

**Board of Zoning Adjustment**  
**Staff Report**  
December 5, 2022



<b>Case No:</b>	22-APPEAL-0011
<b>Project Name:</b>	East Whitney Avenue Appeal
<b>Location:</b>	114 East Whitney Avenue
<b>Owner/Appellant:</b>	Glenn E. Kerns
<b>Representative:</b>	Harry B. O'Donnell IV
<b>Jurisdiction:</b>	Louisville Metro
<b>Council District:</b>	21 – Nicole George
<b>Case Manager:</b>	Chris French, Planning & Design Supervisor

**REQUEST(S)**

- Appeal of an administrative decision regarding a zoning enforcement action.

**CASE SUMMARY/BACKGROUND**

The subject property is zoned R-5 single family residential and is located within the Traditional Neighborhood Form District. The property is located at the southwest corner of East Whitney Avenue and South Brook Street. The Jefferson County Property Valuation Administrator classifies this property as 510 RES 1 Family Dwelling.

The property owner was issued a notice of violation on August 24, 2022 by zoning enforcement officer (case ENF-ZON-22-001024) for an unlawful use (automobile repair) in a residential zoning district and exceeding the maximum number of vehicles allowed to be parked outside (3 vehicles). The Appellant's representative filed an appeal case on September 23, 2022. This appeal was filed within 30 days of the issuance of the notice of violation; therefore, this is a timely appeal.

**STAFF ANALYSIS/FINDINGS**

The following sections of the LDC are applicable to this case:

Section 2.2.7 R-5 Residential Single Family District

This zoning district does not allow automobile repair.

Table 9.1.3 B

This table lists the minimum and maximum parking required for specific land use categories, one of which is single family residential. The maximum parking provision for a single-family residential use in a Traditional Neighborhood Form District is 3 vehicles. This provision applies to vehicles parked outside and not within a garage or parking structure.

The Appellant's basis of appeal includes the following statements in support of overturning the decision made by zoning enforcement staff:

1. This Notice of Appeal is filed in the present form as the notation in the NOV that "BUZA appeal forms" are "available at a web address and location of [www.louisvilleky.gov/planningdesign](http://www.louisvilleky.gov/planningdesign)" is incorrect. As of 9/23/22 at 9:00 A.M. the indicated address produces a message "Not Found The requested page could not be found." A copy of a screen print of the aforesaid is attached as Exhibit #2 hereto. Based on Planning & Design Services failing to make "appeal forms" readily available to Mr. Kerns, it would be a deprivation of Mr. Kerns' rights to Due Process of Law under BOTH the Federal and Kentucky Constitutions to deny Glenn's timely appeal of the NOV in the present form as submitted.

2. The property is NOT being put to an "Unlawful Use in Residential Zoning District" by Glenn as stated in the NOV. Mr. Kerns was using the property for an auto repair business, for many years, under prior zoning which allowed such use and he has continuously maintained that use of the property to the present day. That prior and

continuing use cannot be restricted by the present zoning of the property as to do so is contra to Constitutional limitations imposed by Sections 13, 19 and/or 242 of the Kentucky Constitution, the Takings Clause of Fifth Amendment to the United States Constitution, applicable Kentucky law and precedents. Additionally, upon prior protest by Glenn, after the zoning of the property was changed to residential, the use of the property for an auto repair business was, many years ago, specifically recognized and accepted as a non-conforming use by Planning & Design and/or its predecessor related agencies.

3. For the same reasons and based upon the same legal authorities set forth in the preceding Paragraph 2, Mr. Kerns CANNOT be subject to any citation or penalty for his use of the subject property for "Parking: Noncompliant Parking in Residential Area" as stated in the NOV. The parking of vehicles on the property in the manner set forth in the NOV is necessary and appropriate for use of the property as an auto repair business—as aforesaid a legal, accepted and allowable non-conforming use.

