

**Board of Zoning Adjustment**  
**Staff Report**  
October 7, 2019



<b>Case No:</b>	18CUP1202
<b>Project Name:</b>	Short Term Rental
<b>Location:</b>	1535 Texas Avenue
<b>Owner/Applicant:</b>	Carrico, LLC
<b>Attorney:</b>	John C. Talbott
<b>Jurisdiction:</b>	Louisville Metro
<b>Council District:</b>	10 – Pat Mulvihill
<b>Case Manager:</b>	Steve Hendrix, Planning & Design Coordinator

**This item was initially heard by the Board on August 19, 2019 and DENIED.**  
**A reconsideration request was presented to the Board on September 9, 2019 and passed.**

**REQUEST**

Reconsideration Request of a Conditional Use Permit to allow short term rental of a dwelling that is not the primary residence of the host in an R-5 Zoning District and Traditional Neighborhood Form District.

**CASE SUMMARY/BACKGROUND**

The 0.087 acre site is in the Schnitzelburg neighborhood on the northeast corner of Texas Avenue and Pindell Avenue and was built in 1925. The house is adjacent to single family homes and backs up to DuPont Manual Stadium. The 1,100 square foot house has two bedrooms which will allow for six guests. The property has approximately 26 feet of frontage along Texas Avenue and more than 120 feet along Pindell Avenue, providing more than enough parking.

There is one short term rental within 600 feet.

There is one open enforcement case, ENF-ZON-19-000505-Complaint; illegal short tern rental, No CUP, case is on hold and scheduled for re-inspection 10/31/2019.

**STAFF FINDING / RECOMMENDATION**

Based upon the information in the staff report and the testimony and evidence provided at the public hearing, the Board of Zoning Adjustment must determine if the proposal meets the standards established in the LDC for a Conditional Use Permit.

**TECHNICAL REVIEW**

None

## INTERESTED PARTY COMMENTS

A neighborhood meeting was held on May 23, 2019 and four invitees attended.

Two people spoke in opposition and Councilman Hollander spoke as a neutral party at the August 19, 2019 hearing.

## STANDARD OF REVIEW AND STAFF ANALYSIS FOR CONDITIONAL USE PERMIT

1. Is the proposal consistent with applicable policies of the Comprehensive Plan?

STAFF: The proposal does not conflict with Comprehensive Plan policies.

2. Is the proposal compatible with surrounding land uses and the general character of the area including factors such as height, bulk, scale, intensity, traffic, noise, odor, drainage, dust, lighting and appearance?

STAFF: When appropriately managed, the proposed use is compatible with surrounding development and land uses. No exterior construction or alterations to the building or the site will be required.

3. Are necessary on-site and off-site public facilities such as transportation, sanitation, water, sewer, drainage, emergency services, education and recreation adequate to serve the proposed use?

STAFF: The subject property is served by existing public utilities and facilities. The proposal will not create additional requirements for the site.

4. Does the proposal comply with the specific standards required to obtain the requested conditional use permit?

**4.2.63** Short Term Rental Term Rental of a dwelling unit that is not the primary residence of the host or the Short Term Rental of a condominium unit that is the primary residence of the host in a R-R, R-E, R-1, R-2, R-3, R-4, R-5, U-N, R-5A, R-5B, R-6, R-7 or R-8A district and Short Term Rental of any dwelling unit in a TNZD district may be allowed upon the granting of a Conditional Use Permit. In addition to any conditions of approval, a short term rental and its host shall meet the following requirements:

A. The maximum stay for a guest shall be 29 consecutive days. A dwelling unit rented to the same occupant 30 consecutive days or more is not considered a short term rental.

***The applicant has been informed of this requirement.***

B. The dwelling unit shall be limited to a single short term rental contract at a time.

***The applicant has been informed of this requirement.***

C. At no time shall more persons reside in the short term rental than two times the number of bedrooms plus two individuals, except where the licensed property is in excess of two acres in which case the occupancy limit shall be two times the number of bedrooms plus six individuals.

***The applicant states that the residence has two bedrooms which will allow for six guests.***

- D. The property on which the short term rental(s) is situated shall not be located closer than 600 feet (measured in a straight line from nearest property line to the nearest property line) to any property on which another approved short term rental that required a conditional use permit is situated. The provision shall not apply to a property in the TNZD district which required a conditional use permit even though it is the primary residence of the host.

