



AMENDED - SPECIAL CITY COUNCIL AGENDA

May 17, 2024 at 12:00 PM

Wilsonville City Hall & Remote Video Conferencing

PARTICIPANTS MAY ATTEND THE MEETING AT:

City Hall, 29799 SW Town Center Loop East, Wilsonville, Oregon

YouTube: <https://youtube.com/c/cityofwilsonvilleor>

Zoom: <https://us02web.zoom.us/j/81536056468>

TO PARTICIPATE REMOTELY:

Register with the City Recorder:

CityRecorder@ci.wilsonville.or.us or 503-570-1506

City Recorder - Wilsonville City Hall

29799 SW Town Center Loop East, Wilsonville, OR 97070

CITY COUNCIL MISSION STATEMENT

To protect and enhance Wilsonville's livability by providing quality service to ensure a safe, attractive, economically vital community while preserving our natural environment and heritage.

CITY COUNCIL MEETING

The following is a summary of the legislative and other matters to come before the Wilsonville City Council a special session to be held, May 17, 2024 at City Hall. Legislative matters must have been filed in the office of the City Recorder by 10:00 a.m. on May 8, 2024. Remonstrances and other documents pertaining to any matters listed in said summary filed at or prior to the time of the meeting may be considered there with except where a time limit for filing has been fixed.

This is a special-set Council meeting to consider an appeal from a decision by the Development Review Board, which is not a public hearing. No other City business will be conducted at this meeting.

CALL TO ORDER [12:00 PM]

1. Roll Call
2. Pledge of Allegiance
3. Motion to approve the following order of the agenda.

MAYOR'S BUSINESS

4. None.

COMMUNICATIONS

5. None.

CITIZEN INPUT AND COMMUNITY ANNOUNCEMENTS

6. None.

COUNCILOR COMMENTS, LIAISON REPORTS AND MEETING ANNOUNCEMENTS

7. None.

CONSENT AGENDA

8. None.

NEW BUSINESS [12:05 PM]

9. [Appeal of DRB Resolution No. 432, A Resolution Denying the Proposed Occupant's \(The Home Depot\) Proposed Use at 29400 SW Town Center Loop West is a Continuation of the Existing Non-Conforming Use in Case File No. DB24-0003 \(Planning Director Referral of AR23-0031\).](#)

CONTINUING BUSINESS

10. None.

PUBLIC HEARING

11. None.

CITY MANAGER'S BUSINESS

12. None.

LEGAL BUSINESS

13. None.

ADJOURN

Time frames for agenda items are not time certain (i.e. agenda items may be considered earlier than indicated). The City will endeavor to provide the following services, without cost, if requested at least 48 hours prior to the meeting by contacting the City Recorder at 503-570-1506 or CityRecorder@ci.wilsonville.or.us: assistive listening devices (ALD), sign language interpreter, and/or bilingual interpreter. Those who need accessibility assistance can contact the City by phone through the Federal Information Relay Service at 1-800-877-8339 for TTY/Voice communication. Habrá intérpretes disponibles para aquellas personas que no hablan Inglés, previo acuerdo. Comuníquese al 503-570-1506.



**CITY COUNCIL MEETING
STAFF REPORT**

Meeting Date: May 17, 2024		Subject: Order on Appeal: DRB Resolution No. 432	
		Staff Member: Miranda Bateschell, Planning Director; Stephanie Davidson, Assistant City Attorney	
		Department: Community Development, Legal	
Action Required		Advisory Board/Commission Recommendation	
<input checked="" type="checkbox"/> Motion <input type="checkbox"/> Public Hearing Date: <input type="checkbox"/> Ordinance 1 st Reading Date: <input type="checkbox"/> Ordinance 2 nd Reading Date: <input type="checkbox"/> Resolution <input type="checkbox"/> Information or Direction <input type="checkbox"/> Information Only <input type="checkbox"/> Council Direction <input type="checkbox"/> Consent Agenda		<input type="checkbox"/> Approval <input type="checkbox"/> Denial <input type="checkbox"/> None Forwarded <input type="checkbox"/> Not Applicable Comments: Development Review Board Resolution No. 432 issued a decision denying continuation of non-conforming use in Case File No. DB24-0003 (Planning Director Referral of AR23-0031) that the Appellant has appealed to City Council.	
Staff Recommendation: Staff recommends Council affirm the decision of the Development Review Board in Resolution No. 432.			
Recommended Language for Motion: I move to adopt an Order on the Appeal of Development Review Board Resolution No. 432 affirming the decision in Development Review Board Resolution No. 432.			
Project / Issue Relates To:			
<input type="checkbox"/> Council Goals/Priorities:	<input checked="" type="checkbox"/> Adopted Master Plan(s): Comprehensive Plan, Town Center Plan	<input type="checkbox"/> Not Applicable	

ISSUE BEFORE COUNCIL:

An appeal of Development Review Board Resolution No. 432, dated April 24, 2024, issuing a decision denying continuation of non-conforming use to the Appellant (Proposed Occupant) in Case File No. DB24-0003 (Planning Director Referral of AR23-0031).

EXECUTIVE SUMMARY:

Two fundamental disputes exist between the Appellant and the City regarding how non-conforming uses are determined. First, should a local government recognize an entire category or classification of non-conforming use (“commercial retail”) or should it recognize the actual use occurring on the property at the time of non-conformance as a basis to determine what is a continuation or change of use? Second, should a local government rely exclusively on the original land use approval to determine the non-conforming use? Only one party has any legal basis for its positions. The City has shown throughout these proceedings, and again in this staff report, that non-conforming uses are to be narrowly defined relying on evidence of the use at the time of non-conformance to limit continuation and expansion of non-conforming uses.

This appeal is the result of Appellant’s continued attempts to ignore staff guidance, Oregon law, and evidence in the record that Appellant’s proposed use described herein is not a continuation of the existing non-conforming use at 29400 SW Town Center Loop West (the “Location”).

