

## **IMPACT STATEMENT**

**Legislation title:** Appeal of the property owners and Accessory Short-Term Rental (ASTR) operators against the Hearings Officer's decision to revoke the land use approval for a Type B ASTR use, limited to 3 bedrooms and 6 guests, within the existing house located at 2946 NE 9<sup>th</sup> Avenue (Hearing: LU 18-118937 CU)

**Contact names:** Marguerite Feuersanger, City Planner, BDS Land Use Services Division  
(503) 823-7619  
Justin Lindley, City Planner, BDS Property Compliance Division  
(503) 823-7478

**Presenter names:** Marguerite Feuersanger and Justin Lindley

**Purpose of proposed legislation and background information:**

The request is not for a legislative action, but rather an appeal of the Hearings Officer's decision to revoke the land use approval for ASTR use (Conditional Use). 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 (such as evidence that conditions of the land use approval were violated). The Hearings Officer's decision to revoke the land use approval may be appealed to City Council per Zoning Code Sections 33.700.040.D and 33.730.030.F.

**Financial and budgetary impacts:**

This is an appeal of the Hearings Officer decision to revoke a land use decision (not legislation). The City Council decision on this matter will not have financial or budgetary impacts on the City.

Generally, Land Use Reviews are fee supported. In this case, the appeal fee was waived per 33.700.040.D. City costs associated with this appeal are for staff time to process the appeal.

**Community impacts and community involvement:**

The standard public involvement procedures for Type II and III processes have been followed. Two public hearings were held regarding the proposal. Interested and affected neighbors submitted written and oral testimony to the Hearings Officer. Neighborhood concerns focus on violations of conditions of ASTR approval, such as rental of ASTR groups that exceeded the maximum group size of 6 guests, and use of driveway, side entrance door, and outdoor decks beyond the limits set by the conditions. Neighbors state that the violations resulted in adverse noise and livability impacts (more pronounced during night-time hours). The Hearings Officer addressed these concerns in the revocation decision.

Raymond M. Burse and Raymond M. Burse, Jr., are the property owners and ASTR operators. They are expected to testify and request that the revocation decision be overturned.

Adjacent and nearby neighbors are expected to testify in support of the revocation decision. The site is within the Irvington Neighborhood and a representative of the Irvington Community Association (ICA) is expected to testify in support of the revocation decision. Among other issues associated with the ASTR use, the ICA has raised the concern of using housing for accessory short-term rental activity exacerbates the city's housing shortage and housing affordability issues.

### **Budgetary Impact Worksheet**

**Does this action change appropriations?**

- ☐ **YES:** Please complete the information below.  
☒ **NO:** Skip this section

<b>Fund</b>	<b>Fund Center</b>	<b>Commitment Item</b>	<b>Functional Area</b>	<b>Funded Program</b>	<b>Grant</b>	<b>Sponsored Program</b>	<b>Amount</b>



**City of Portland, Oregon**  
**Bureau of Development Services**  
**Office of the Director**  
FROM CONCEPT TO CONSTRUCTION

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**MEMORANDUM**

August 28, 2019

TO: Mayor Ted Wheeler  
Commissioner Chloe Eudaly  
Commissioner Nick Fish  
Commissioner Amanda Fritz  
Commissioner Jo Ann Hardesty

FROM: Rebecca Esau, Director *RE*  
Bureau of Development Services

RE: City Council hearing for LU 18-118937 CU (Revocation of an Accessory Short-Term Rental Approval)

The purpose of this memorandum is to submit the Council paperwork and provide a brief description of the Hearings Officer's decision to revoke a prior land use approval that will be presented to you in public hearing on August 28, 2019 at 2:30 pm.

**Site Address:** 2946 NE 9<sup>th</sup> Avenue

**BDS Representatives:** Marguerite Feuersanger and Justin Lindley (City Planners)

1. **Appeal Action Requested:** Overturn the revocation decision of the Hearings Officer and allow the prior Conditional Use approval for a Type B Accessory Short-Term Rental (ASTR) use (limited to 3 bedrooms and 6 guests).
2. **Key Elements of Revocation Decision:** The Hearings Officer found that the prior land use approval is a final decision. As such, the ASTR Operators are legally obligated to follow conditions of the final decision. Based on review of all evidence in the record, the Hearings Officer found:
  - Substantial violations of conditions of approval had occurred during times relevant to this case; and
  - The ASTR Operator's violations of conditions of approval constituted a failure to implement conditions such that the original approval criteria for the Conditional Use request would not be met.

