

Bob Dobrich
1760 NE 17th Ave
Portland, OR 97212

Jim Barta
2317 NE 12th Ave
Portland, OR 97212

Dean Gisvold
2225 NE 15th Ave
Portland, OR 97212

Barbara Nagle
2938 NE 9th Ave
Portland, OR 97212

BUREAU OF DEVELOPMENT SVCS
CASE FILE Marguerite Feuersanger
1900 SW 4TH AVE #5000
PORTLAND OR 97201

Richard Plagge
2938 NE 9th Ave
Portland, OR 97212

Lily Copenagle
1542 N Simpson St
Portland, OR 97217

James Stevens
2448 SE Yamhill St
Portland, OR 97214

Kate Bloom
2947 NE 10th Ave
Portland, OR 97212

Nikki Johnston
2125 NE 16th Ave
Portland, OR 97212

James Posey
117 NE Stanton St
Portland, OR 97212

Gregg Snyder
2926 NE 9th Ave
Portland, OR 97217

Carolyn Dasher
2937 NE 10th Ave
Portland, OR 97212

Raymond M Burse Sr.
Raymond Burse Jr.
2946 NE 9th Ave
Portland, OR 97212

Raymond M Burse Sr.
Raymond Burse Jr.
7010 New Bern Court
Prospect, KY 40059

Emailed: Marguerite--, Linly Rees, Lauren King, Maja
Haium, BDS Hearings Clerks, Hearing Officers Clerks,
Douglas Morgan, Kurt Krueger, Dawn Krantz, Robert
Haley, Dawn Uchiyama, Stephen Himes, Mari Moore,
Tamara Burkovskaia, Toni Anderson

LU 18-118937 CU

Order mailed: SEPTEMBER 24 2019



NOTICE OF FINAL DECISION

TO: All Interested Persons

DATE: September 24, 2019

RE: LU 18-118937 CU

Appeal of Raymond Burse, Sr. and Raymond Burse, Jr. against the Hearings Officer's decision to revoke the land use approval for a Type B Accessory Short-Term Rental use, limited to three bedrooms and six guests, within the existing house located at 2946 NE 9th Avenue (Hearing; LU 18-118937 CU)

To Whom It May Concern:

Enclosed is a copy of the Order of Council on LU 18-118937 CU, denying the appeal and upholding the decision of the Hearings Officer to revoke the land use approval in LU 18-118937 CU pursuant to PCC 33.700.040.E.1.c. If you wish to obtain a copy of the City Council's findings and decision, please contact Karla Moore-Love, Council Clerk by email at: Karla.Moore-Love@portlandoregon.gov or at (503) 823-4086.

City Council's decision is the final review process available through the City. You may appeal this decision to the Oregon Land Use Board of Appeals (LUBA) by filing a Notice of Intent to Appeal with LUBA within 21 days of the date of decision, as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that a petitioner at LUBA must have appeared orally or in writing during the City's proceedings on this land review. LUBA's address is: DSL Building, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283. You may call LUBA at 1-503-373-1265 or visit LUBA's website (www.oregon.gov/LUBA) for further information on filing an appeal.

Yours sincerely,
Mary Hull Caballero
Auditor of the City of Portland

By: 

Karla Moore-Love, Council Clerk

Encl.

Karla Moore-Love, Council Clerk
City of Portland
1221 SW 4th Avenue, Room 130, Portland, OR 97204
(503) 823-4086
www.portlandoregon.gov/auditor/councilclerk



APPEAL OF RAYMOND BURSE, SR. AND RAYMOND BURSE, JR. AGAINST THE HEARINGS OFFICER'S DECISION TO REVOKE THE LAND USE APPROVAL FOR A TYPE B ACCESSORY SHORT-TERM RENTAL USE, LIMITED TO THREE BEDROOMS AND SIX GUESTS, WITHIN THE EXISTING HOUSE LOCATED AT 2946 NE 9TH AVENUE (HEARING; LU 18-118937 CU)

Property Owners and ASTR Operators (Appellants):

Raymond M. Burse and Raymond M. Burse, Jr.
7010 New Bern Court
Prospect, KY 40059

Site Address: 2946 NE 9th Avenue

Legal Description: BLOCK 101, LOT 15, IRVINGTON

Other Designations: Historic Resource Protection Overlay Zone, Contributing Structure within Irvington Historic District

Zoning: **R5** (Single-Dwelling Residential 5,000 base zone)

Original Case Type: CU, Conditional Use (Type II Procedure)

Procedure: Reconsideration of a Land Use Decision, per PCC 33.700.040. Modified Type III procedure does not require a pre-application conference and does not require submittal of a fee or an application.

Action Requested by Appellants: 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).

