



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

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**NOTICE OF A PUBLIC HEARING BEFORE THE CITY COUNCIL ON  
AN APPEAL OF A LAND USE DECISION BY THE LAND USE  
HEARINGS OFFICER**

CASE FILE: **LU 18-118937 CU**  
Hearings Office Case # 4190011

WHEN: **Wednesday August 28, 2019, at 2:30 PM**

WHERE: City Council Chambers  
1221 SW Fourth Avenue  
Portland, OR 97201

Notice mail date: July 17, 2019

To: Interested Person

From: Marguerite Feuersanger, Land Use Services  
503-823-7619 / [mfeuersanger@portlandoregon.gov](mailto:mfeuersanger@portlandoregon.gov)

Justin Lindley, Property Compliance  
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A public hearing will be held to consider an appeal of the Hearings Officer's decision. On June 21, 2019, the Land Use Hearings Officer issued a decision to revoke the land use approval for a Conditional Use Review for a Type B Accessory Short-Term Rental (ASTR) for rental of three bedrooms at 2946 NE 9<sup>th</sup> Avenue. This decision was appealed by Raymond M. Burse and Raymond M. Burse, Jr. (ASTR Operators and property owners). At the August 28, 2019 public hearing, City Council will consider the appeal. You are invited to testify at the hearing.

This will be an "on-the-record" hearing in which the City Council will decide the appeal based on the evidence in the public record that was available to the Hearings Officer. New evidence cannot be considered by the City Council.

Copies of the zoning map and site plan are attached. Marguerite Feuersanger and Justin Lindley are the staff handling this case. Please contact us with any questions regarding the proposal, the Council hearing, or how to testify in this matter. The last page of this notice contains a general explanation of the City Council hearing process.

**Appellants and Property Owners:** Raymond M. Burse and Raymond M. Burse, Jr.  
7010 New Bern Court  
Prospect, KY 40059

**Site Address:** 2946 NE 9<sup>th</sup> 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, ccontact Laura Becker at 503-388-6088.  
**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  
**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.

### Proposal and Process

On July 27, 2018, 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. The Conditional Use approval (#18-118937 CU) included Conditions A.1-A.3 and B.1 – B.16. On April 15, 2019, BDS initiated a Reconsideration of a Land Use Approval process per Zoning Code Section 33.700.040 after obtaining evidence of violations of certain conditions of approval. On May 15, 2019, a public hearing was held to consider the BDS recommendation to revoke the land use approval. On June 21, 2019, the Hearings Officer found substantial violations of conditions of approval (B.1, B.2, B.3, B.5, B.7, B.8, B.9, B.10 and B.13) and found that because the conditions of approval were not met, the original Conditional Use approval criteria would not be met. The Hearings Officer decision was a Revocation of the Land Use Approval. The conditions found to be violated are:

*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.*
- 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 hours 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.*
- 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.*
- 5. Smoking and inhalant delivery systems (vaping, etc.) is prohibited anywhere on the property, including indoor and outdoor spaces.*
- 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 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).*
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 9<sup>th</sup> Avenue, and 2937, 2947 and 3007 NE 10<sup>th</sup> 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.*

### **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.

### **ASTR Review Process**

Zoning Code regulations allow ASTR uses in Residential zones, provided the relevant regulations of 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](http://www.portlandoregon.gov/zoningcode).

## **HEARINGS OFFICER'S DECISION**

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

The Hearings Officer concluded that the Conditional Use (Type B ASTR) land use approval must be revoked due to substantial evidence that one or more conditions of the land use review approval have not been implemented or have been violated (33.700.040.B.1).

The full decision is available on the Hearings Office website:

<https://www.portlandoregon.gov/bds/article/735558>

## **APPEAL OF THE HEARINGS OFFICER'S DECISION**

The Hearings Officer's decision was appealed by Raymond M. Burse and Raymond M. Burse, Jr. The appellants state that the Hearings Officer's decision is broader than the notice of violation, that substantial violations are not proven, and that the Hearings Officer misapplied the facts and failed to review and use all evidence. The appellants provided a four-page written narrative in support of the appeal, which is attached to this notice.

