

Board of Zoning Adjustment
Staff Report
October 7, 2019



Case No:	18CUP1198
Project Name:	Fulton Short Term Rental
Location:	1137 Mulberry Street
Owner(s):	Katy Fulton
Applicant:	Katy Fulton
Jurisdiction:	Louisville Metro
Council District:	10 – Pat Mulvihill
Case Manager:	Jon Crumbie, Planning & Design Coordinator

REQUEST(S)

Conditional Use Permit to allow short term rental of a dwelling unit that is not the primary residence of the owner/host in an R-6 zoning district and Traditional Neighborhood Form District.

CASE SUMMARY/BACKGROUND

The applicant requests approval to conduct short term rentals at the subject property. The subject property is developed with one structure that is a single family residence. The applicant states that the residence has four bedrooms that will allow a maximum number of ten guests. The site has credit for up to four on-street parking spaces.

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.

RELATED CASES

18ZONE1017 – Change in zoning from R-5 to CN never progressed past the pre-application stage.

TECHNICAL REVIEW

There are no outstanding technical review items.

INTERESTED PARTY COMMENTS

A neighborhood meeting was held on May 20 and six people attended.

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.

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 substantial 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 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 subject property is smaller than two acres. The applicant states that the residence has four bedrooms that will allow a maximum number of ten 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, within 600' of the subject property, there is 1 property with an approved conditional use permit allowing short term rentals that is not the primary residence of the host. The applicant is requesting relief to the provision in accordance with LDC Section 4.2.2.B. If provided, the applicant's justification for this relief is attached to this report. 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.***
- 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 applicant has been informed of this requirement.***
- 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 on-street parking spaces***
- 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.***

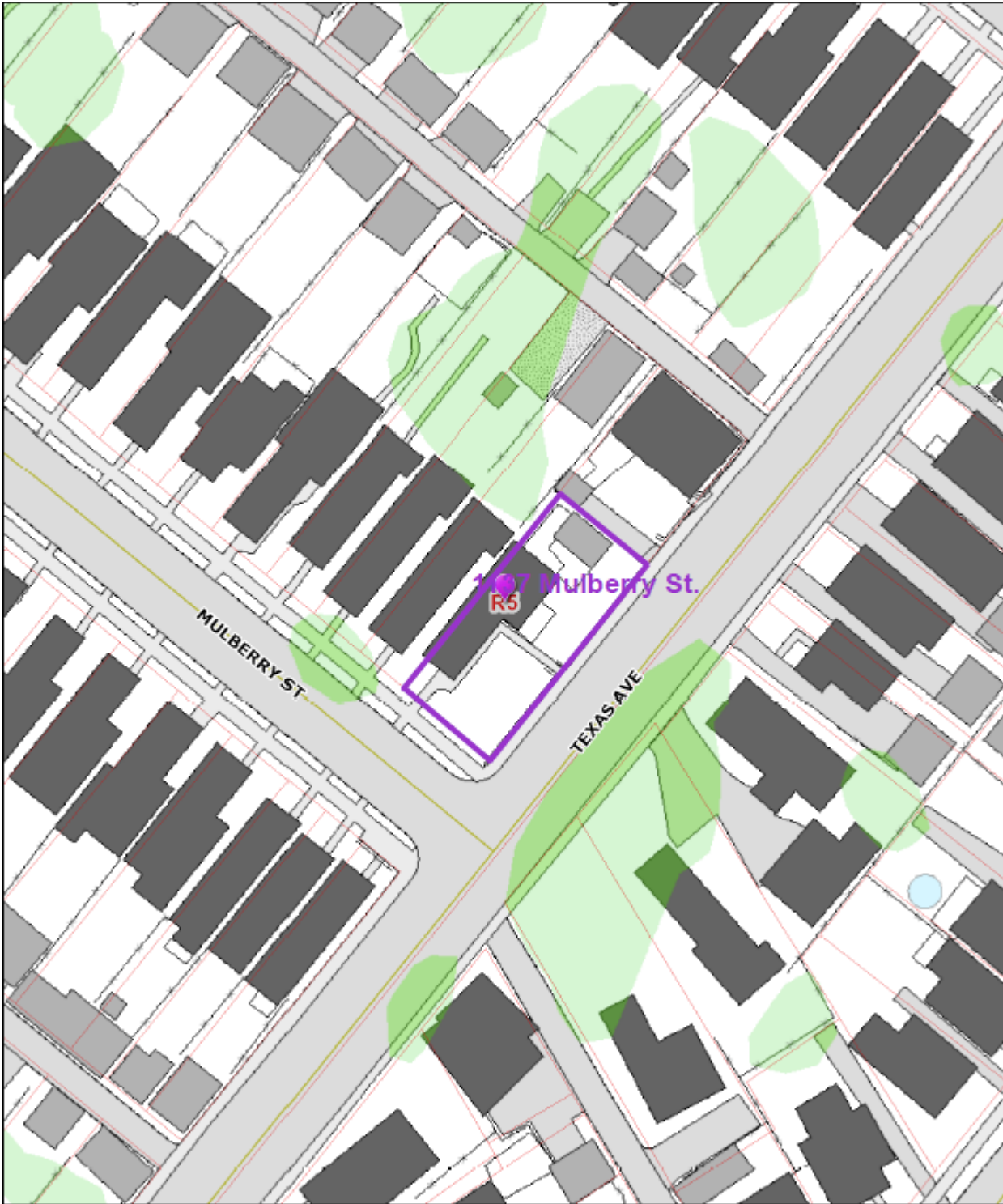
NOTIFICATION

Date	Purpose of Notice	Recipients
9/20/2019	Hearing before BOZA	1 st and 2 nd 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' Map
- 4. Justification