***As of the date of this report, there is one other property with an approved Conditional Use Permit allowing short term rental that is not the primary residence of the host within 600 feet of the subject property. The applicant will need to request relief to this provision in accordance with LDC Section 4.2.2.B. If the Board does not grant relief, the application does not meet all of the listed requirements and the Conditional Use Permit cannot be approved.***

**The August 19, 2019 meeting Justification letter and the Request for Reconsideration letter dated September 8, 2019 are attached.**

- E. The building in which the dwelling unit is located shall be a single-family residence, duplex, or condominium. If the short term rental is a condominium unit, the condominium unit must be the primary residence of the host. All conditional use permit applications for the short term rental of a condominium unit shall include evidence showing the applicable condominium association has taken action to approve the short term rental of the subject condominium. The evidence shall be provided in the form of minutes from an officially called meeting of the applicable condominium association board where in all condominium would be discussed and a majority of the board members voted in favor of permitting/allowing the short term rental of the subject condominium. In addition to notification required by Chapter 11 Part 5A, an applicant for a short term rental within a condominium shall provide notice of the Conditional Use Permit public hearing to all condominium owners within the association. Proof of notification shall be by way of affidavit. This provision shall not be waived or adjusted.

***The dwelling unit is a single family residence.***

- F. Food and alcoholic beverages shall not be served by the host to any guest.

***The applicant has been informed of this requirement.***

- G. Outdoor signage which identifies the short term rental is prohibited in residential zoning districts.

***The applicant has been informed of this requirement.***

- H. There shall be a sufficient amount of parking available for guests, as determined by the Board of Zoning Adjustment. The amount and location of parking shall be based on the land uses and density of the immediate vicinity.

***The site has credit for approximately six parking spaces along Pindell Avenue.***

- I. The short term rental and host shall meet all additional requirements set forth in the Louisville Metro Code of Ordinances.

***The applicant has been informed of this requirement.***

- J. If the property is subject to two (2) or more substantiated civil and/or criminal complaints within a twelve (12) month period, the Planning Director may revoke the approval. When the Planning Director revokes an approval under this section, the owner and host shall be notified of the revocation and shall have thirty (30) days in which to request an appeal before the Board of Zoning Adjustment. If no appeal is requested, the revocation shall become final on the thirty-first (31) day

after the initial action by the Director. Civil complaints include, but are not limited to, reported violations of building, safety, property maintenance, nuisance, health and sanitation, fire, electrical, plumbing, and mechanical codes. Criminal complaints include, but are not limited to, reported drug activity, theft and criminal mischief.

***The applicant has been informed of this requirement.***

- K. Prior to commencement of any short term rental on the subject property, the host shall register the short term rental pursuant to the Louisville Metro Code of Ordinances. If the short term rental is not registered within thirty (30) days of the issuance of the conditional use permit, the permit shall become null and void.

***The applicant has been informed of this requirement.***

- L. An active registration for the short term rental, as required by the Louisville Metro Code of Ordinances, shall be maintained. No short term rentals may take place unless the registration is active and in the name of the current host and property owner. If the registration is not renewed and lapses for six months, or in the event of a change of ownership and/or host, a new registration is not issued within six months from the date of the change, the conditional use permit shall become null and void. In order to recommence short term rentals, a new conditional use permit must be granted if required by this Land Development Code.