**Review of the Case File:** The Hearings Officer's decision and all evidence on this case are available for review (by appointment) at the Bureau of Development Services, 1900 SW Fourth Avenue, 4<sup>th</sup> Floor, Portland OR 97201. Please contact support staff at 503-823-7617 to schedule a time to review the file. We can provide some information over the phone. Copies of all information in the file can be obtained for a fee equal to the cost for such services. You may also find additional information about the City of Portland and City bureaus as well as a digital copy of the Portland Zoning Code, by visiting the City's home page on the Internet at [www.portlandoregon.gov](http://www.portlandoregon.gov).

**We are seeking your comments on the proposal.** The hearing will be held before the City Council. To comment, you may write or testify at the hearing. In your comments, you should address the approval criteria, which are identified above. Please refer to the case file number when seeking information or submitting testimony. Written comments **must be received by the end of the public testimony of the hearing** and should include the case file number and name and address of the submitter. Written comments must be given to the Council Clerk in person, mailed to 1221 SW Fourth Avenue, Room 130, Portland, OR 97204, or e-mailed to [cctestimony@portlandoregon.gov](mailto:cctestimony@portlandoregon.gov).

**Appeal of the City Council's decision:** The decision of the City Council may be appealed to the Oregon Land Use Board of Appeals (LUBA) at 775 Summer Street NE, Suite 330, Salem, OR 97310. The phone number for LUBA is (503) 373-1265. 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 City Council on this case may preclude an appeal to LUBA on that issue. Also, if you do not provide enough detailed information to the review body, they may not be able to respond to the issue you are trying to raise. In such a situation an appeal to LUBA based on that issue may not be allowed.

**Transportation to City Hall:** Public transportation to City Hall is available. See [www.trimet.org](http://www.trimet.org) or call TriMet at (503) 238-7433 for routes and times. Parking garages are available in the vicinity.

**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).**

**Enclosures:**

1. Zoning map
2. Site plan
3. Four-page appellants' narrative in support of the appeal
4. City Council Appeal Hearing Process for "on the record" land use appeals