Staff response to Basis of Appeal:

- Use Classification: The appeal does not contest the finding by the officer that the existing use (auto repair) is not permitted in the subject zoning category (R-5). In the LDC, it is clear that auto repair is not a permitted use in the R-5 zone and it is clear that no more than 3 vehicles may be parked outside on a single-family residential property within the Traditional Neighborhood Form District. In order for the use to continue, the property owner would need to have a lawfully established nonconforming use or rezone the property.
- Due Process Rights: The Appellant's representative stated that the Appellant's due process rights were violated because they had difficulty finding the appropriate form on the Metro website; however, the appeal application was submitted and accepted within the 30-day requirement. After its submittal, the appeal was docketed in a timely manner in consultation with the appellant and further enforcement action was stayed. Therefore, staff does not find that any due process rights were violated.
- Nonconforming Use: There is not a nonconforming use determination on file with this property. Further, the Appellant did not file a nonconforming use determination application with PDS in conjunction with this appeal. While the appeal asserts the property has nonconforming rights, it did not include any information supporting this claim, including but not limited to when the use was established and how it is continuously operated as an auto repair use in the R-5 zone. With that said staff did do some preliminary work on nonconforming right based on records available to PDS. The following Google Street View photographs show the property for several years from 2007 to 2022. The 2011 photo shows one car parked in the driveway. The 2019 photo shows

two vehicle parked next to the driveway. The 2022 photo shows three vehicles parked next to the driveway.



2022



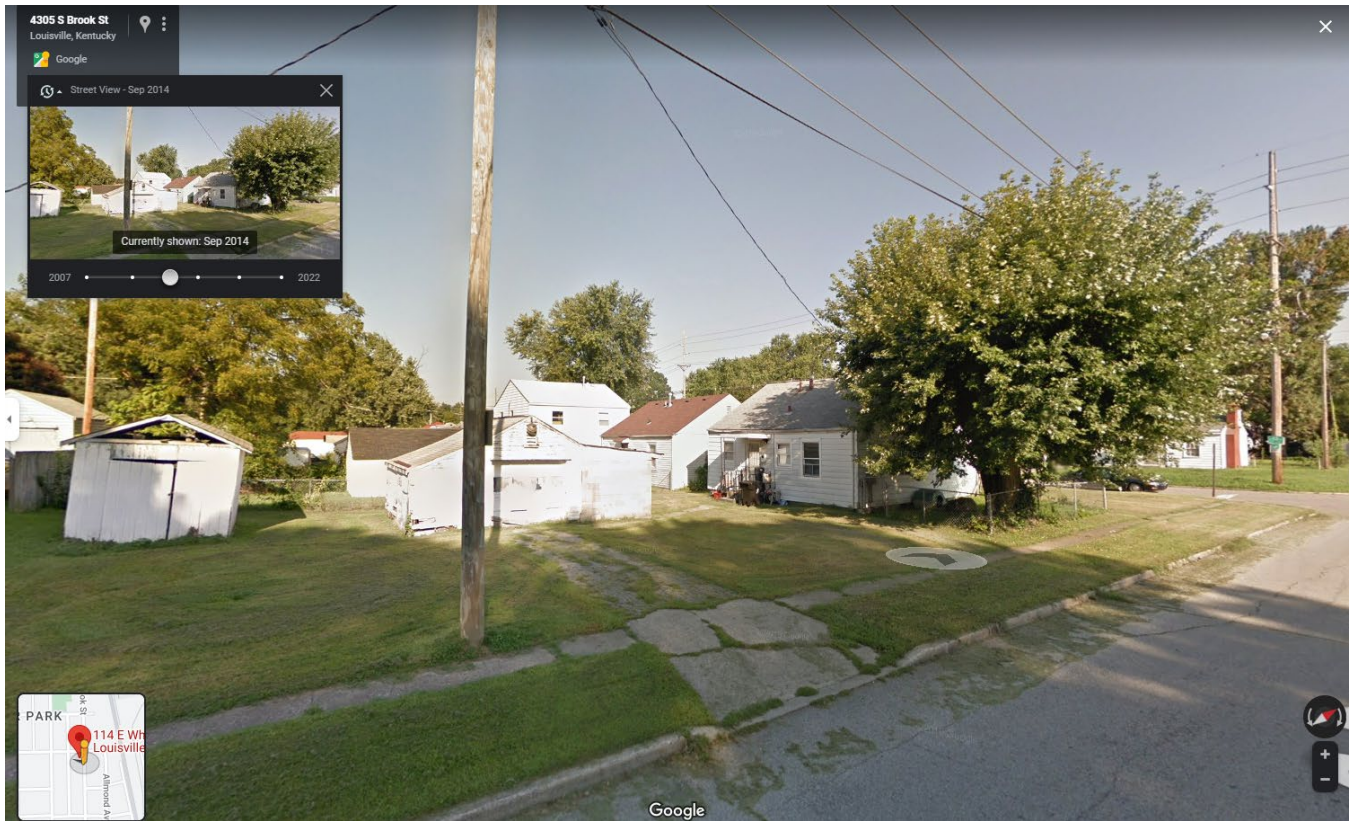
2022 shows closeup of sign on side of shed