***The applicant has been informed of this requirement.***

**NOTIFICATION**

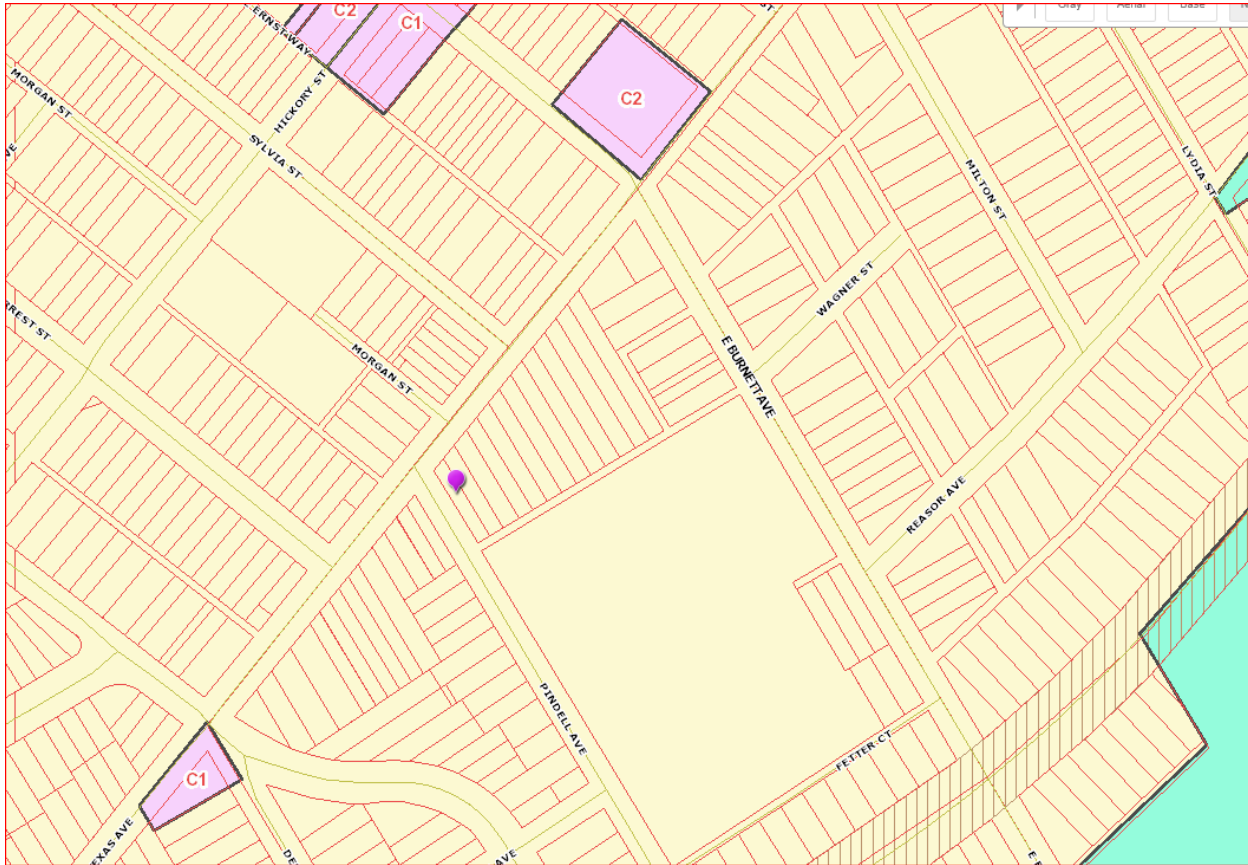
Date	Purpose of Notice	Recipients
8.2.2019 8.1.2019	Hearing before BOZA	1 <sup>st</sup> and 2 <sup>nd</sup> tier adjoining property owners Registered Neighborhood Groups in Council District 10
8.2.2019	Hearing before BOZA	Sign Posting

9.20.2019	Hearing before BOZA	1 <sup>st</sup> and 2 <sup>nd</sup> tier adjoining property owners Registered Neighborhood Groups in Council District 10
9.20.2019	Hearing before BOZA	Sign Posting