# ZONING



THIS SITE LIES WITHIN THE:  
IRVINGTON HISTORIC DISTRICT



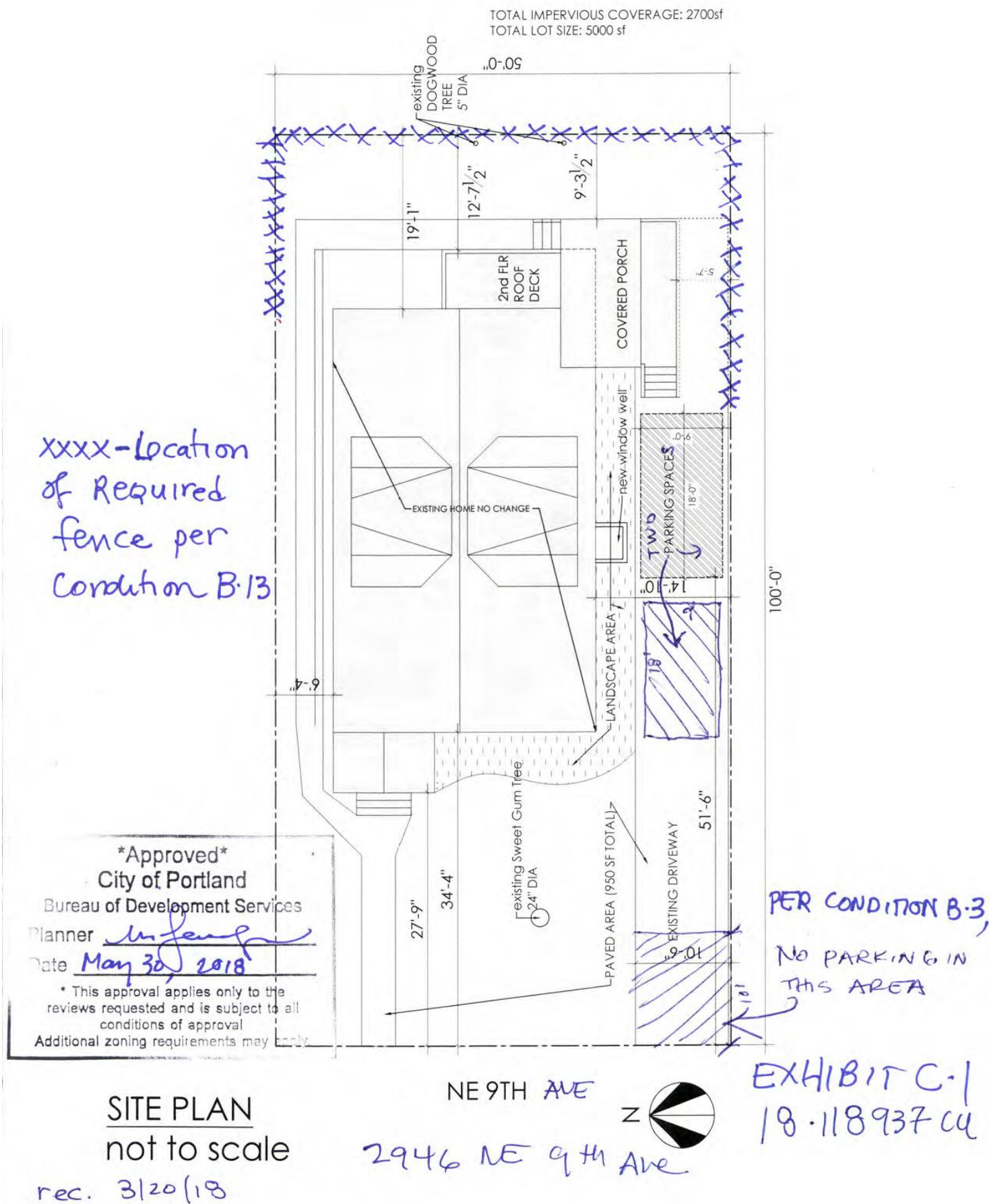
Site



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





**Appellants' Narrative in support of the appeal**

The Hearings Officer in the submitted case rendered a decision dated June 21, 2019, after a hearing on the recommendation by the Bureau of Development Services ("BDS") for revocation of the subject land use approval. The Hearings Officer decision was for revocation of the Land Use Approval LU 18-118937. It is from that decision that the Operators and Owners now appeal to the Portland City Council.

For their appeal the Owners/Operators state as follows. We believe the Hearings Officer to be in error for the following reasons and we request the City Council to reverse and overturn the Hearings Officer's Decision.

**Acting Beyond Noticed Violations**

In the Hearings Officer's Decision the officer went beyond what was before the hearings officer. In particular, by notice dated November 30, 2018, the Operators received from BDS notice of five violations. Each violation provided what was required for correction of and to address the violations. A second notice, dated December 7, 2019, was sent by BDS to the Operator containing the same information as the November 30, 2018 notice. Operators responded by requesting an Administrative Review and had an in-person meeting with BDS staff on January 18, 2019. BDS requested additional information in a letter dated January 24, 2019. A written response to the January 24, 2019 letter was provided by Operator dated February 7, 2019.

The November 30, 2018 and December 7, 2019 Notices of Zoning Violation included five issues, Conditions B.1., B.2., B.3., B.5., and B.8 violations. The Notice of Public Hearing Regarding Reconsideration had each of the violations listed in the November 30 and December 7 notices but added a B.7 violation. The Reconsideration Notice added an item on which there was no previous notice. At the reconsideration hearing BDS presented only on the noticed violations. The Hearings Officer Decision includes a number of additional violations not brought by BDS. Portland City Code ("PCC") 33.700.030.B. provides that "BDS **must give** written notice of any violation . . . ." (Emphasis added) The Decision includes several violations for which no notice was given, a clear violation of PCC and a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

The Hearings Officer makes findings on conditions not a part of the Notices of Violations or the Notice and bases his findings on the absence of a response from the Owners/Operators in the record. Such action on his part is clear example and proof of acting beyond the notices and the Notice of Reconsideration.