The City Council appeal hearing was opened in Council Chambers, 1221 SW 4th Avenue on August 28, 2019 at approximately 2:30 p.m. After hearing public testimony and considering the evidence in the record, Council voted 5-0 to tentatively deny the appeal and uphold the Hearings Officer's decision to revoke a conditional use permit and ordered findings be prepared for September 18, 2019 at 10:45 a.m. On September 18, 2019 at approximately 10:45 a.m., Council voted 3-0 to deny the appeal and uphold the decision of the Hearings Officer to revoke the land use approval in LU 18-118937 CU pursuant to PCC 33.700.040.E.1.c. The record before the Hearings Officer and City Council contains substantial and adequate evidence to support the decision of the City Council to deny the appeal and revoke the land use approval.

DECISION

Based on evidence in the record and adoption of the Council's Findings and Decision in **Case File LU 18-118937 CU** and by this reference made a part of this Order, **it is the decision of Council deny the appeal and uphold the decision of the Hearings Officer to revoke the land use approval pursuant to PCC 33.700.040.E.1.c.:**

The City Council hereby adopts and incorporates the Hearings Officer's June 21, 2019 decision and findings, as its own decision and findings, and adopts the additional findings below.

However, the City Council corrects two typographical errors on page 23 of the Hearings Officer's June 21, 2019 decision and findings. The Hearings Officer found on page 20 that violation of condition B.14 is not a substantial violation under PCC 33.700.040.E.1.c. Consistent with that finding, Council deletes the two instances in which Condition B.14 is listed as a substantial violation in the Conclusion section on page 23.

Additional Findings:

I. Notice and Testimony

1. The City mailed notice of the Appeal Hearing before City Council on July 17, 2019. The notice described the date, time location and procedure for the hearing.
2. One of the appellants, Raymond M. Burse, testified in support of the appeal.
3. No persons testified in support of the appellant.
4. Thirteen persons testified in opposition to the appeal.
5. Several testifiers in opposition to the appeal raised new information regarding violations of conditions alleged to have taken place after the Hearings Officer's record closed on May 29, 2019. At the hearing, City Council identified this information as new evidence and reminded participants that it was an on the record hearing and new evidence would not be considered.
6. City Council did not consider new evidence in making its decision. Council rejects the new evidence and does not consider it to be part of the record.
7. On August 28, 2019, the City Council voted tentatively to deny the appeal and uphold the Hearings Officer's June 21, 2019 decision.
8. On September 18, 2019, based on persuasive evidence in the record regarding numerous, substantial violations, such that the original approval criteria for the use are not being met, the Council voted to deny the appeal, uphold the Hearings Officer's decision to revoke the land use approval and adopt a decision and findings.

II. Response to Appeal Issues

A. Notice of Violations

Appellants assert that because the November 30, 2018 and December 7, 2018 notices of violation referred to non-compliance with five conditions, B.1, B.2, B.3, B.5 and B.8, the Hearings Officer was limited to considering evidence of violations related to those conditions during the land use approval reconsideration process. The City Council finds that PCC 33.700.040 allows the Director of BDS to initiate the reconsideration process if there is evidence that one or more conditions of a land use approval have not been implemented or have been violated. As discussed on page 6 of the June 21, 2019 Hearings Officer's decision, there was evidence in the record regarding one or more violations to support initiation of the reconsideration process. Once the reconsideration process is initiated, the entire land use approval is reconsidered, not only the violations that were noticed pursuant to PCC 33.700.030. There is nothing in the text of PCC 33.700.040 that limits the scope of the review body's reconsideration to those conditions for which notice had previously been provided. To the contrary, PCC 33.700.040.E.1 contemplates that the review body will evaluate whether the use is or is not "complying with the conditions of the land use approval" or whether there are "substantial violations of conditions." (PCC 33.700.040.E.1.a and c.) Council interprets this language to mean that the review body may consider evidence and find violations of any conditions for the land use approval being reconsidered.

The Appellants specifically refer to Condition B-7, which requires guests to use the front entrance. The condition was added by Hearings Officer Joe Turner (July 27, 2018 Decision on Appeal of the Administrative Decision, Exhibit I-5). The Appellants proposed this condition during the public hearing to address noise impacts and the Hearings Officer found this to be appropriate mitigation (pp. 20-21 of Exhibit I-5).

BDS notified Mr. Burse under PCC 33.700.030 that his ASTR violated Conditions B.1, B.2, B.3, B.5 and B.8 of the land use approval (November 30, 2018 and December 7, 2018, Exhibits I-13 and I-14). BDS notified Mr. Burse that his ASTR violated Condition B.7 in the Notice of a Public Hearing Regarding the Reconsideration (April 15, 2019, Exhibit I-33). This Notice was mailed 30 days before the May 15, 2019 Hearings Officer hearing. It provided Mr. Burse 15 days to submit written comments that could be incorporated into the staff report (PCC 33.700.040.D.3) and provided information about how to obtain the staff report. The Staff Report and Recommendation to the Hearings Officer (Exhibit J-6) was published May 3, 2019, 12 days before the public hearing. The staff report contained details about conditions that were violated, including B.1, B.2, B.3, B.5, B.7 and B.8.