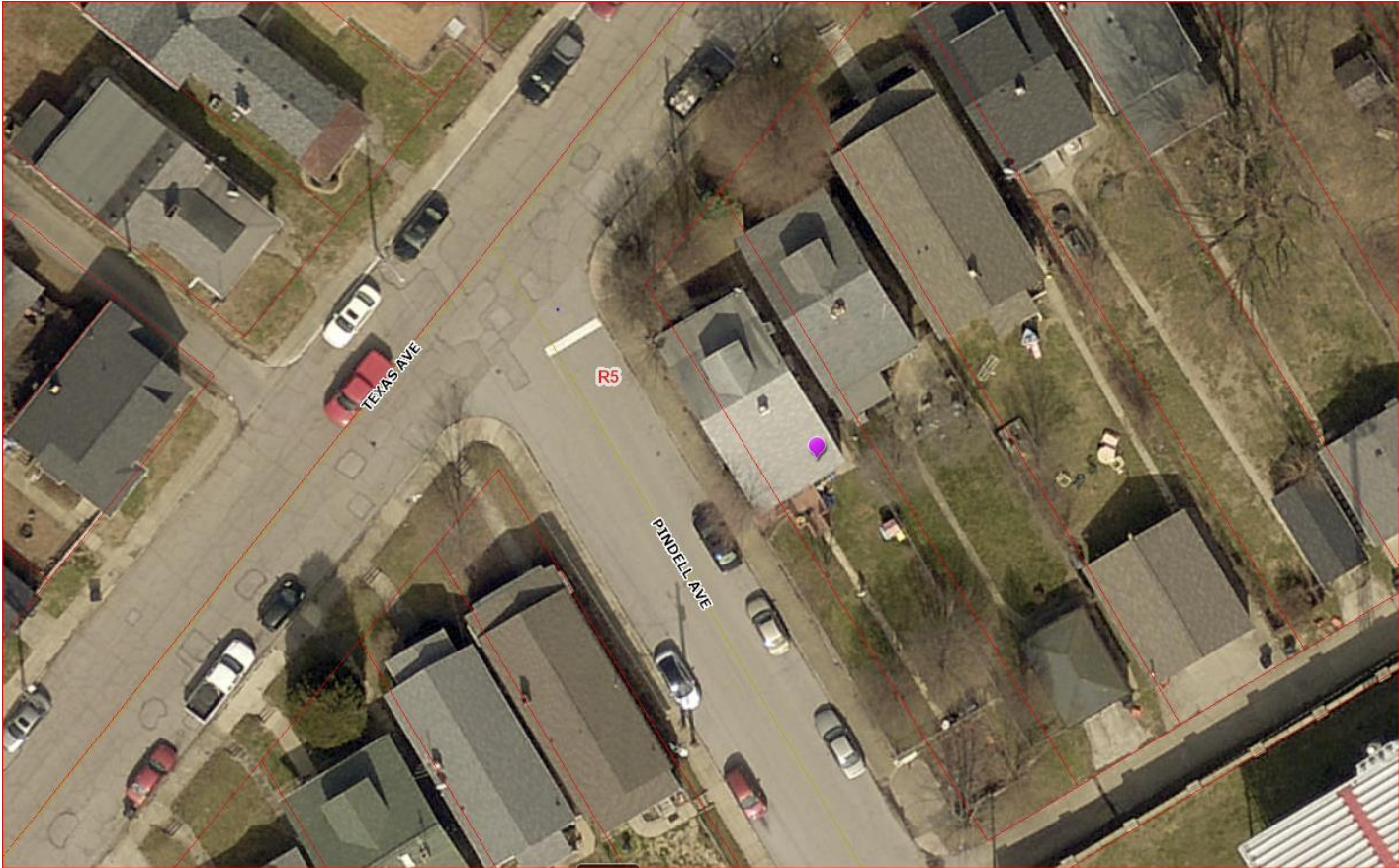
**ATTACHMENTS**

1. Zoning Map
2. Aerial Photograph
3. 600 Foot Map
4. Front of house
5. Neighborhood Attendance Sheet/Summary Minutes
6. Bedroom Pictures
7. Relief Justification Letter
8. Reconsideration Request Letter (September 8, 2019)