The Development Review Board held a special meeting on April 24, 2024, to consider all evidence timely submitted regarding Case File No. DB24-0003. Following deliberation on the matter, the Development Review Board approved Resolution No. 432 denying the Proposed Occupant’s (The Home Depot) proposed use at the Location is a continuation of the existing non-conforming use. The Notice of Decision for Case File No. DB24-0003 was issued on April 24, 2024. On May 7, 2024, the Appellant filed a Notice of Appeal with the City Recorder, which highlights the following key issue in this appeal: “...*the Decision’s determination that the [Appellant]’s proposed Home Depot development does not constitute a continuation of the nonconforming use at the subject property, which is that of a commercial retail operation or retail store.*” (Notice of Appeal, page 2)

Therefore, the primary question before Council is:

Was the appropriate decision made based on the applicable policies and standards? In other words, based on the record, does the Council agree with the Development Review Board determination in Resolution No. 432, denying the Proposed Occupant’s (The Home Depot) proposed use of the Location is a continuation of use?

Pursuant to WC 4.022(.06), and the Council Appeal Order dated May 6, 2024, the Appeal is a review on the record, which shall include: 1) a factual report prepared by the Planning Director (this document), 2) all exhibits, materials, pleadings, memoranda, stipulations and motions submitted by any party and received or considered in reaching the decision under review (Attachments 1 and 2), and 3) the written transcript of the hearing with summary of the evidence (Attachments 3 and 4). The decision shall be made based upon the record after hearing the Appellant’s argument on the record.

As an initial matter, the Notice of Appeal also appears to suggest that Appellant also appeals the following issue: “...*the DRB’s adoption of the Staff Report for DB24-0003.*” (Notice of Appeal, page 2). Appellant does not cite any legal authority to support the second item listed above and does not provide any substantive argument on this point in the Notice of Appeal. Therefore, this issue

is not briefed in this staff report; there is no legal authority or any argument to support this position, and should be rejected by the Council.

Further, in the Notice of Appeal, the Appellant raised an objection to the Class II process stating “...the City has violated its own Development Code that requires nonconforming use determinations be processed under the City’s Class I procedures...” (Notice of Appeal, page 3). The Appellant applied for the Class II application, did not raise this issue during the procedures before the Development Review Board, and the issue is not found in the record; therefore, this argument is not preserved and will not be considered or heard before the Council.

INTRODUCTION:

This staff report includes a statement of relevant facts, including important procedural background related to the appeal. The staff report is organized as follows: 1) background, 2) legal standard of review, 3) relevant facts and considerations, 4) response to arguments raised by appellant, and 5) conclusory findings.

Staff notes that the Appellant’s argument includes a substantial amount of information that is irrelevant to the matter before Council. Given the volume of information attached, staff have outlined in this report the applicable findings for this application type, referencing the relevant portions of the Development Review Board Record, specifically an analysis of the Wilsonville Development Code and the legal standard established in state law. Further, staff explored the relevancy and merits of the Appellant’s arguments to assist the Council in rendering a final decision, again referencing the relevant portions of the Development Review Board Record.

FACTUAL BACKGROUND:

This section provides a factual summary of the proceedings and summary of the evidence in the record that was considered in reaching the decision under review.

I. The Location

The Location that is the subject of this appeal is at 29400 SW Town Center Loop West within the Wilsonville Town Center. The Location is developed with a 159,400 square-foot electronics-related retail store. As Council is aware, the community engaged in a two-year planning process with City staff to establish a new vision for the Wilsonville Town Center. This culminated in Council’s adoption of Ordinance No. 835, the Town Center Plan and new Town Center (TC) zoning designation, which went into effect on June 5, 2019. This resulted in the rezoning of the Location from the Planned Development Commercial-Town Center (PDC-TC) zone to the TC zone (Attachment 2, page 8). The TC zone limits single-user commercial or retail uses to a building footprint of 30,000 square feet. The existing structure at the Location has a footprint of 124,215 square feet in a single story and does not conform to the new TC zone standards (Attachment 3b, page 256).

II. Non-conforming Status

The City's non-conforming development standards (WC 4.189 through 4.192) intentionally encourage future uses and developments to become more in line with the vision and standards of new zoning code regulations that replace prior, outdated regulations. The non-conforming standards ensure ongoing and future uses of locations and buildings are no more non-conforming than the use, structure, or site conditions existing at the time the new regulations went into effect. As outlined in this staff report, this is consistent with best practices and supported by Oregon case law, as non-conforming uses inherently detract from the effectiveness of the new comprehensive plan. Local governments do not consider a property's original zoning, or the prior land use approvals, in establishing the nature and extent of the legally established non-conforming use at the point in time it becomes non-conforming, but rather what use existed on that date and has continued after adoption of the new regulations.

In the case of the Location, the prior master plan and zoning was replaced with the new Town Center Plan and Zone. As of June 5, 2019, the effective date for the new Town Center development regulations, a Fry's Electronics store existed at the Location; thus, the actual use of the Location was an electronics retail store with a total interior square-footage of 159,400 square feet. This became the recognized, legally established non-conforming use, non-conforming structure, and non-conforming site conditions at the Location on that date. The Development Review Board recognized the non-conforming use, structure, and site conditions, in its March 15, 2024 Resolution No. 429. At its regular meeting on April 15, 2024, the Council issued an Order affirming the Development Review Board decision on the Class I Review Application in Resolution No. 429, determining the scope of the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store", and further, that this was a correct and appropriate decision made based on application of laws, policies and standards, and denying the appeal (Attachment 6). On May 3, 2024, the Appellant filed a Notice of Intent to Appeal the Council's Order to LUBA.

PROCEDURAL BACKGROUND:

On October 30, 2023, the City received the application for the Class I Review (ADMN23-0029) to confirm the status of the existing use and structure at the Location (the "Class I Review Application"), but in the same application, Appellant also asked the City to confirm that The Home Depot and Fry's Electronics are both warehouse retail uses and that The Home Depot may operate in the existing structure. This second request, for a continuation of use determination, requires interpretation of WC 4.189, which is processed as a Class II Administrative Review per WC 4.030(.01)B.3. On November 28, 2023, City staff contacted the Appellant by email clarifying the secondary request required a Class II review process and providing options for processing the application but received no response within the time noted.