- 1. **Zoning Map**

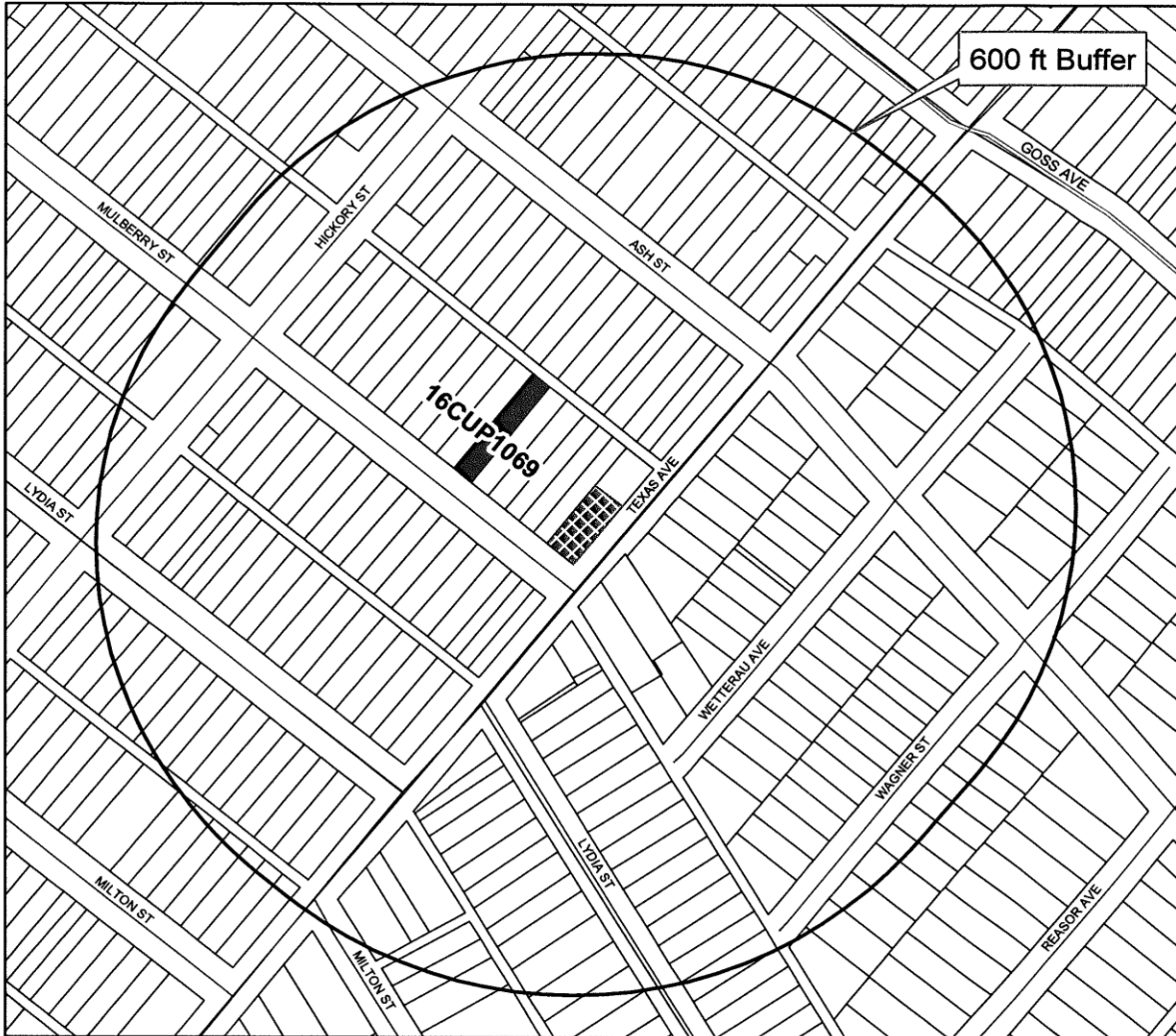


2. Aerial Photograph






3. 600' Map

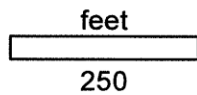
Map Created: 09/26/2019



Legend

-  Buffer
-  Subject Site
-  Approved

**Proximity Map
#18CUP1198**



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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4. Justification

Justification for Relief from 600 Foot Rule

1137 Mulberry Street

This property is located in the Schnitzelberg, slightly south of Goss Ave. 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 legal, non-conforming 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, making them effective as of June 1, 2016. These regulations were amended on May 8, 2019 incorporating the limitation of properties within 600 feet of another short term rental CUP. The applicant, through a wholly owned and related entity, entered into a contract to purchase the property 1137 Mulberry before the regulations went into effect and then closed on June 15, 2016 with the intent of using it as a short term rental. The Applicant originally attempted to rezone the property to allow for office space on the lower floor and residential rentals through Short Term Rentals on the second floor. The applicant spent \$25,000 on the property 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. The original rezoning application was formally filed before the 600 foot rule went into effect. The subsequent CUP pre-application was also filed before the 600 foot rule went into effect, being filed in December of 2018.

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.

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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 determines 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.

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