## Zoning Map

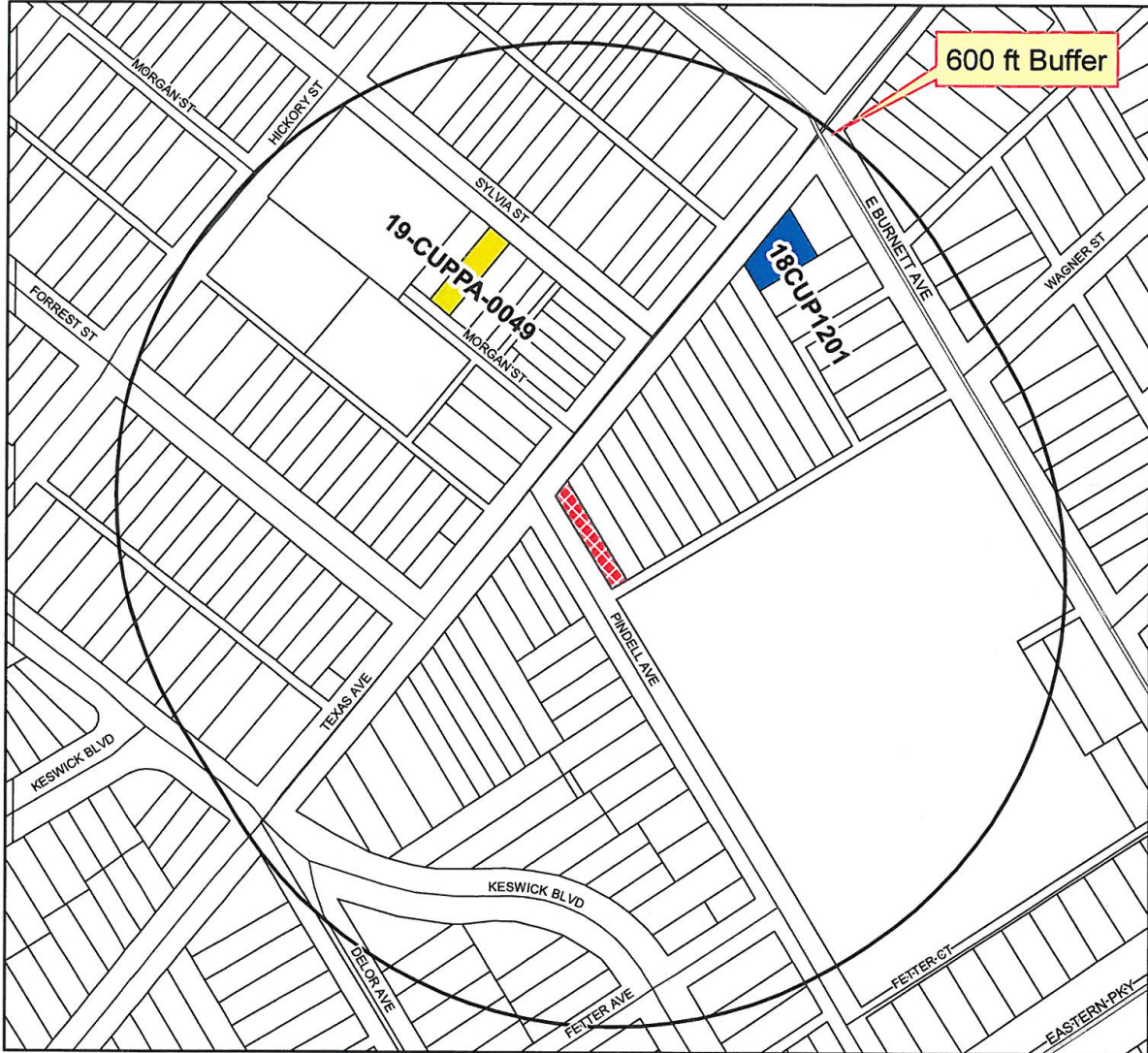


**Aerial Photograph**









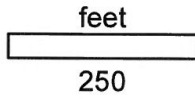
Map Created: 09/26/2019



**Legend**

-  Buffer
-  Subject Site
-  Pending
-  Approved

**Proximity Map  
#18CUP1202**



This map is subject to change upon the Board of Zoning Adjustment granting approvals to other Short Term Rental Conditional Use Permits.



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Front of house





# Developer's Neighborhood Meeting

*Meeting Date and Time*      Thurs May 23, 2019 @ 7:00 pm      *Developer's Name*      Katy Ashford II, LLC c/o Eric Carrico

*Location of Meeting*      Medical Arts Building, 1169 Eastern Pkwy (lower level off of elevator).

*Description of Proposal*      Conditional Use Permit to allow short-term rentals

*Subject Site Location*      1509 Texas Ave - 18CUP1201; 1530 Texas Ave - 18CUP1203; 1535 Texas Ave - 18CUP1202

## NEIGHBORS IN ATTENDANCE

NAME	ADDRESS	ZIP CODE	EMAIL ADDRESS
<i>PLEASE PRINT CLEARLY</i>			
LuAnn Muench	1806 Edenside Ave, Lou, KY 40204		LMUENCH1@ATT.NET
Eddie Muench	" " " "		
Geoff Wohl	D70 LA		geoff.wohl@lowtsvilleky.com
Wayne Gallavin	1156 Borchman bl, Lou, KY 40204		WP.Gallavin@yahoo.com
Eric Carrico	8700 Oldbury Place 40222		ericcarrico@gmail.com

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E:\CLIENT FOLDER\Carrico, Eric\Short Term Rentals\1509 Texas Ave\neighborhood meeting\Neigh Meeting Sign Up Form 05 23 19.doc

Neighborhood Meeting Summary

1509, 1530, and 1535 Texas Ave.