As outlined in the Code, a Class I is intended for minor decisions and modifications, it is processed as a ministerial action against objective criteria, and as such does not require public notice or a public hearing, only providing the applicant appeal rights. Confirmation of existing non-conforming use (as opposed to a determination of continuation of use or change of use) is a Class

I review pursuant to WC 4.030(.01)A.7., which states that a Class I application is required for a “[d]etermination that an existing use or structure is a non-conforming use or non-conforming structure, as defined in this Code.” Importantly, this section does not include as a Class I review, a determination of continuation of or change of non-conforming use. Such review cannot not be implicitly included in the Code provision. See ORS 174.010 (in statutes, cannot insert words that are omitted); see also *Western Land & Cattle, Inc. v. Umatilla County*, 230 Or App 202, 210 (2009) (courts apply statutory construction principles in ORS 174.010 to local code).

Comparatively, a Class II Administrative Review is a more substantial change and/or requires professional judgment in applying the relevant code criteria and thereby does require public notice and is subject to appeal or call-up. Evaluating a proposed use as it compares to an existing, recognized non-conforming use, requires professional judgment, a comparative analysis, and an interpretation of information and code, and thereby should also allow the right for public review and appeal. Interpreting the non-conforming Code provisions in WC 4.189-4.192 as applied to the Location, is a Class II review pursuant to WC 4.030(.01)B.3., and can be called up pursuant to WC 4.030(.01)B. In any event, this issue was not preserved before the DRB and thus waived by the Appellant. Furthermore, the Appellant experiences no prejudice by a Class II process because the administrative process ultimately follows the same course – that is, beginning with the Planning Director review, then Development Review Board review, and finally, City Council review.

On December 15, 2023, the City received an application for Class II Review (AR23-0031; the “Class II Review Application”). Specifically, the request was stated as: *“A Class II Staff Interpretation to confirm that The Home Depot and Fry’s Electronics are both warehouse retail uses”* (Attachment 3b, page 86). Further, the Appellant described the application (also in Attachment 3b, page 85) as *“an application for a staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for 29400 Town Center Loop W, Wilsonville, OR 97070 constitutes a warehouse retail use and may operate in the existing structure”*.

The City deemed the Class II Review Application complete on January 12, 2024, and processed the request as a Class II Planning Director Interpretation, per WC 4.030 (.01) B. 3. Per Wilsonville Code 4.030(.01)A.7., determination of the non-conforming status of an existing use was processed through the Class I process. The subject of the Class II Administrative Review was to confirm or deny the Proposed Occupant’s (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use of the non-conforming use currently located at the Location (the Current Occupant).

Given the public interest and comment on the Class I Review Application, the Planning Director, in anticipation that persons other than the applicant were expected to question the application’s compliance, referred the application to the Development Review Board for a public hearing pursuant to 4.035(.03)B. as Case File No. DB24-0003 under the authority set forth in WC 4.030 (.01)B. The public hearing occurred on April 8, 2024, and the written record was left open until April 15, 2024, for the Appellant to submit additional evidence. On April 24, 2024, the Development Review Board reconvened to consider the application and, by Resolution No. 432,

denied the Proposed Occupant's (The Home Depot) proposed use at the Location is a continuation of the existing non-conforming use (Attachment 2).

On May 7, 2024, the Appellant filed a Notice of Appeal of the Development Review Board decision in Resolution No. 432. An Appeal of a Development Review Board Decision is heard by the Council per WC 4.022 (.02). In anticipation of an appeal, on May 6, 2024, the Council adopted an order to conduct a special meeting on May 17, 2024, to address the matter (Attachment 1). Pursuant to its authority under WC 4.022 (.05) A., the Council limited the appeal to a review on the record subject to WC 4.022 (.06), and will not hold a public hearing or otherwise accept any additional evidence.

LEGAL STANDARD:

I. Evidentiary Standard

Council's decision in this matter must be supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). This standard disallows LUBA from overturning a local government decision if a reasonable person could draw the same conclusion as the local government – even if a reasonable person could draw a different conclusion from the same evidence. *See Adler v. City of Portland*, 25 Or LUBA 546, 1993 WL 1473299 at *6 (1993); *Fraley v. Deschutes Cnty.*, 32 Or LUBA 27, 31-32 (1996), *aff'd*, 145 Or App 484 (1996).

II. Burden of Proof

The proponent of a proposed non-conforming use, or expansion or change to a recognized non-conforming use, has the burden of proof. *See ODOT v. City of Mosier*, 36 Or LUBA 666, 671 (1999) (citing *Lane Cnty. v. Bessett*, 46 Or App 319 (1980)); *Sabin v. Clackamas Cnty.*, 20 Or LUBA 23, 30 (1990) (citing *Webber v. Clackamas Cnty.*, 42 Or App 151, *rev den*, 288 Or 81 (1979)).

In this matter, Appellant has the burden of proof and the Council's decision is subject to the "substantial evidence" standard. *River City Disposal and Recycling v. City of Portland*, also a case regarding non-conforming uses, illustrates how these concepts should be applied together. In *River City Disposal and Recycling*, LUBA found that the City hearings officer's decision satisfied the "substantial evidence" standard. *See* 35 Or LUBA 360 (1998). It was enough that the hearings officer found that evidence presented in an affidavit (aerial photographs) was not persuasive. *Id.* at 367-71. Thus, the decision-maker is entitled to weigh evidence and to determine the credibility of evidence. LUBA also clarified that the City of Portland was not obligated to present contrary evidence to counter the applicant's evidence, and the "substantial evidence" standard was satisfied because the hearings officer found that the applicant failed to satisfy its burden of proof. *Id.*

Because the Appellant has the burden of proof, the City may decide that not enough evidence has been provided by Appellant to satisfy its burden of proof. The City is not obligated to produce its own evidence to counter Appellant's evidence. Further, the City may determine the credibility

of evidence in the record; in particular, when conflicting evidence exists, the City may decide that some evidence is credible and persuasive, and other evidence is not.

III. Legal Standard Regarding Continuation of Non-conforming Uses

1. WC 4.189 (.01)

A non-conforming use may be continued subject to the requirements of WC 4.189. *See* WC 4.189 (.01). There are no other Code provisions regulating a continuation of a non-conforming use.

