

Board of Zoning Adjustments

Staff Report

March 18, 2019



Case No:	19APPEAL1001
Project Name:	Everett Appeal
Location:	1274 Everett Avenue
Appellant:	Wayne P. Gallavin
Jurisdiction:	Louisville Metro
Council District:	8 – Brandon Coan
Case Manager:	Chris French, AICP, Planning and Design Supervisor

REQUEST(S)

- Appeal of an administrative decision on 1/10/2019 to revoke a short term rental registration

CASE SUMMARY/BACKGROUND

According to KRS 100.257, “The board of adjustment shall have the power to hear and decide cases where it is alleged by an applicant that there is error in any order, requirement, decision, grant, or refusal made by an administrative official in the enforcement of the zoning regulation. Such appeal shall be taken within thirty (30) days.”

This appeal by the property owner and short term rental host, All Black Land Trust 204 and Wayne Gallavin, is in regard to the revocation of a short term rental registration because the dwelling unit in question was determined to not be the primary residence of the host as required by the Land Development Code. The registration was revoked on January 10, 2019. The appeal was timely filed. The following is a timeline of events that have taken place regarding short term rentals at the subject property:

Timeline of Related Events (Events directly relevant to this appeal in bold):

- 4/23/2018: Following an initial complaint regarding an alleged unlawful STR use, enforcement case opened (18PM7598)
- 4/25/2018: Enforcement courtesy notice regarding STR sent to property owner (18PM7598)
- 7/10/2018: Property owner submitted Conditional Use Permit Pre-Application form submitted (18CUP1093)
- 8/8/2018: Citation issued regarding unlawful STR
- 8/13/2018: Driver’s License issued to Wayne Gallavin showing address as “1274 Everette Avenue”**
- 8/13/2018: Short Term Rental Registration form submitted by Wayne Gallavin (STR9247412)**
- 8/14/2018: Short Term Rental Registration issued to Wayne Gallavin (STR9247412)**
- 8/27/2018: Neighborhood meeting held (18CUP1093)
- 9/18/2018: Citation issued regarding unlawful short term rental use
- 1/10/2019: Short Term Rental Registration revoked due to residency (STR9247412)**
- 1/11/2019: Kentucky Certificate of Registration issued to Wayne Gallavin for a Honda Accord (address shown as “1274 Everett Ave”)**
- 1/18/2019: Short Term Rental Registration form submitted by Wayne Gallavin (application not processed, pending outcome of 19APPEAL1001)
- 2/6/2019: Administrative Appeal filed regarding 1/10/2019 decision to revoke registration (19APPEAL1001)**

Notes: Subsequent to the zoning enforcement case being opened on April 23, 2018, additional service complaints regarding the short term rental were submitted to Louisville Metro Government. Service complaints received since 4/23/2018 were consolidated and investigated under Case #18PM7598, which remains open as of the date of this report.

A Conditional Use Permit Formal Application was never submitted.

The Appellant asserts that the administrative official, in this case, the Planning Director erred in the decision to revoke the short term rental registration. The Appellant asserts that he resided within the specific dwelling unit at the time of the revocation and therefore, the Planning Director erred in revoking the license.

STAFF ANALYSIS/FINDINGS

The decision of the Planning Director to revoke the short term rental was based on multiple vehicle registrations where the home address was not the 1274 Everett Avenue address.

The following is the basis of appeal submitted by the Appellant on February 6, 2019. The basis of appeal is as follows:

1. Registration of Short Term rental as primary residence is a paper review of supporting documentation. There is no opportunity for neighbor (public) comment or complaints. Therefore, a primary residence short term rental cannot be revoked based on neighbor complaints. To unilaterally revoke the primary residence short term rental registration following neighbor or public complaints is an arbitrary and capricious application of the law. If the neighbors consider themselves aggrieved, they are the proper party to appeal the decision, not the owner originally granted the registration.
2. The regulations do not contain a definition of "primary residence". In the "Frequently Asked Questions" of the Short Term Rental website, there is no definition for "primary residence", and points to the definition contained under KRS. It also states a drivers license, or other governmental identification, is the basis to determine "primary residence" or domicile. The FAQ section of the website has been taken down as of February 5, 2019. Since "primary residence" did not have a definition at the time of the present application, the subsequent revocation is arbitrary and capricious.
3. The unilateral revocation of the registration following unverified complaints is arbitrary and capricious. The unilateral revocation of the registration is not contained within the enacting laws. There is authority to do so once the applicant has satisfied the registration requirements.
4. The appeal fee must be paid by the applicant, and is a sum 20 times the amount of the registration. Based on investigation, the appeal fee is to defray costs of the hearing. Since the primary residence short term rental process is by application only, there is no commentary available at the initial approval, and the Commission unilaterally revoked the registration, the appeal cost is a barrier of entry not legally allowed. For primary residence appeals, the appeal fee must be paid by the complaining party and revocation cannot occur until after the hearing. If revocation occurs at the time of application, the applicant must appeal the decision. But, after granting registration, then the onus is on the complaining parties. To act otherwise is arbitrary and capricious.
5. By unilaterally revoking the registration, the homeowner's ability to use his home, domicile and primary residence in the manner he chooses has been limited. There is selective restriction of his ability to use his home as he chooses. As an example, if the homeowner had a home-based business, such as an accountant, attorney or counselor, the public and neighbors would not have an ability to limit his profession. Here, BOZA has allowed that to occur.