A neighborhood meeting was held on Thursday, May 23rd at 7:00 p.m. at the Medical Arts Building located at 1169 Eastern Pkwy. Those in attendance included the applicant's representatives, John C. Talbott, attorney with Bardenwerper, Talbott & Roberts, and the applicant/property owner, Eric Carrico.

The meeting was relatively short. Only four people attended the meeting, one of which was another owner of short term rentals and attended simply to observe how our meeting was conducted. Although not attending the meeting, we have been contacted by more immediate neighbors who support the CUP being granted because of how well the properties are being maintained. The neighbors had no concerns about the application and were generally pleased with the investment in the properties. This property has been operated as a short term rental and the application is being made to remove any questions about compliance with the current Metro Louisville ordinances and regulations.

The applicant, Mr. Carrico, explained that the rules that all tenants have to submit to includes that there is no outside noise after 10:00 pm. The "house rules" were shown to the attendees which emphasize the noise restrictions and other various rules, such as limitation on guest, no overnight guests, no parties, etc.



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Justification for Relief from 600 Foot Rule

1509, 1530, and 1535 Texas Ave.

These three properties are relatively close to one another, all on Texas Ave. in Schnitzelberg. This area is zoned R-5 and it is the Traditional Neighborhood Form District, which is characterized by predominately residential uses from low to high density, with neighborhood serving bars, restaurants, multi-family, and low-intensity commercial located together at activity centers on corners, as is the case in this area. The proposed CUP for Short Term Rental is sought to clarify that the previously existing short term rental use, which has been in existence since before the 600 foot rule and before the STR CUP rule was enacted by Metro Council.

Louisville enacted for the first time regulations on the operation of short term rentals in December 2015. These regulations were amended on May 8, 2019 incorporating the limitation of properties within 600 feet of another short term rental CUP. The applicant purchased 1530 Texas Ave. on October 23, 2014 with the intent of using it as a short term rental and spent \$55,000 renovating it for such purpose. The applicant purchased 1509 Texas Ave. on June 30, 2016 with the intent of using it as a short term rental and spent \$45,000 renovating it for such purpose. The applicant purchased 1535 Texas Ave. on September 4, 2017 with the intent of using it as a short term rental and spent \$35,000 renovating it for such purpose. The applicant's contractual obligation to purchase properties was months before the dates of actual purchase, again which were purchased with the intended use as a short term rental.

It has long been the law that pre-existing uses cannot be made illegal through subsequent legislation. Pre-existing non-conforming uses are vested rights constitutionally and they cannot be eliminated by subsequent legislation. *See Perkins v. Joint City-County Planning Com.*, 480 S.W.2d 166 (Ky. App. 1972).

In *Darlington v. Board of Councilmen of City of Frankfort*, 282 Ky. 778, 140 S.W.2d 392 (1940), Kentucky's highest court found that a property owner who purchased property to construct a florist shop and was proceeding forward with the conversion when both an emergency ordinance and general zoning ordinance were passed subsequent thereto, that the owners rights were "vested" under the state and federal constitution. The *Darlington* opinion held that the property owner had acquired rights protected by the state and federal constitutions which were "vested" and "when, prior to the enactment of such restrictions, the owner has in good faith substantially entered upon the performance of the series of acts necessary to the accomplishment of the end intended." It follows that not only are nonconforming rights of property owners protected by Kentucky statute, they are also protected by the state and federal constitutions and the courts.

The *Darlington* Court stated as follows: "*If she had not thus acquired a vested right to proceed, it is difficult to conceive how such a right could be acquired. Surely it could not be seriously contended that if appellant had completed the alteration of her premises and opened her florist shop, she could have been compelled to demolish her building or discontinue her business. If so, constitutional safeguards of property rights are meaningless. Obviously, it is not the amount of*

*money expended which determinations the vesting of the right, since one property owner might be required to expend more in the preliminary steps of altering his property for the conduct of a particular business than his neighbor would be compelled to expend in completing the alteration of his property for a different type of business."*

Consequently, it is apparent that the applicant has vested constitutional and statutory rights under KRS 100.253 because he acted in good faith prior to the enactment of the 600 foot rule and on one property before enactment of the CUP requirement entirely.