The property owners and ASTR operators are Raymond M. Burse and Raymond M. Burse, Jr.

3. **Hearings Officer Revocation Decision:** The Hearings Officer found the code requirements of PCC 33.700.040.E.1.c were satisfied, and revocation of the land use approval is factually and legally warranted.

4. **Alternatives Facing Council:**

1. Deny the appeal and uphold the Hearings Officer's decision to revoke the prior land use approval for a 3-bedroom, 6 guest ASTR (revocation decision).

*This alternative is possible if City Council finds that there are substantial violations of conditions or failure to implement conditions such that the original approval criteria are not met.*

2. Grant the appeal to overturn the revocation decision, thereby restoring the prior land use approval for a 3-bedroom, 6-guest ASTR.

*This alternative is possible if City Council finds that the ASTR Operators have complied with conditions of approval of the prior land use approval.*

3. Grant the appeal to overturn the revocation decision, thereby restoring the prior land use approval for a 3-bedroom, 6-guest ASTR, but modify or add conditions of approval.

*This alternative is possible if City Council finds that the ASTR Operators:*

- *have not fully complied with conditions of approval, but that the violations are not substantial enough to warrant revocation; and*
- *the ASTR Operators can comply with the original approval criteria if the conditions are met.*

*For this alternative, City Council can modify the existing conditions and/or add new conditions to ensure compliance with the approval criteria. However, City Council may not approve a more intensive use than originally approved without providing additional public notice and hearing.*



# City of Portland, Oregon - Bureau of Development Services

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## Type III Decision Appeal Form

LU Number: 18-118937CU

### FOR INTAKE, STAFF USE ONLY

Date/Time Received 7/3/19 @ 11:50 am

☒ Action Attached

Received By Mary Buterschoen

Fee Amount None

Appeal Deadline Date 7/5/19 @ 4:30 pm

[Y] [N] Fee Waived N/A

☐ Entered in Appeal Log

Bill # N/A

☐ Notice to Auditor

[Y] [N] Unincorporated MC

☐ Notice to Dev. Review

### APPELLANT: Complete all sections below. Please print legibly.

PROPOSAL SITE ADDRESS 2946 NE 9TH AVENUE DEADLINE OF APPEAL JULY 5, 2019

Name RAYMOND M. BURSE and RAYMOND M. BURSE, JR.

Address 7010 New Bern Court City Portland State/Zip Code OR 97209

Day Phone 502 552 8201 Email raymond@burse.com Fax 502 228-2978

Interest in proposal (applicant, neighbor, etc.) OWNERS/CREATORS - APPLICANT

### Identify the specific approval criteria at the source of the appeal:

Zoning Code Section 33. 700 . CSC

Zoning Code Section 33. \_\_\_\_\_ . \_\_\_\_\_

Zoning Code Section 33. 700 . UTC

Zoning Code Section 33. \_\_\_\_\_ . \_\_\_\_\_

Describe how the proposal does or does not meet the specific approval criteria identified above or how the City erred procedurally:

Review broader than notice of violation. Substantial violations not proven -  
Misapplication of facts and failure to review and use all evidence  
(See ATTACHMENT)

Appellant's Signature [Signature]

### FILE THE APPEAL - Submit the following:

- ☒ This completed appeal form
- ☒ A copy of the Type III Decision being appealed
- ☐ An appeal fee as follows: N/A - (per planner)
  - ☐ Appeal fee as stated in the Decision, payable to City of Portland
  - ☐ Fee waiver for ONI Recognized Organizations approved (see instructions under Appeals Fees A on back)
  - ☐ Fee waiver request letter for low income individual is signed and attached
  - ☐ Fee waiver request letter for Unincorporated Multnomah County recognized organizations is signed and attached

The City must receive the appeal by 4:30 pm on the deadline listed in the Decision in order for the appeal to be valid. To file the appeal, submit the completed appeal application and fee (or fee waiver request as applicable) at the Reception Desk on the 5th Floor of 1900 SW 4th Ave, Portland, Oregon, between 8:00 am and 4:30 pm Monday through Friday.

The Portland City Council will hold a hearing on this appeal. The land use review applicant, those who testified and everyone who received notice of the initial hearing will receive notice of the appeal hearing date.

Information about the appeal hearing procedure and fee waivers is on the back of this form.



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.



### **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.