September 2007



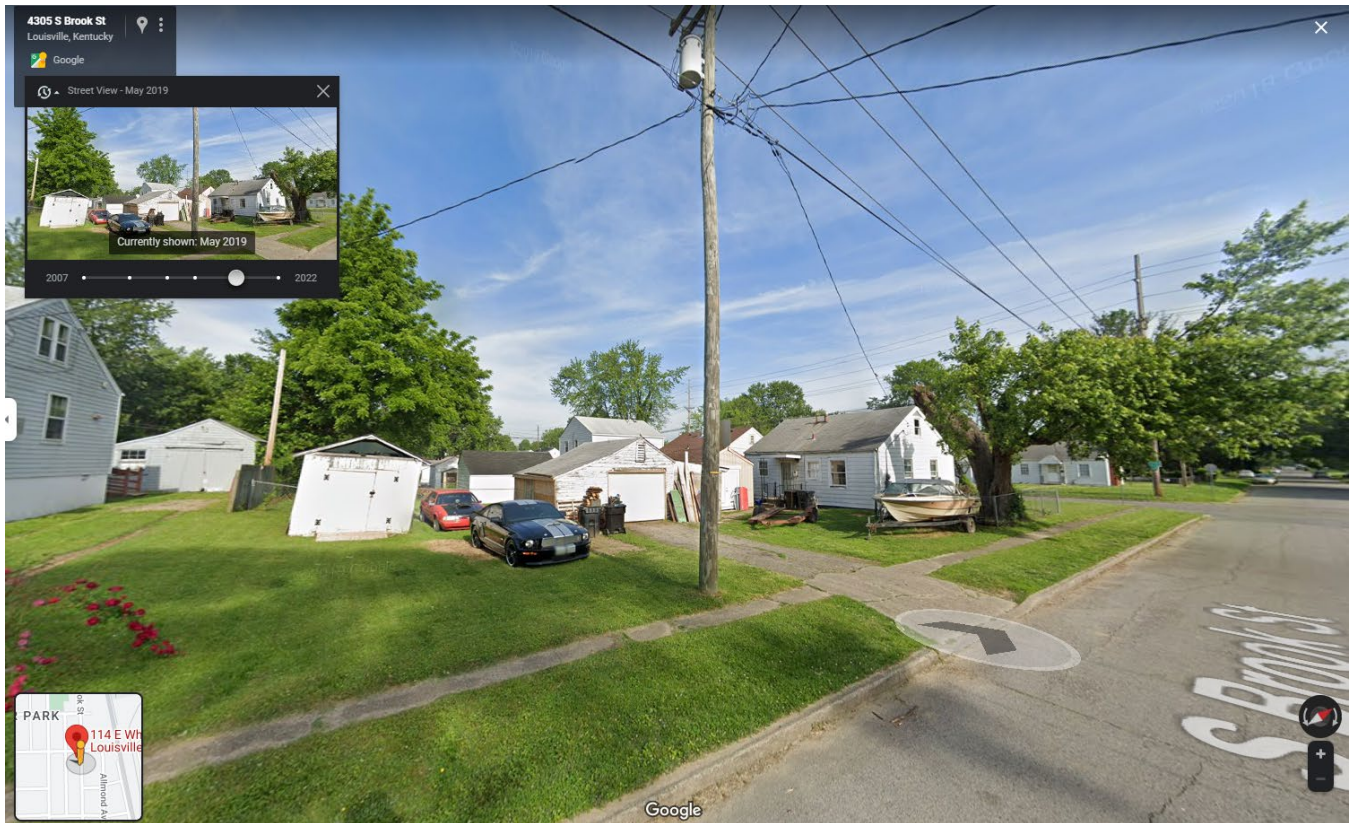
October 2011



September 2014



September 2015



May 2019

It does appear that the property was zoned M-2 Industrial prior to May 1986. Therefore, any nonconforming use of the property must have existed on the property prior to this time and the use must have continued forward to the present day.