Additionally, relief should be granted through the discretionary power of the Board itself. The properties have not generated any opposition, and certainly no significant opposition. The 600 foot rule appears to be intended to allow protection of the fabric of the neighborhood. However, in this case, the significant investments in the properties have already improved the fabric of the neighborhood. Moreover, the CUP's are actively supported by the neighbors who have written letters of support expressly stating how the short term rentals are preferred and have benefitted the neighborhood.

Section 4.2.2 of the Land Development Code expressly grants the Board the authority to waive listed requirements, either on a permanent or temporary basis. This regulation further refers to Section 11.5.A of the Land Development Code, which does not apply any increased or strict standard for waiving conditions of a CUP regulation. As an example, LDC 4.2.35 for Mini-Warehouses expressly sets forth that no structure shall exceed one-story or be taller than 15 feet. The Board routinely waives this condition.

The 600 Foot regulation, using the same standard, can be waived and should be waived in this instance. No significant opposition exists and rather the primarily affected neighbors support the granting of the CUP for the Short Term Rental. The waiver of the 600 foot rule should not be scrutinized any more strictly. In the Short Term Rental CUP regulation, Metro Council directed BOZA to apply a strict standard to LDC 4.2.63(E). This section, referring to the type of building used for a short term rental, specifically directed the Board to not waive or adjust this provision. It stated *"This provision shall not be waived or adjusted."* Clearly Metro Council is well aware of how to limit or restrict relief from conditions. However, with regard to the 600 foot rule, no such language was included. Consequently, no strict standard should and can be applied to the 600 foot rule limitation contained in LDC 4.2.63(D).

The Kentucky Supreme Court recently decided the case of *Jefferson County Bd. Of Educ. v. Fell*, 391 S.W.3d 713 (Ky. 2012). In this case, the Supreme Court specifically cautioned against deriving legislative intent from *"biases that might appear in extra-statutory materials such as committee reports or a single legislator's post-enactment comments."* See generally, *Bd. of Trustees of the Judicial Form Retirement Sys. v. Atty. Gen. of Commonwealth*, 132 S.W.3d 770, 786 (Ky. 2003) ("It is a basic principle of statutory construction that legislative intent may not be garnered from parol evidence, especially parol evidence furnished by a member of the legislature, itself.")

The regulations allowing the Board discretion to provide relief from CUP conditions is long-standing and well entrenched. Nothing in the Short Term Rental CUP requirements indicate or suggest a stringent test on justifying waiver of this condition. Indeed, it is clear Metro Council intended to continue to allow the Board the same discretion it always has in waiving conditions for CUP's. Consequently, on the basis of the facts of this case and the reliance of the applicant, the 600 foot rule should be waived.

BARDENWERPER, TALBOTT & ROBERTS, PLLC

ATTORNEYS AT LAW

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September 8, 2019

SENT VIA EMAIL

Chris French, AICP  
Planning and Design Supervisor  
Office of Planning & Design Services  
444 S. Fifth Street, Suite 300  
Louisville, KY 40202

Re: Request for Reconsideration of #18CUP1203 at 1530 Texas Ave., 18CUP1202 at 1535 Texas Ave., and 18CUP1198 at 1137 Mulberry St.

Dear Chris,

We are requesting that BOZA reconsider its denials under the BOZA Bylaws 8.01 of the above referenced cases. Pursuant to 8.01.01, the reconsideration motion must be made by a member of the Board who voted with the majority. As you know, in land use matters, abstentions are counted as a vote with the majority. **Therefore this motion may be made by any member who was present but abstained, as well as any who voted with the majority.** See Pierson-Trapp Co. v. Knippenberg, 387 S.W.2d 587 (Ky. 1965). A member did abstain on all of these votes.

The Short Term Rental CUP's were denied on the basis of violation of the 600 Foot Rule which went into effect in May 2019, long after these applications were made. As a result, the application of the ordinance is illegally retroactive and arbitrary. Mr. Carrico has invested significant amounts of money to improve his Short Term Rentals at these locations and the retroactive application is an unconstitutional taking.

Further, the grounds for the reconsideration are that it is arbitrary and capricious to deny permits on property which was being developed and used as a short term rental, and which the Carrico's have invested tens of thousands of dollars in using the properties as short term rentals, prior to the enactment of the new law.

The Land Development Code, Section 4.2.2 clearly gives the Board broad authority to waive the CUP requirements. As was evident, the Board applied a "compelling" standard to the waiver request, which has no basis in the ordinance and was an improper application of the ordinance itself.