Mr. Burse testified at the May 15, 2019 public hearing about the B.7 violations. The Hearings Officer concluded, based on the evidence in the record, that the violations of B.7 were substantial. The Hearings Officer also found substantial violations of additional conditions of approval based on evidence submitted during the hearing: B.9, B.10, and B.13.

As discussed above, nothing in the text of 33.700.040 limits the Hearings Officer's reconsideration of a land use approval to only those violations that were noticed pursuant to PCC 33.700.030. However, even assuming for the sake of argument that the City's reconsideration were limited to violations of conditions that were noticed pursuant to PCC 33.700.030, the City Council finds that the evidence in the record and findings contained in the Hearings Officer's June 21, 2019 decision, incorporated as the Council's findings, of substantial violations of conditions B.1, B.2, B.3, B.5 and B.8 by themselves satisfy the criteria in PCC 33.700.040.E.1.c and provide ample basis for revocation of the land use approval under PCC 33.700.040. In particular, as stated in the Hearings Officer's findings, even one violation of conditions B.1 or B.2 would be considered significant and therefore meet the "substantial violations" standard, and evidence of repeated violations of conditions B.3, B.5 and B.8 constituted substantial violations.

B. Correction of Violations

Appellants claim that the City failed to acknowledge corrective actions taken to address the violations and the Hearings Officer decision does not identify violations that occurred after the November and December 2018 notices of violations. This claim has no basis in the record. The charts on pages 8 -14 of the May 3, 2019 staff report (Exhibit J.6) identify multiple violations of conditions B.1, B.2 , B.3, B.5, B.7 and B.8 that occur after the notices of violation were sent, including multiple violations in March and April 2019, immediately before the staff report was mailed. The Hearings Officer's findings and decision incorporated into this decision refer to and rely on Exhibit J.6 to find substantial violations of conditions that occur after December 2018.

C. Findings regarding PCC 33.700.040.E.2.c.

PCC 33.700.040.E states that the City may take any of the actions listed in E.1, E.2 and E.3. In other words, if revocation is justified under E.1, the City is not required to find cause for revocation under E.2 or E.3. The City finds that the land use approval must be revoked under PCC 33.700.040.E.1.c. but finds that revocation under PCC 33.700.040.E.2.c is not appropriate. Findings are not necessary for PCC 33.700.040.E.2.b. because the land use approval is revoked under E.1.c.

Appellants take one sentence of the Hearings Officer's June 21, 2019 findings regarding PCC 33.700.040.E.2 out of context to make an argument that the entire decision is unreasonable and not supported by evidence. After finding that the land use approval should be revoked pursuant to PCC 33.700.040.E.1.c, the Hearings Officer considered the other basis proffered by BDS for revocation: PCC 33.700.040.E.2.c. Hearings Officer's June 21, 2019 findings and decision at page 22. In considering the three requirements set forth in PCC 33.700.040.E.2.c, the Hearings Officer found (1) the use was at a different intensity than was approved, and (2) the use of the property did

not comply with the approval criteria. However, in considering the third requirement - that it could not be reasonably conditioned to come into compliance – the Hearings Officer found that new or modified conditions could be imposed to force the Operators into compliance, and thus he would not revoke the approval based on PCC 33.700.040.E.2.c. It was in this context that the Hearings Officer stated another review body might find the property could not be reasonably conditioned to come into compliance, and could base revocation on PCC 33.700.040.E.2.c. Because the City revoked the land use approval based on PCC 33.700.040.E.1, not PCC 33.700.040.E.2, Council rejects Appellant's assertions.

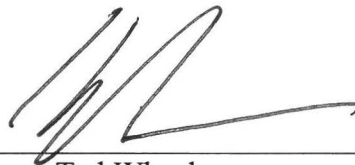
D. Neighbors Documenting Complaints

In their written appeal and in testimony before Council, Appellants made assertions about the racial motivations of neighbors who documented complaints about violations of the conditions of approval. Appellants do not provide evidence for these assertions, nor do Appellants identify how these assertions relate to the criteria for the City's review under PCC 33.700.040. A number of neighbors testified before the Hearings Officers and Council about the City complaint process and stated that they were not motivated to complain about violations of conditions of approval based on race. Council finds the neighbors' testimony credible. Council further finds that Appellants' assertions are not supported by evidence in the record and are not relevant to the criteria for this review.

IT IS SO ORDERED:

SEP 24 2019

Date



Mayor Ted Wheeler
Presiding Officer at Hearing of
September 18, 2019
9:30 a.m. Session