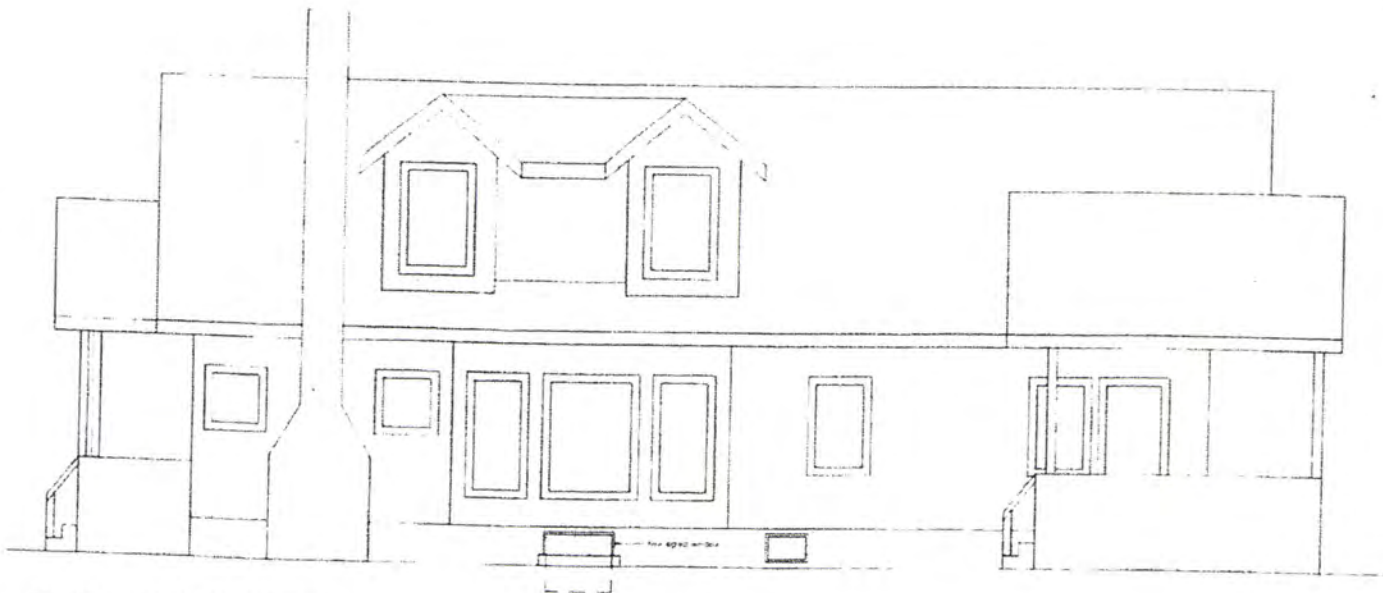
2946 NE 9th Ave
Existing Conditions Drawings for Type B Accessory Short Term Rental

2/2

strikeforce design
971.270.0951
www.strikeforcedesign.net

12/14/17

FLOOR PLANS
2946 NE 9th Avenue
EXHIBIT C-2
18-118937 CUL



EXISTING SOUTH ELEVATION
SCALE: $\frac{1}{4}"=1'-0"$

Approved
City of Portland
Bureau of Development Services
Planner *[Signature]*
Date May 30, 2018

* This approval applies only to the
reviews requested and is subject to
conditions of approval.
Additional zoning rules.

HOUSE ELEVATIONS
2946 NE 9th Avenue

rec. 3/20/18

8



EXISTING FRONT (WEST) ELEVATION
SCALE: $\frac{1}{4}"=1'-0"$

EXHIBIT C-3
18-118937 CU

NOT P