6. Any aggrieved party failed to file its appeal of the granting of the registration within 30 days of the determination of registration, and failed to pay the appeal fee under KRS 100.261.
7. A revocation of the registration did not comply with LRC, specifically LRC 4.3.23 and LRC 11.7.3. Further, the LRC and unilateral revocation of the decision did not comply with KRS 100, et seq.
8. From a factual standpoint, the applicant is the only individual with knowledge of his intent of maintaining his primary residence at the premises. The applicant satisfied, and continues to satisfy, the primary residence requirements as laid out by the LRC.

Regarding the basis of appeal, staff will respond to each point discussed by the Appellant.

1. The short rental was not revoked based on neighbor complaints. Zoning enforcement is conducted on a complaint basis. Once a service complaint is filed, staff will review the complaint and look for any substantiating evidence. While complaints led to the investigation, the decision to revoke was based on records, not observations. In this case it was found that multiple vehicles were registered in the Appellant's name at a residential address in Indiana. The Planning Director decided that was sufficient evidence to revoke the Short Term Rental registration for not being the primary residence of the host.
2. Neither the Louisville Metro LDC nor the Metro Code of Ordinances provide a definition of primary residence. Further, staff is not aware of a directly applicable definition in Kentucky Revised Statutes. Even if statutes or local regulations provide such a definition, it would have to be relevant to the context of short term rentals. As the requirement for residency is within the LDC, the interpretation of what constitutes primary residency sits with the Planning Director, which may be reviewed by the Board upon administrative appeal. It is clear by the intent of the regulations that there can be only one primary residence for a host. A driver's license is not the sole piece of evidence that can be used to determine the primary residence. Kentucky law does not require that the address on a driver's license be a "primary residence". Further, there are other statutes and regulations that relate to residency. It is staff's understanding of the law that a personal vehicle owned by a Kentucky resident must be registered in Kentucky, which was not the case upon the date of the revocation as the vehicles were registered in Indiana. The FAQ in question was developed administratively by staff to provide the public with basic parameters of how to show residency upon application submittal. It was not adopted by Metro Council and does not supersede any requirements or subsequent interpretations. The subject question/answer in FAQ was to show what an applicant needed to provide at the time of an initial registration submittal. A driver's license, as well as other governmental documents governed by Kentucky Revised States and local ordinances, suggests primary residency. However, it was not intended to be relied upon as direction in situations where contradictory evidence is found suggesting primary residency elsewhere. As far as the FAQ being removed from the website, it is revised periodically as it is an administrative document.
3. Land Development Code (LDC) section 4.3.23 allows a short term in a R-5B zone as a permitted use with standards when the dwelling unit is the primary residence of the host and in conformance with the listed standards A through J. Standard I states, "In order to maintain a registry of short term rental, the host of the short term rental shall submit a notice of intent to commence a short term rental to the Office of Planning and Design Services in a form prescribed by the Planning Director. This form may be an online form that does not require the host to visit the office. In addition, LDC section 11.1.1, designates the Planning Director as the principal administrative official for the implementation and enforcement of the regulations contained within the LDC. Therefore, the Planning Director has the authority to revoke the Short Term Rental registration for noncompliance with the LDC.
4. This is not relevant to the appeal case. In addition, the procedure for appeals is established by KRS 100 and further by the LDC. The fee schedule for applications of the LDC is the jurisdiction of the Planning Commission, in accordance with LDC section 11.9.2.

5. This is not relevant to the appeal case. The LDC does regulate home occupations in chapter 4 as accessory uses. Short Term Rentals are considered a principal use of the property. Further, Short Term Rentals have never been permitted by right in Louisville Metro. Dependent on zoning and residency, they are permitted as a conditional use or with special standards. To have a right to operate, the host must meet all applicable standards and receive all applicable approvals.
6. In this case the aggrieved party is the Appellant. The Appellant, Mr. Gallavin did file his appeal case within the timeframe allotted by KRS 100 and the LDC.
7. The registration was revoked because the Planning Director determined that there was sufficient evidence that 1274 Everett Avenue was not the primary residence of the host which is in violation of LDC section 4.3.23. Due to the property's zoning, if the address is not the host's primary residence, the host cannot conduct Short Term Rentals and the Planning Director is obligated to revoke the registration as allowing it to remain in effect would be contradictory to the requirements and purpose of the LDC.
8. The Planning Director is the principal administrator of the LDC and as such has the authority to interpret the zoning regulations. The Planning Director based on the evidence that multiple vehicles were registered in the Appellants name with an address that was not 1274 Everett Avenue; therefore, the Planning Director revoked the Short Term Rental registration for noncompliance with the requirements of the LDC.

The Appellant has presented Affidavits, a voter registration, and at least one vehicle registration stating that 1274 Everett Avenue is his current primary residence. No additional evidence has been presented to show that 1274 Everett Avenue was his primary residence when the revocation took place on January 10, 2019.