**Notices of Violation Provides Action and Time Period for Correction of Violations**

The Notices of Violation provided the corrections needed to correct and address the violations. Operators submitted documentation documenting the corrective steps taken. The Notices of Zoning Violation states, "You have 30 days from the date of this notice to correct the violations." Operators took such action and provided evidence of such actions to BDS in a letter with exhibits dated February 7, 2019, following an in-person



meeting with BDS staff on January 18, 2019. This occurred after having requested an appeal.

The Hearings Officer's only acknowledgement of the corrective actions taken and documented in the record is on page 22 of the Decision when the Hearings Officer says, "... evidence is in the record that the Operator has made some, albeit late and not enough, to address the condition violations." The Officer pays short shrift to Operators efforts and completed actions. His statement implies only perfection is acceptable which is an impossible task for anyone. He does not analyze each corrective action to determine its sufficiency.

Nowhere in the Decision is it stated that there is evidence of violations after the Notices of Violation. The Hearings Officer Decision cited examples to support the revocation are all prior to the Notices of Violation – page 14 August 25, 2018 and September 23, 2018. The Hearings Officer also says "neighbors" presented evidence of violation when it was one neighbor who happens to be a board member of the Irvington Community Association and the additional complaints were by those on the board with her. Directors include Dean Gisvold, Huck Bales, Jon Eaton, Jim Barta, Nathan Corser, Susan Hathaway-Marxer, Liz Morgan, Josh Plager, Anna Withington, Alex Michel, Barbara Nagle, Sean Stone, Jason Messer, Peter O'Neill and Elizabeth Tyler. When this is compared to those "neighbors" complaining about the Operators use of their property one finds a perpetuation of the same complaints of one neighbor repeated by the group. A serious look at the record shows this and the biases environment created that the Hearings Officer did not look at or behind. The Decision does not show nor demonstrate a review of the single neighbor's actions and agenda. As an example on page 15 of the Decision the Hearings Officer references a neighbor's complaint regarding a violation of Condition B.3 on May 10, 2019, parking. The only testimony at the Hearing regarding this date was that the Owner/Operator was there on that date with friends and family. A clear example of the neighbor's inability to distinguish between parties (guests or owners) and with an agenda to record everything which happened on the property whether it is or was a violation or not. And throughout the Decision the Hearings Officer gives weight and credence and credibility to whatever the neighbor has logged or said with no consideration to her agenda which is clear from the documentation. Even though there was testimony and documentation concerning the neighbor having a camera aimed at (and possibly recording) the private spaces of Owners' property and the intrusion it provided, such behavior had no impact on the Hearings Officer weighing credibility and the facts in this matter. Creditable direct evidence of correspondence between Operators and the neighbors and the attorney for the Irvington Community Association (Attachment 6 to Operators May 22, 2019 Submittal) was available but in the Decision is not mentioned nor the appearance of consideration given.

Additionally, neighbors and Neighborhood Association were given contact information for resident, management company, and property owner, contradictory to what was noted by the Hearings Officer. However, with this contact information neither neighbors nor the Neighborhood Association ever contacted any of the aforementioned parties to



solve any reported issues. This breaks protocol set forth by the City Planner, Marguerite Feuersanger, within her roles and responsibilities chart accompanying the City's original ruling. Had the neighbors and Neighborhood Association used any of these reporting mechanisms set forth by the City they quickly would have found out that the incidents being reported were in fact the resident and/or the property owner.

Hearings Officer found support for a violation where there was no testimony that the protocols for notification from neighbors to Operator were followed.

#### **Conditions Applied to Operators are Unusual and Different**

The Hearings Officer in the Decision on page 12 states,

"The Hearings Officer takes note that Hearings Officer Turner imposed land use condition approval B.16. The Hearing Officer finds this condition is not typical for ASTR conditional use approval."

This is acknowledgement that in this case conditions have not been applied and followed as in the typical case. Operators have been unfairly singled out by the earlier hearings officer and harassed by one neighbor in particular. Evidence of the latter is that BDS accepted everything this neighbor has said and submitted it as its own and ran with it without corroboration and validation other than by her fellow board members.