2. Case law Regarding Continuation of Non-Conforming Uses

The following sections outline the legal authorities, in Oregon, that govern whether or not a use is deemed a continuation of a non-conforming use.

a. Non-Conforming Use Defined

Generally, a non-conforming use is understood to be “one that is contrary to a land use ordinance but that nonetheless is allowed to continue because the use lawfully existed prior to the enactment of the ordinance.” *Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (citing *Rogue Advocates v. Board of Comm. Of Jackson Cnty.*, 277 Or App 651, 654 (2016), *rev dismissed*, 362 Or 269, 407 (2017)); *see* WC 4.001 (196.) (defining a non-conforming use as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform”).

b. Non-Conforming Uses Are Disfavored; Local Government Has Broad Discretion to Resist Expansion of Non-Conforming Uses

“Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. . . . Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.” *Parks v. Bd. of Cnty. Comm'rs of Tillamook Cnty.*, 11 Or App 177, 196–97 (1972) (internal citation omitted). “[T]he law of nonconforming uses is based on the concept, logical or not, that uses which contravene zoning requirements may be continued only to the extent of the least intensive variations—both in scope and location—that preexisted and have been continued after the adoption of the restrictions.” *Clackamas Cnty. v. Gay*, 133 Or App 131, 135 (1995), *rev den*, 321 Or 137 (1995), *aff'd*, 146 Or App 706 (1997).

c. Whether a Proposed Use Is a Continuation or Change (of Non-Conforming Use) Depends on the Nature and Extent of the Recognized Non-Conforming Use

It is helpful to think of a proposed use to either be within or beyond the scope of a recognized non-conforming use. A use that is within the scope of a recognized non-conforming use is a “continuation” of use. A use that beyond this scope is a “change” of use. A use that is deemed too expansive to be a “continuation” of use is necessarily a “change” of use – a use must be one or the other. The following cases are helpful in illustrating the line between “continuation” and “change” of use.

The nature and extent of the lawful use in existence at the time the use became nonconforming is the reference point for determining the scope of permissible continued use. *Sabin* at 30 (citing *Polk County v. Martin*, 292 Or 69 (1981)) (emphasis added). As discussed herein, that determination of the existing use at the time of nonconformance occurred in the Class I review. The focus of a review of whether or not a use is continuous must focus on the actual *use* of a property during relevant times – a change in the property occupant does not, by itself, cause a legally protectable non-conforming use to be abandoned when the use that the various parties made of the property is recognized to be the same. *See Vanspeybroeck v. Tillamook Cnty. Camden Inns, LLC*, 221 Or App 677 (2008) (LUBA did not err in recognizing a continuous residential use of a property when residency changed from tenant to owner, back to tenant).

A local government that is reviewing a proposed alteration of, change to, or expansion of a recognized non-conforming use should review evidence to determine the current actual use or proposed use (as applicable), and determine whether that use is within or beyond the scope of the recognized non-conforming use. In *Larson v. City of Warrenton*, 29 Or LUBA 86, 1995 WL 1773182 (1995), the City of Warrenton determined that a company had impermissibly expanded its operations beyond activities protected in a prior administrative decision. The prior administrative decision protected the following uses on the subject property: “[s]toring and repairing marine construction equipment and [a] base of operations for [the property owner’s] construction company.” *Id.* at *1. In 1994, the property’s neighbors complained to the city about these business operations, arguing that the intensity of the use had increased. *Id.* The city evaluated various forms of evidence (testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs). *Id.* at *2. The city determined that the property owner was impermissibly operating beyond the scope of the non-conforming use recognized in the 1991 administrative decision, and LUBA affirmed this decision. *Id.* As LUBA has stated in another case, “[w]e believe a change in use includes adding a new use to an existing nonconforming use.” *River City Disposal and Recycling* at 373 n. 11.

In this matter, the City may determine that the Appellant’s proposed use of the Location includes uses that are beyond the scope of the recognized non-conforming use; these uses would only be permissible if the City approved a “change” of non-conforming use. This proceeding is limited to the question of whether certain uses are a “continuation” of use – a potential “change” of non-conforming use is beyond the scope of what may be addressed in this matter.

d. Local Government Has Broad Discretion to Draw Distinctions Between Various Uses, and to Allow Some Uses to Continue but Disallow Other Uses

A local government has broad discretion to reject an applicant’s characterization of a use, and to draw distinctions between various uses. For example, in *Fraley*, the applicant sought recognition of a property use involving the repair of diesel engines and tractor trailer trucks. In the local government decision at issue, the county found that a prior property owner “maintained a use significantly different in nature from the commercial vehicle repair business which the applicant seeks to verify.” *Id.* at 34. This prior property owner engaged in the structural repair of motorhomes, campers, RVs and camp trailers. *Id.* Testimony from this prior property owner did not mention vehicular engine repair. *Id.* On appeal, LUBA rejected the applicant’s challenge to the county’s finding and decision on this point, stating, “[w]e do not agree with [applicant] that the use was not interrupted because all of the commercial operations on the subject property since [the date more restrictive zoning regulations were applied] share the same essential nature or common nucleus. . . . [The mobile home repair business] had little in common with the present primary use, the repair of diesel engines and tractor trailer trucks.” *Id.* at 35. LUBA went on to note that these two businesses used the yard in different ways – one stored lumber in the yard, and the other stored large trucks in various states of repair. *Id.*

Appellant addresses the *Fraley* case on page 11 of its Notice of Appeal. It seems that City staff and Appellant disagree about whether or not this case is relevant to this matter. City staff agree that this case was based on ORS 215.130, which is a statute that does not apply to cities. However, this case is useful to the extent that it provides an example of a local government drawing distinctions between various uses – that is the only reason for which this case is cited in this staff report.

Further, a local government may specifically allow certain uses as non-conforming, but deny others, even when all such activities are related to the same business venture. In the Clackamas County Hearings Officer’s Findings and Decision, docket no. Z1155-91-E/A¹, the hearings officer determined that there was a protected non-conforming use for “the storage commercial goods in the two structures in question, including the storage of cedar wood fencing materials.” Findings and Decision of the Hearings Officer at 6, Z1155-91-E/A (Feb. 11, 1994). (Attachment 3b, pages 47-53). The applicant in this case had also applied for a “change” (i.e., expansion) of this recognized use for an on-site office facility for this warehousing and repackaging business. *Id.* The reasoning and legal standard used by the hearings officer relates to only counties – and not cities, but the important point is that he declined to expand the recognized non-conforming use. *Id.* The Clackamas County Hearings Officer’s decision in docket no. Z1155-91-E/A is an example of a local government deliberately and selectively recognizing some activity to be within the scope of a recognized non-conforming use – and other activity to be beyond this scope of the recognized non-conforming use – even when both activities relate to the same business venture.