The testimony in opposition at the original hearings was also inappropriately given too much weight. As the Board seemed to recognize later in the day, after several CUP Hearings and after Eric's cases were already denied, the supposed affected neighbors testifying against the Eric's CUP requests were not immediately affected neighbors at all. Rather they were individuals with an agenda against Short Term Rentals themselves, rather than a true interest affected by the

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individual applications.

As an example, one was Ray Brundige who lives at 1718 Edgeland Ave., which is more than two miles away. Another was Berry Price-Kerr who lives at 931 Samuel St. effectively a mile away. These two in particular, as well as others, testified against virtually every single Short Term Rental application being heard that day, irrespective of location or the facts of each individual case. Additionally, several people misrepresented themselves as a “neutral” voice, but they were clearly not neutral at all.

Not one of the hundreds of residents who lived closer to the properties, including the immediate neighbors, opposed the applications. Not one. The only immediately adjacent property owners who took the time to participate wrote in support of the project and grant of the CUP request. They cited and recognized the benefits of improved property and the complete lack of negative impacts to the direct neighbors from these short term rentals. Also, in later cases, it became evident that the Board was not aware of the extent of actual neighbors given notice by the applicant of the CUP requests, mistakenly attributing the lack of true opposition to a lack of notice, which was not correct.

What was absolutely clear at the end of the hearings on August 19, 2019, that the same agenda driven people opposed every single Short Term Rental request, regardless of where the properties were located and regardless of the facts and merits of each individual case. Since Eric’s cases were heard first, it is believed that those opponents were given improper weight as it was not known that they were agenda driven opponents, rather than actual directly affected neighbor opponents until after Eric’s cases were already denied. What is and was important, is that not one single actual neighbor on Texas Ave. or Mulberry opposed these cases.

Moreover, the property at 1535 Texas Ave. backs up to Manual Stadium making it exactly the type of property which the Board has routinely waived the 600 foot rule where the use next to the home is much more intense than a residential use. Manual Stadium creates a lot of noise, traffic, late night events and lights, and nuisances, making this property exactly the type of property where the 600 foot rule should be waived. While 1530 Texas Ave. does not back up to Manual Stadium, it is very close and still subject to many of the nuisances and impacts from Manual Stadium, making waiver of the 600 foot rule appropriate.

All of these properties were being used as a short term rental prior to the enactment of the 600 foot rule ordinance, and some prior to the STR CUP ordinance itself as early as 2014, rendering the application of the 600 foot rule inappropriate. Mr. Carrico simply applied for the Short Term Rental applications in order to be in compliance as a “good citizen” and neighbor, not recognizing that his actions would then be used as a basis to deny the STR CUP for all his other properties. 1137 Mulberry St. is on the corner of Mulberry St. and Texas Ave., also making it ideal for a short term rental location in a neighborhood which has traditionally had more intense uses at the corners, such as bars, restaurants, multi-family, and other commercial retail uses, as is the historical pattern of land use in this area.

September 8, 2019

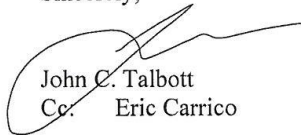
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Furthermore, it should be recognized that the application of a new ordinance to properties which are already in the process of being legally used as a STR is inappropriate and constitutionally invalid. Pre-existing non-conforming uses are vested rights constitutionally. *See Perkins v. Joint City-County Planning Com.*, 480 S.W.2d 166 (Ky. App. 1972). “[T]he right to utilize one's property for the conduct of a lawful business . . . becomes entitled to constitutional protection against otherwise valid legislative restrictions as to locality, or, in other words becomes "vested" within the full meaning of that term, when, prior to the enactment of such restrictions, the owner has in good faith substantially entered upon the performance of the series of acts necessary to accomplishment of the end intended.” *Conley v. Anchorage*, 806 S.W. 2d 404, 405-406 (Ky. App. 1990).

Rather than force Eric to undergo a long and expensive appeal, we are requesting that BOZA appropriately grant the motion to reconsider approval of the CUP requests.

For the foregoing reasons, we would request BOZA move to allow the cases to be reconsidered at the next regularly scheduled meeting of the Board.

Sincerely,

  
John C. Talbott  
Cc: Eric Carrico

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