Another example of the unusual and different is the prohibition of parking of vehicles within 10 feet of the front property line. That restriction/prohibition is not only in the Operators' approval for the permitted use but is also applicable to all residents in the neighborhood. As Attachment 4 amply displays violations of this restriction is common in the neighborhood. Holding Operators to an item that others do not comply with is unfair.

Unusual also was the requirement that neighbors and their HOA of owners/operators' absences of more than three days from the property. What makes this unusual is the activities engaged in by the neighbors which raise safety concerns.

#### **Finding in the Decision Could be Different by Another Officer**

The Hearings Officer states that 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". (Page 22 of Hearings Officer Decision) This admission shows clearly that the Decision is not fully supported by the facts and it is not unreasonable to have a decision different than the Hearings Officer. Before a party is deprived of a property right (the kind recognized by the Due Process and Equal Protection Clauses found in the United States Constitution) it should be clear that the only plausible decision should be the one found by the Hearings Officer. Here that is not the case.

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**Substantial Used Inconsistently in Decision**

Proof of substantial violations is necessary. Hearings Officer uses definitions of substantial inconsistently throughout the Decision and thus there is no consistent standard applied to the analyses in the Decision.

**Consideration and Impact of Race**

Operator had on two occasions raised with the BDS staff the issue of race impacting the activities, statements and actions of some of the complaining parties. This occurred after the approval in July 2018 and at the conference with staff in January 2019. In none of the materials of the BDS staff is this documented and when asked about it in preparation for the hearing staff sought to walk away from the discussions. This was also raised at the hearing and any reference to it is noticeably missing from the Decision.

## **GENERAL EXPLANATION OF CITY COUNCIL APPEAL HEARING PROCESS FOR ON-THE-RECORD APPEALS**

### **1. SUBMISSION OF LEGAL ARGUMENT**

- a. On-the record appeals are limited to legal argument only. The only evidence that will be considered by the City Council is the evidence that was submitted to the Hearings Officer prior to the date the Hearings Officer closed the evidentiary record. Parties may refer to and criticize or make arguments in support of the validity of evidence received by the Hearings Officer. However, parties may not submit new evidence to supplement or rebut the evidence received by the Hearings Officer.
- b. Written legal argument must be received by the time of the hearing and should include the case file number. Testimony may be submitted via email to [CCTestimony@portlandoregon.gov](mailto:CCTestimony@portlandoregon.gov) or in writing to the Council Clerk, 1221 SW Fourth Avenue, Room 130, Portland, Oregon 97204.
- c. Legal argument may be submitted orally (see below).

### **2. COUNCIL REVIEW**

- a. The order of appearance and time allotments are generally as follows:
 

Staff Report	10 minutes
Appellant	10 minutes
Supporters of Appellant	3 minutes each
Principal Opponent of Appeal (Applicant)	15 minutes
Other Opponents of Appeal	3 minutes each
Appellant's Rebuttal	5 minutes
Council Discussion	
- b. The applicant has the burden of proof to show that the evidentiary record compiled by the Hearings Officer demonstrates that each and every element of the approval criteria is satisfied. If the applicant is the appellant, the applicant may also argue the criteria are being incorrectly interpreted, the wrong approval criteria are being applied or additional approval criteria should be applied.
- c. In order to prevail, the opponents of the applicant must persuade the City Council to find that the applicant has not carried the burden of proof to show that the evidentiary record compiled by the Hearings Officer demonstrates that each and every element of the approval criteria is satisfied. The opponents may wish to argue the criteria are being incorrectly applied, the wrong approval criteria are being applied or additional approval criteria should be applied.

### **3. OTHER INFORMATION**

- a. Prior to the hearing, the case file and the Hearings Officer decision are available for review by appointment, at the Bureau of Development Services, 1900 SW 4<sup>th</sup> Avenue, #5000, Portland, OR 97201. Call 503-823-7617 to make an appoint to review the file.

**If you have a disability and need accommodations, please call 503-823-4085 (TDD: 503-823-6868). Persons requiring a sign language interpreter must call at least 48 hours in advance.**