



CITY OF HARRISONBURG COMMUNITY DEVELOPMENT

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November 4, 2019

TO THE MEMBERS OF CITY COUNCIL CITY OF HARRISONBURG, VIRGINIA

SUBJECT: Request from Orange Sky Investments LLC for a special use permit per Section 10-3-40(8) of the Zoning Ordinance to allow for a short-term rental within the R-2, Residential District. The +/- 11,250 sq. ft. property is addressed as 165 New York Avenue and is identified as tax map parcel 24-O-13.

EXTRACT FROM MINUTES OF HARRISONBURG PLANNING COMMISSION MEETING HELD ON: October 9, 2019

Chair Way read the request and asked staff to review.

Ms. Dang said that the Comprehensive Plan designates this site as Neighborhood Residential. These areas are typically older residential neighborhoods, which contain a mixture of densities and a mixture of housing types, but should have more single-family detached homes than other types of housing. This type of land use highlights those neighborhoods in which existing conditions dictate the need for careful consideration of the types and densities of future residential development. Infill development and redevelopment must be designed so as to be compatible with the desired character of the neighborhood.

The following land uses are located on and adjacent to the property:

- Site: Single-family detached dwelling, zoned R-2
- North: Single-family detached dwellings and duplexes, zoned R-2
- East: Single-family detached dwellings, zoned R-2
- South: Single-family detached dwellings, zoned R-2
- West: Single-family detached dwellings, zoned R-2

A request from the applicants to operate a short-term rental (STR) in a seven-bedroom, single-family detached dwelling located at 165 New York Avenue to a maximum of 14 STR guests during the lodging period was received by Planning Commission on August 14, 2019. Staff had recommended that the special use permit request be denied. The property was not the applicants' primary residence and there would be no STR operator present during the lodging period. Planning Commission also recommended denial (6-0) of the special use permit request. The meeting minutes extract is attached.

On August 28, 2019, the applicants submitted an email explaining that since the August 14, 2019 Planning Commission meeting, one of the applicants/property owners would be moving to 165 New York Avenue and will make it his primary residence. The applicant does not intend to be present during the lodging period. The applicant had also reduced the requested number of STR guests at any one time from 14 to 12. The applicant's email is included as an attachment.

Staff presented the updated request to City Council on September 10, 2019. Given that the circumstances of the request had changed and made it similar to previously approved requests, staff's recommendation also changed. Because the City has approved multiple STR SUP applications in similar locations throughout the City and with comparable operating situations, staff recommended approval of the request with the following conditions:

1. The site shall be an operator's primary residence.
2. If an operator is not the property owner, then an operator shall be present during the lodging period.
3. All STR accommodations shall be within the principal structure.
4. There shall be no more than seven STR guest rooms or accommodation spaces.
5. The number of STR guests at one time shall be limited to 12.
6. Prior to operation, the operator shall submit to City staff a completed Short-Term Rental Pre-Operation Form. Furthermore, the operator shall maintain compliance with the Pre-Operation Form when short-term rental guests are present.
7. Minimum off-street parking spaces do not need to be delineated and can be accommodated utilizing the driveway or other areas on the property.
8. If in the opinion of Planning Commission or City Council, the short-term rental becomes a nuisance, the special use permit can be recalled for further review, which could lead to the need for additional conditions, restrictions, or the revocation of the permit.

Given the changes to the application since Planning Commission's first review, City Council did not take action on this item and referred it back to Planning Commission for review and recommendation. The City Council meeting minutes extract is attached.

Chair Way asked if there were any questions for staff.

Commissioner Colman said that the property owner is Orange Sky LLC, so is the expectation that one of the partners or owners would live there.

Ms. Dang said that is correct.

Commissioner Ford-Byrd asked what would be proof of living in the home. Would this happen after there is some community feedback or opposition or is this something that you would monitor?

Ms. Dang said that it could be either.

Commissioner Colman said that there was mention of a violation. Is there any more information on that?

Ms. Dang said that on August 27th the City sent a notice of violation to the owners because we found that they were operating their STR without an approved SUP. They have paid the \$100 penalty and, as far as we know, they have not operated.