Staff Conclusions

It is staff's belief that the Appellant has not provided sufficient evidence from the time period surrounding the January 10, 2019, revocation date to overturn the Planning Director's decision. However, there does appear to be sufficient evidence indicating that 1274 Everett Avenue is the current primary residence of the Appellant.

Standard of Review

The Board must determine whether there is sufficient evidence submitted by the Appellant and presented at the public hearing that an error was made in the decision to revoke the Short Term Rental registration because the property was not the primary residence of the host. In addition, staff would request that the Board also decide whether the current address of the Appellant is 1274 Everett Avenue.

INTERESTED PARTY COMMENTS

No comments submitted.

NOTIFICATION

Date	Purpose of Notice	Recipients
2/27/2019	Appeal Hearing	GovDelivery District 8
2/28/2019	Appeal Hearing	APO Notice List, Appellant, and Planning Director
3/8/2019	Appeal Hearing	Legal ad Courier Journal

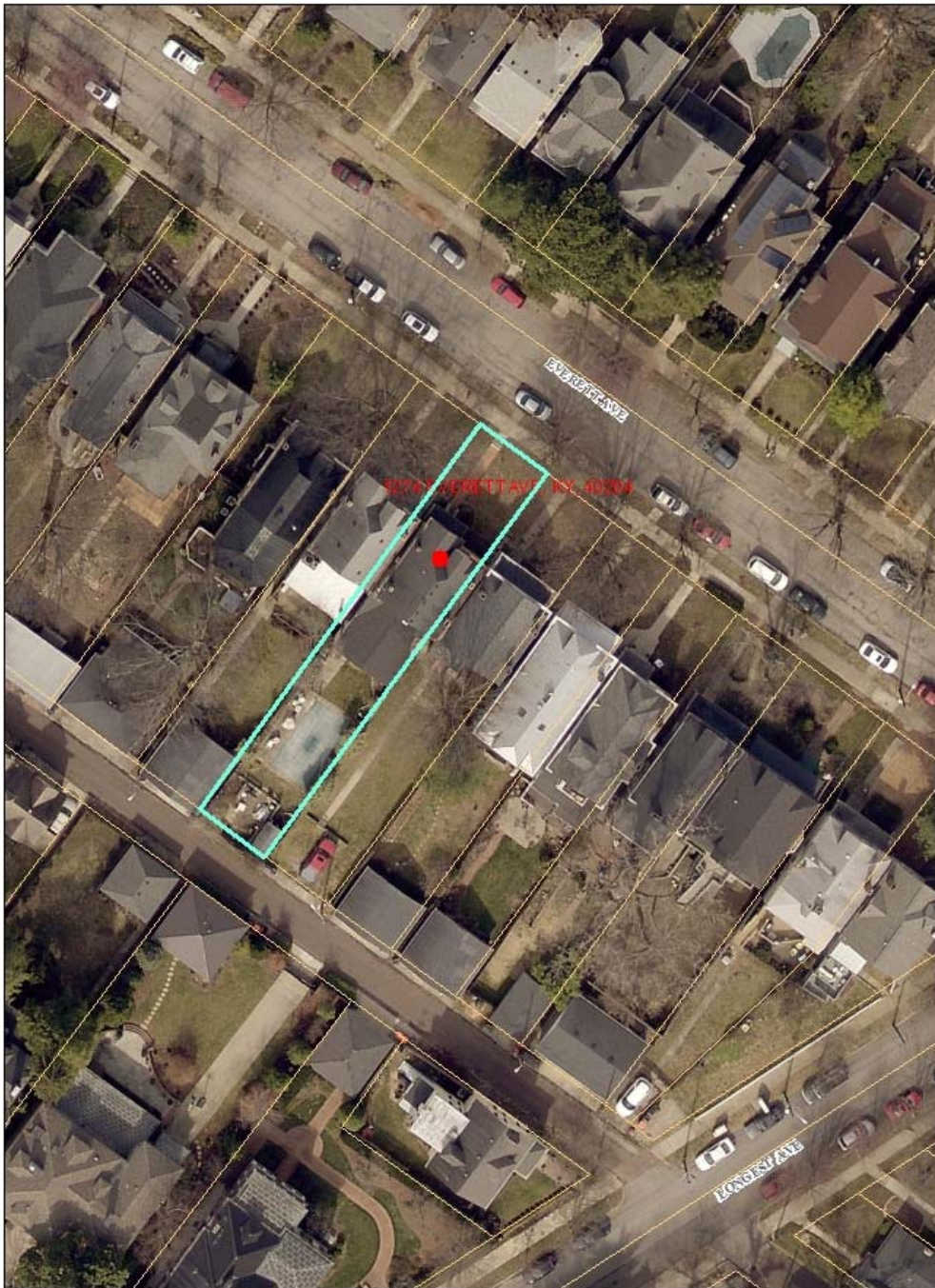
ATTACHMENTS

1. Zoning Map
2. Aerial Photograph

1. Zoning Map



2. Aerial Photograph



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1274 Everett Avenue