¹ This Hearings Officer Decision is the remanded determination by Clackamas County following *Hendgen v. Clack. Cty.*, 115 Or App 117 (1992). See also 24 Or LUBA 355 (1992) (LUBA decision remanding the matter to Clackamas County following previously cited Court of Appeals opinion).

RELEVANT FACTS AND CONSIDERATIONS:

Key relevant facts and considerations regarding the application of laws, policies and standards to this application are highlighted in this section. Council is referred to the Development Review Board Decision in Case File No. DB24-0003 (see Attachment 2) for a detailed discussion.

I. What Is the Current Non-conforming Use?

As determined by the Development Review Board Decision in Case File DB24-0002 (Resolution No. 429), and affirmed by Council in its Order on Appeal (Attachment 6), there is a legally established non-conforming use at the Location; specifically, that the protected use is “a 159,400 square-foot electronics-related retail store” (the Current Occupant).

When the TC zone regulations went into effect on June 5, 2019, the occupant of the Location was Fry’s Electronics. The Appellant’s application (Attachment 3b, page 87) characterized the Current Occupant as follows: *“Fry’s was a large electronics warehouse store that retailed software, consumer electronics, household appliances, cosmetics, tools, toys, accessories, magazines, technical books, snack foods, electronic components, and computer hardware. Fry’s also had in-store computer repair and custom computer building services, and offered technical support to customers.”*

As demonstrated in the as-built floor plan, photographs, and discussion in the Development Review Board Decision in Case File No. DB24-0003 (Attachment 2, pages 15-20), items available for sale at the Location by the Current Occupant were consistent with an electronics-related retail use, including computers, monitors, small electronics, and related accessories. The majority of the products sold were small in size and could be carried in hand by the customer. No activities occurred outside of the structure at the Location, including storage, staging of inventory, or receiving/unloading of heavy equipment. In 2019, at the time the TC zone regulations went into effect, the store was operating in the same manner as what is shown on the 2014 floor plan. Based on this information, the Development Review Board concluded that the Current Occupant sold the following goods: electronic components, computer accessories, computer hardware, computer software, office goods, telecom equipment, video accessories, audio equipment, televisions, small appliances, CD’s, videos, and video games.

II. What Is the Proposed Use?

The Appellant’s application characterized the Proposed Occupant at the Location as follows:

“The Home Depot, Inc. (“HD”) intends to operate a store within the existing structure that was previously occupied by Fry’s, and therefore seeks confirmation from the City that a warehouse retail store can continue operating at the property... HD operates home improvement warehouse stores that retail tools, construction products, appliances, and services, including transportation and equipment rentals. HD’s Home Services

division also offers technical expertise for home improvement projects, and both onsite and offsite install, repair, and remodel services. Although the vast majority of HD customers are private individuals, contractors and other professionals account for close to half of HD's annual sales.⁴"
(Attachment 3b, pages 89-90)

While the Appellant's materials did not provide detail on how all of these activities would occur at the Location, an examination of other area Home Depot locations revealed that components of the activities, including the garden center and transportation and equipment rentals, both of which are proposed in the application, occur on the exterior of the building (Attachment 2, pages 21-23).

Further, the Appellant in its characterization of the Proposed Occupant during its presentation at the Development Review Board public hearing on April 24, 2024 (Attachment 3b, pages 468-484), showed images of a typical Home Depot interior that included such merchandise as floor polishers, tools, hardware, chainsaws, flooring, paint, cleaning products, windows and doors, large appliances such as washers, dryers, and refrigerators, light fixtures and lighting systems, saw blades, and patio furniture, much of it displayed on floor-to-ceiling racking requiring an industrial step stool to reach high display levels, all typical of a home improvement warehouse.

The Appellant also states that "no exterior garden center" is planned (Attachment 3b, page 486), although the site plan includes an interior garden center (Attachment 3b, page 256), and that the "lumber pad is an operational area for safe receiving/unloading for heavier merchandise, **NOT** for exterior storage" (Attachment 3b, page 486). It is expected that receiving and unloading would occur outside prior to moving the inventory inside for storage. During its presentation to the Development Review Board, the Appellant described the staging of large product and delivery to the store by large trucks, including flatbed trucks: when product that is so large it is "not in a box truck or a 53-foot trailer that could back into a loading dock. We have to unload some of our heavier products off of a flatbed. That's the difference." "It [the outdoor lumber pad] operates as a "receiving function" (Attachment 5, page 10).

The Appellant also stated the following during its presentation when comparing the Current Occupant with the Proposed Occupant:

- "... customer service locations that are located throughout the store. ... In this example, A customer could come in and have a technical expertise from a sales associate mix paint to whatever color that you were seeking [referring to Proposed Occupant]." (Attachment 5, page 8; Slide 8 in Attachment 3b, page 475)
- "Now, looking at these two photos, Nintendo games, where a game cartridge is a component to a gaming system [referring to Current Occupant]. We have effectively, saw blades as a component to a circular saw [referring to Proposed Occupant]." (Attachment 5, page 9; Slide 13 in Attachment 3b, page 440)
- "Both the previous user and the proposed use also have ancillary sales. Items that may or may not be directly related to either, in this case, electronics [referring to Current Occupant] or home improvement [referring to Proposed Occupant], but here we have an

example of both the previous and the proposed user selling hats, one for winter conditions, the other for gardening.” (Attachment 5, page 9; Slide 15 in Attachment 3b, page 482)

- “We [Proposed Occupant] do not have an exterior garden center. It's never proposed. Our live goods are inside the existing building.” (Attachment 5, page 10; Slide 19 in Attachment 3b, page 486)

III. Is the Proposed Use a Continuation of the Current Non-conforming Use?

For a use to be deemed a continuation of a legally established non-conforming use, it must have the same nature and extent as the recognized non-conforming use. *See Sabin v. Clackamas Cnty.* In this matter, the reference point is the nature and extent of the use of the Location as of June 5, 2019, as determined by the Development Review Board in Case File DB24-0002 (Resolution No. 429), and affirmed by Council in its Order on Appeal (see Attachment 6).