- Parking issue: The Appellant did not apply for a maximum parking waiver to allow more vehicles to be parked outside. Neither the Appellant nor the Appellant's representative provided information that nonconforming rights existed for an auto repair use on the property. Also, without permanent (hard durable surface) parking in place staff does not believe there would be nonconforming rights for a parking area to exceed the maximum number of spaces permitted outside on this property.

### **Staff Conclusions**

The appeal does not state that there was an error in the application of the LDC by the zoning enforcement officer in his determination that the use was (auto repair) and is not permitted in R-5. Further, the appeal did not provide any documentation supporting the use's establishment and continued existence since the date the R-5 regulation took effect. There is not any information in records available to PDS that an auto repair use existed on the property in May 1986. Therefore, staff recommends that the Board deny the appeal request.

**Standard of Review**

Pursuant to LDC 11.7.3 and KRS 100.257, the BOZA shall have the power to hear and decide cases where it is alleged by the 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.

The Board must determine if an error was made regarding the zoning enforcement action that the Appellant was in violation of the zoning code by operating a commercial automobile repair business within a residentially zoned property.

**RELATED CASES**

ENF-ZON-22-001024

**INTERESTED PARTY COMMENTS**

Staff has not received any interested party comments.

**NOTIFICATION**

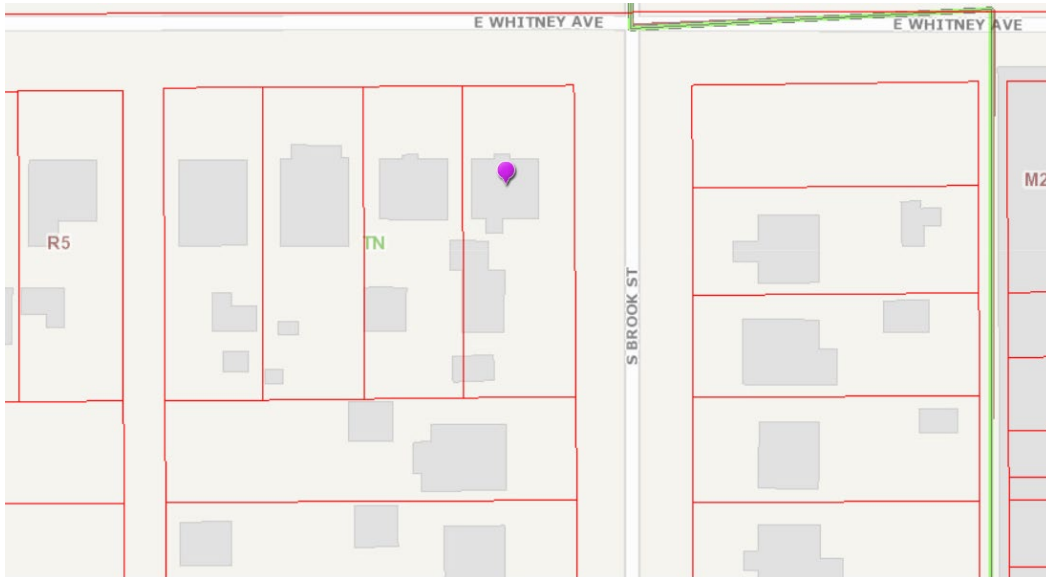
<b>Date</b>	<b>Purpose of Notice</b>	<b>Recipients</b>
11/18/2022	Notification of appeal of an administrative decision	Adjoining property owners and GovDelivery for Council District
11/22/2022	Notice of appeal hearing	Sign Posting
11/27/2022	Legal ad for notification of appeal of an administrative decision	Courier Journal - published in paper by Appellant

**ATTACHMENTS**

1. Zoning Map
2. Aerial Photograph



1. Zoning Map



2. Aerial Photograph