Commissioner Finnegan said that the reasons he voted against the original request were that it was not owner occupied and it was the first one that I had seen that had a third-party management company. I suppose there is no legal difference between the other STRs that we have approved. If they wanted to switch to using a service like that, a third-party service, they could.

Mr. Fletcher said that they have to use it. Airbnb is a third-party service.

Mr. Russ said that he means a third party managing the STR. Someone else would be doing the advertising. They might be doing the cleaning. They are communicating with the guests. They are handling virtually everything. He is simply the person who owns the company.

Commissioner Finnegan said that it could be an outside firm with many properties all over the country.

Commissioner Finks asked if that calls into question who is the operator.

Chair Way said so you are saying that it does not matter whether it is a primary residence or not.

Commissioner Finks said that it has to be the operator's primary residence. What makes someone the operator if all of the work is being done by someone else? Are they the operator?

Commissioner Ford-Byrd asked if that is still the plan. If the operator is living in the residence, is Evolve still going to be involved?

Commissioner Colman said that we have talked about this before, about defining who an operator is. Now it has come up again.

Chair Way asked if there were any more questions for staff. Hearing none, he invited the applicant or applicant's representative to speak to the request and clarified that it was not a public hearing.

Wes Smallwood, 165 New York Avenue, came forward to speak to the request. We did have the violation after the last Planning Commission meeting. We were fined. We paid the fine before the City Council meeting. We come before you tonight to see if you would reconsider our petition. I have taken primary residence there. As my proof of residence, I have all the supporting documents. There is a monitor on site that monitors a heart condition that I have it is connected to the University of Virginia. It is in constant communication with UVA. I can answer any other questions that you may have.

Chair Way asked him to speak to the question about the operator.

Mr. Smallwood said that we are the operator. Evolve Vacation Rentals markets the property and they book it. It is not a property management company.

Commissioner Colman said that based on the City Council meeting there were some things said about the violation and your own comments about having the property rented for this month and next month, is that still the case? Are you still in violation?

Mr. Smallwood said that we spent a large part of the time going back and forth with that. We did have a booking on August 23. When we called Evolve and asked them to take everything down, they missed that booking. The people were coming from Orlando and we did not want to cancel them at the last minute. We kept that booking. We have not had a booking since then. Even then, on the 23rd, you could see our listing, but you could not book it. They had shut down the opportunity to book our property.

Commissioner Ford-Byrd said that you stated that Evolve is the platform that will advertise your property, but in your email, you also said that you are not going to be present during the lodging period. Is Evolve also who guests would call if something happens? Are they reaching out to you or to the company?

Mr. Smallwood said that all of our personal information is posted at the property. The first call should be to us. If they do call Evolve, the next call is to us.

Dionne Jones, 930 Turkey Run Road, said that for all Airbnbs, if something goes wrong, Airbnb wants you to call them first.

Commissioner Finks said that the owner will not be present during the lodging. Typically, the wording has been that the operator does not have to be present during the lodging period. You plan to not be present during any of the lodging periods. How do you plan to keep it as your primary residence? How many times a year are going to be renting this out if you are not going to be there during the lodging period?

Mr. Smallwood said that generally our bookings run from Friday to Sunday. I will be there Monday through Thursday. I am there at times during the lodging periods, meeting guests.

Commissioner Finks asked where are you going to be the other times? I assume you will have lodgers throughout the year, as much as you can. If it is going to be your primary residence and you are gone three days a week, it is difficult to see it as your primary residence.

Mr. Smallwood said that it sounds like we need a legal definition for what is a primary residence. The way I understand it, it is ok that we do this.

Commissioner Colman said that you came with one request and now, given our conditions, you have changed your situation so that you can operate it. It is difficult for us to believe that. I understand what you are trying to do. You have an investment property and you are trying to make it work. If your home is going to be occupied and you will not be there, you certainly have another home. Which one is the primary residence? We had that issue come up before. We had that discussion about what determines a primary residence. We have had those discussions and have tried to balance that. We have not reached a resolution on that. We do not know what a primary residence is.