The City is entitled to draw distinctions between uses. In *Fraley*, Deschutes County drew a distinction between the repair of motorhomes, campers, RV's and camp trailers, and storage of lumber, on one hand, and the repair of diesel engines and tractor trailer trucks, on the other hand. The County took the position that not all motor vehicle repair activities are the same. In this matter the City may draw distinctions between the uses carried out by Fry's Electronics and Appellant, just as the County did in *Fraley*.

Further, once the City draws distinctions between uses, it is entitled to determine that certain uses are beyond the scope of a recognized non-conforming use when there is no evidence of them at the relevant time – and therefore determine that there is no “continuation” with respect to those uses – just as the County did in *Hendgen*. Just as LUBA stated in *River City Disposal and Recycling v. City of Portland*, a new or additional use is a change of use rather than a continuation of use.

Based on the application materials provided by the Proposed Occupant, and an examination of how the Proposed Occupant operates locally, the Development Review Board concluded the following:

- Appellant acknowledges that the Proposed Occupant operates “home improvement warehouse stores” (Attachment 3b, page 89).
- Evidence does not support that the Current Occupant operated in a retail warehouse format or as a home improvement store (Attachment 2, pages 15-20).
- Appellant acknowledges that contractors and other home improvement professionals, not private individuals, account for close to half of the Proposed Occupant's annual sales (Attachment 3b, page 90).
- Appellant acknowledges that the Current Occupant and Proposed Occupant “carry different products” (Attachment 3b, page 90) and includes a list of products and services provided by the Proposed Occupant, such as “tools, construction products, appliances, and services, including transportation and equipment rentals”, a “garden center”, and “both onsite and offsite install, repair, and remodel services” (Attachment

3b, page 89), that are not electronics-related or included in the products and services provided by the Current Occupant.

- Appellant shows on the site plan included in its application materials activities that occur outside the structure at the Location, such as the proposed lumber pad at the back of the structure (Attachment 3b, page 256), stated on the record that flatbed trucks provide deliveries to the site (Attachment 5, page 10), and describes other activities that are likely to occur outside, such as transportation and equipment rentals (Attachment 3b, page 89).
- Current Occupant did not have outdoor activities, including receiving, unloading, or temporary storage and there is no evidence in the record to the contrary.
- Appellant has not presented any evidence to prove that the Proposed Occupant's activities existed at the Location as of June 5, 2019.
- The Proposed Occupant is not an electronics-related retail store.
- The Proposed Occupant contains products and activities that extend beyond the scope and nature of those provided by the Current Occupant. The products sold by the Proposed Occupant are substantially different than those sold by the Current Occupant in nature, use, scale, and deployment to the end user.

In other words, the Proposed Occupant's proposed use of the Location, goes far beyond a mere continuation of the non-conforming use of the Location that was recognized by the Development Review Board. The Proposed Occupant may engage in these uses at the Location only if it obtains a recognition of change of use, which is beyond the scope of what may be addressed in this matter.

Findings A5 through A11 of the Development Review Board in Case File DB24-0003 (Resolution No. 432) evaluate the Current Occupant against the non-conforming use standards in WC 4.001 (196.) and 4.189 (.01) through 4.189 (.06) (see Attachment 2, pages 34-35). Specifically the Findings state that:

- Current Occupant at the Location is "a legally established non-conforming use in the TC zone" (Finding A5); and
- Proposed Occupant "is not the same use as the Current Occupant at the Location" and, therefore, "operation of the Proposed Occupant at the Location is not a continuation of non-conforming use" (Finding A6); and
- Determination of whether or not the non-conforming use at the Location is no less conforming than the existing use is "outside the scope of review of the current application" (Finding A7).

RESPONSE TO ARGUMENTS RAISED BY APPELLANT:

Appellant has made several arguments in its Notice of Appeal, and written submissions to the Development Review Board, that are irrelevant in the applicable analysis, which is outlined in this staff report. City staff now address these arguments only in order to preserve the City's response.

I. Appellant's Position Ignores a Valid Council Order

Appellant's demand for the Development Review Board, and now Council, to recognize a non-conforming use for "commercial retail," "warehouse retail" or "retail use" ignores Council's Order on Appeal of Resolution No. 429 (see Attachment 6). Appellant has filed a notice of appeal with LUBA that will very likely lead to LUBA's review of this Council Order. It is possible that LUBA will reverse or remand this decision, and that ultimately, it may be amended in some way by Council. Until this happens, this order is an act of the City. In particular, this order establishes the nature and extent of the non-conforming use recognized by the City with respect to the Location. Appellant has not cited any legal authority that says otherwise.

II. Appellant Presents Only Evidence that Is Irrelevant to this Appeal

City staff want to address evidence that was presented to the Development Review Board and that is referenced in Appellant's Notice of Appeal. The evidence addressed in this section is irrelevant to the decision before Council for the reasons stated below.

1. Evidence Regarding Number of Parking Spaces and Traffic Impact Does Not Support a Finding of Continuation of Non-Conforming Use

The Appellant submitted the following evidence in its April 15, 2024 "Open Record Submittal":

- Exhibit A (Attachment 3a, page 7): An "Analysis from Lars Anderson & Associates that details the potential impacts of Home Depot, in relation to Fry's Electronics." This exhibit description is taken, verbatim, from Appellant's Open Record Submittal. This document makes statements regarding the number of parking stalls typically needed by the Proposed Occupant's stores; its main point appears to be that the Proposed Occupant will require fewer parking stalls than currently exist at the Location.
- Exhibit B (Attachment 3a, pages 8-17): A "Trip Generation Memorandum for Home Depot's use of the subject property, prepared by Transportation Engineering Northwest." This exhibit description is taken, verbatim, from Appellant's Open Record Submittal. This memorandum appears to be an ITE traffic study that compares the traffic impact of an "electronic superstore" to that of a "home improvement superstore." This study does not appear to be based on any study or observation of the Location.

Analysis of comparative impacts between an existing non-conforming use and a proposed non-conforming use is to aid in a determination of change of use – that is, whether the proposed use is no more non-conforming. This appeal involves only a determination of whether the Proposed Occupant's proposed use of the Location is a continuation of (i.e., the same as) the Current Occupant's as of July 5, 2019. These documents both suggest that the Proposed Occupant's

proposed use of the Location is different than the Current Occupant's use of the Location as of July 5, 2019. Therefore, this evidence does not support Appellant's argument that the Proposed Occupant would be a continuation of the recognized non-conforming use.

As noted, this evidence might be relevant to an application for change of use, but that is not what was requested in Appellant's initial application and is, consequently, beyond the scope of this appeal.

Appellant has produced no evidence regarding the number of parking spaces actually used by the Current Occupant as of June 5, 2019, or the traffic impact of the Current Occupant as of June 5, 2019. If Appellant wanted the City to recognize non-conforming use in terms of number of parking spaces that may be used by Proposed Occupant's customers or its traffic impact, it should have provided evidence of the number of parking spaces used at the Location and the Current Occupant's traffic impact as of June 5, 2019 in the Class I proceeding. *See Sabin* at 30 (stating that it is the nature and extent of the lawful use in existence at the time the use became non-conforming that is the reference point for determining the scope of permissible continued use). Appellant has provided no such evidence.

2. Certificates of Occupancy Are Irrelevant to Land Use Decisions, and the Certificate of Occupancy for the Location Is Irrelevant to this Appeal; City Approvals of Other Businesses Are Irrelevant to this Appeal

A Certificate of Occupancy is issued by the Building Division for a certain type of occupancy classification and use designation of a building, such as Business (Group B), Mercantile (Group M), or Institutional (Groups I-1, I-2, etc.). Issuance of a Certificate of Occupancy certifies that a building is constructed and will be occupied by the occupancy classification and use designation for which it was intended per the Building Code. The occupancy classification and use designation as defined by the Building Code is not the same as land use, which defines the use based on the Development Code as reviewed during the land use review process. A Certificate of Occupancy does not approve a particular use; that is the purpose of land use review based on clear and objective standards of the Development Code. Further the occupancy classifications and use designations in the Building Code and land use as defined in the Development Code do not dictate one another, but are completely separate and serve different purposes. Because of this, the Building Code requires multi-family residential structures be built in accordance with the commercial building code standards; however, land use designates multi-family structures as residential in use. Thus, a use category for one does not provide meaning to the other. The Oregon Building Code is codified in Chapter 9 of the Wilsonville Municipal Code, whereas the Development Code is codified in Chapter 4 of the Wilsonville Municipal Code and City Planning and Zoning is codified in Oregon Revised Statute (ORS) Chapter 227.

Appellant attempts to equate entire classifications or categories of uses as being one in the same for purposes of establishing a continuation of non-conforming use. Not only is such argument contrary to all applicable law provided by either party in this matter, it is practically nonsensical.

3. The 1991 Decision Is Irrelevant to this Appeal

In its Notice of Appeal, Appellant continues to call for a recognition of a “commercial retail” non-conforming use based on the assertion that the 1991 Decision is the “controlling authority” for determining the scope of the recognized non-conforming use in this matter.

This is an issue that was resolved in the Class I proceeding, and is beyond the scope of this Class II appeal proceeding. In short, the 1991 Decision is irrelevant to a determination of the scope of a non-conforming use based on established Oregon case law. Appellant still has not cited any legal authority that establishes that an original land use approval or original zoning regulations are relevant to this inquiry.

Finally, Appellant makes some statements regarding the operation of Ordinance No. 55; Appellant misunderstands this ordinance and the City’s land use approval process. For the sake of responding to the Appellant’s argument only, the Development Review Board Decision in Case File DB24-0003 (Resolution No. 432) addresses the 1991 Decision and the Planning Director’s interpretation of Ordinance No. 55 (Attachment 2, pages 24-27). To briefly summarize key points of this discussion:

- Description of the proposed development, Project Thunder, in the 1991 Decision is “a 159,400 square foot electronics-related retail store” and there is no reference to “warehouse retail” use or “commercial retail center.” There is also no reference to “warehouse retail” or “commercial retail center” in the Ordinance No. 55 land use categories, also referred to as overlay zones, or in the Stage I Master Plan.
- The Planning Commission had the authority to make changes to the application of approved overlays consistent with Ordinance No. 55. This was done via a land use application and action, and is what was done in 91PC43 (the 1991 Decision) to classify the site as Central Commercial.
- Project Thunder, an electronics retail store, was considered consistent with the Central Commercial use category when it was approved in 1991. While electronics store was not a use listed specifically in Central Commercial, modification to the Stage I Master Plan for the development was approved by the Planning Commission under the authority granted to them in Ordinance No. 55.
- Hypothetically speaking, before a tenant like the Proposed Occupant could have engaged in uses (hardware store; building materials, retail outlet only; and cabinet or carpenter shop) listed in the Service Commercial and Food and Sundries use categories in the City Center District at the Location prior to the 2019 Town Center rezone, that same process, a Stage I Master Plan modification for the Location approved by the Planning Commission, would have been required.
- Ordinance No. 55 specifically states (Attachment 3b, page 59): “The Planning Commission shall first approve all uses of property in the CITY CENTER DISTRICT, and in doing so, shall follow as closely as possible the recommended uses and types of use as specified in this Section 4 (3) and for each of the various areas in the District as shown on the attached Zoning Diagram which is marked Exhibit “A” for identification purposes and expressly

made a part of this Ordinance. Any change of a recommended use or similar type of recommended use or of an approved use from one area to another in the CITY CENTER DISTRICT shall first be passed upon by the Planning Commission.”

- Thus, a use not listed in a specific overlay may be permissible, but is not permitted by right, and requires an approval process by the review body (Planning Commission at the time of the 1991 Decision, Development Review Board at the present time).

Therefore, the argument that Proposed Occupant should be deemed a continuation of use of the Location not only ignores applicable case law, but also ignores the zoning regulations in place at the time of the original land use approval as well as the scope of the land use approval itself.