Mr. Smallwood said that he is there every night, overnight.

Commissioner Colman said except when it is being rented.

Chair Way asked if there were any further questions for the applicant. Hearing none, he opened the matter for discussion.

Commissioner Finnegan said that it is a difficult case because it barely fits the definition of what we are looking for in a rather adaptive way. We did turn one down on Nelson Drive where it was an occasional or secondary residence. That is what this feels like to me.

Chair Way said that he has problems with the twelve people in a residential area. That is the big issue, in addition to the things you are talking about.

Commissioner Colman said that a SUP can be recalled if there are complaints or violations of the permit. There was a violation in between getting the permit; that is a concern. If we have violations before the permit is issued, then what are we to expect. They are aligned with what they are trying to do. It is different in that way. It is not a complaint as a nuisance, but as the illegal use of the property.

Commissioner Finnegan said that it may tie in, moving forward, if we decide to regulate these differently, this sheds light on an issue of taking people's word for whether it is their primary residence. We have denied other requests on the basis that the property is not the primary residence. If those people came back and said the same thing, that they are now residing at the property, would we approve them?

Chair Way said that we need to have consistent guidelines about what constitutes a primary residence.

Commissioner Finks said that many of his friends in high school went to college at JMU. At that time, their primary residence was still their parent's house even though they did not live there. They got their mail there; they were registered to vote there; their driver's license was there; and their taxes went there, but they lived on campus or in an apartment. I have a difficult time with determining what a primary residence is. You could have everything registered at an address and step foot in it once a year, although legally they should not be doing that.

Mr. Russ said that there is a difference. It may be confusing. You can have your residence where you live, and you can have your domicile, which is where you intend to return at some point. Many college students, even though they live three quarters of the year in Harrisonburg, may have their domicile somewhere else. They can continue to claim that as their domicile as long as they genuinely intend to return there, at some point, or you have not found somewhere new where you intend to stay permanently.

Commissioner Finnegan said that the permanence that we have already approved is done. Would it make sense, in the future, to amend the language to say that the site shall be the operator's primary residence and domicile? Or does that do nothing legally?

Mr. Russ said that with primary residence you are capturing the idea that they need to physically be there at night, 180 days or so a year. Domicile is not technically a place they have to live in. A primary residence requires that you live in it for more than one half of the year.

Commissioner Colman said that could be an answer. We can state 183 or 185 days as a primary residence.

Chair Way said that we can explore these issues at the work session.

Commissioner Ford-Byrd moved to recommend denial of the request.

Commissioner Finks seconded the motion.

Mr. Fletcher asked that the commissioners explain their votes for the benefit of City Council.

Chair Way said that the confusion about what is a primary residence is a factor. I also have a problem with the twelve guests, as it seems to be a large number for a residential neighborhood.

Commissioner Finks said that he has three reasons. One, the inability to agree on what a primary residence is. I do not know if this fits. Second, I share the concern with the number of guests; twelve seems like a lot for this area. Third, while it seems that there were extenuating circumstances, and I understand the circumstances, it does concern me that there was a violation between when this was submitted and when it went before City Council.

Commissioner Finnegan said that he will also be voting for denial. I do not want to create a loophole where people who have been previously denied can come and say that they have moved to the address. I also share the concern with the number of guests. In a different house or a different neighborhood, I might feel differently about the twelve guests.

Commissioner Colman said that his opinions are along the same lines. City Council is asking for our opinion and it is their decision. They have looked at our previous records to make the decisions. If they were to approve this, I would be very concerned about the numbers. The numbers should be more consistent with the neighborhood as to what number would be an adequate number in terms of occupancy. The operator also concerns me. We need to define it, determine what it means. The violation concerns me, as well.

Commissioner Ford-Byrd said that she agrees with all that has been said. I do not think there is any realistic way to monitor the situation with having twelve individuals in one home. I do not agree with that.

All members voted in favor of recommending denial (6-0). The recommendation will move forward to City Council on November 12, 2019.

Respectfully submitted,
Alison Banks
Planner Senior