4. The 1992 CC&Rs Are Irrelevant to this Appeal

Appellant has submitted the following evidence to its April 15, 2024 “Open Record Submittal”:

- Exhibit D (Attachment 3a, pages 19-57): A document titled “Planned Business Community Declaration for Wilsonville Town Center Property,” and a number of amendments to this document. This document, with its amendments, is a private agreement among property owners.
- Exhibit E (Attachment 3a, pages 58-62): A memorandum written by the City dated November 9, 2023 regarding the above-referenced Exhibit D.

Appellant seems to have submitted this evidence to argue that the covenants and restrictions in the above-referenced Exhibit D burden the Location, and therefore the Town Center Plan may not come to fruition. This evidence, and the related argument, are irrelevant to this appeal. The Town Center Plan is not under review in this appeal proceeding. The fact that the Proposed Occupant would agree to an amendment to the above-referenced Exhibit D is also irrelevant to this appeal proceeding. CCRs are private agreements between property owners and have no bearing on City land use regulations.

III. Appellant Misunderstands and Misrepresents Applicable Case law

1. Current Zoning Regulations Are Irrelevant to the Determination of the Nature and Extent of a Recognized Non-Conforming Use

Appellant appears to argue that the TC zone does not limit the type of retail use – only the size of a retail use; Council’s decision (Attachment 6) recognizes a non-conforming use of the Location for 159,400 square feet; and therefore, the City may not recognize a non-conforming use for only “electronics-related” retail. Appellant appears to argue that any retail use may continue at the Location because the TC zone regulations at issue in this case do not distinguish between retail uses. (See Notice of Appeal, page 5; also Attachment 3b, page 255).

This argument is not relevant to this Class II proceeding. It may have been relevant to the Class I proceeding, because it relates to the City’s determination of the nature and extent of the

recognized non-conforming use. However, Appellant failed to raise the argument in the Class I and thus waived its right to do so now. For argument's sake only, the City wants to make a clear record of its response to this argument.

The City has consistently outlined its position throughout both the Class I proceeding, and this proceeding:

- The first step is to establish that a use does not conform with an existing regulation. See *Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (citing *Rogue Advocates v. Board of Comm. Of Jackson Cnty.*, 277 Or App 651, 654 (2016), *rev dismissed*, 362 Or 269, 407 (2017)) (defining “non-conforming use” to be a use “that is contrary to a land use ordinance but that nonetheless is allowed to continue because the use lawfully existed prior to the enactment of the ordinance.”)
- The second step is to follow the rule established in cases such as *Spurgin* and *Nehoda*, and examine the actual use of the subject property as of the date the more restrictive regulation was effective to determine the nature and extent of the non-conforming use. See *Spurgin v. Josephine Cnty.*, 28 Or LUBA 383 (1994) (“After it is determined that a nonconforming use exists, the nature and extent of the nonconforming use must be identified. . . This requirement is important because the protected right to continue a nonconforming use is a right to continue the nature and scope of use that existed at the time the use became nonconforming.”); *Nehoda v. Coos Cnty.*, 29 Or LUBA 251, 1995 WL 1773153, at *5 (1995) (“The purpose of a local government proceeding to determine the existence of a nonconforming use is to determine what use existed on the date restrictive regulations were applied.”)

In other words, the existing regulation is relevant to only the determination that a use is “non-conforming.” Once this determination is made, the only thing that matters is the actual use made of the property as of the date the regulation became effective.

Appellant asks the City to both bypass the second step outlined above and ignore cases such as *Spurgin* and *Nehoda*. Further, Appellant’s position is totally unsupported by *any* legal authority: Appellant’s position requires that once the City determines non-conformance with a regulation, that the portion of the use that is not addressed by the regulation (in this case type of retail use) is *automatically* permitted to continue. This position is patently inconsistent with blackletter law, established in cases such as *Spurgin* and *Nehoda*, that require – before a non-conforming use may continue – that a local government examine evidence to establish the nature and extent of the non-conforming use that may continue.

Further, once the recognized non-conforming use is defined, the Wilsonville Code provisions regarding the TC zone are totally irrelevant to determining whether a proposed use is a continuation of use or not. Appellant proposes a flawed argument that does not follow legal authority. This argument asks the City to apply only parts of the current Code to the application and at the same time, apply a historic development approval from 1991 and outdated code standards that existed prior to adoption of the TC zone. This is not consistent with development review requirements in Oregon Revised Statutes (ORS 227.178), which states “*approval or denial*

of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.” Neither applicants, nor cities, get to pick and choose, applying some current code criteria applicable at the time of the application while also applying some regulations from obsolete code language. If Appellant wants a determination based on a commercial retail use using the standards in the TC zone, then the Appellant needs to submit the appropriate development application.

2. There Is No Violation of the Codification Requirement

Appellant appears to argue that the Development Review Board and the Council, in the Class I proceeding, violated Oregon’s codification requirement (See Notice of Appeal, page 6; also Attachment 3a, pages 256-257).

The City’s determinations at every level, in both the Class I and Class II proceedings, have been based on the Wilsonville Code, Oregon law, and Oregon case law. Oregon’s codification requirement cannot possibly be interpreted to require that rules stated in Oregon case law are restated in the City’s code or ordinances before the City acts in accordance with those rules of law. It is disingenuous for the Appellant to argue that the City’s reliance on Oregon case law is the same as developing “land use approval standards and criteria through quasi-adjudicative decision-making.” (See Notice of Appeal, page 6). The standards that apply to non-conforming use cases have been clearly established, over the course of decades, by LUBA and Oregon appellate courts, and the City is obligated to follow those rules of law.

If Appellant is arguing that the City’s zoning ordinances in effect at the time of the 1991 Decision, including Ordinance No. 55, violate Oregon’s codification requirement, the City responds as follows:

- Ordinance No. 55 was codified and was adopted into the City’s Development Code. Pursuant to Ordinance No. 55 (Attachment 3b, pages 54-62), the Zoning Map was updated and the development code (known as the Wilsonville Zoning Ordinance at the time) amended to include Section 5.035 for the purposes of establishing the "City Center District" to enable the reclassification of lands in conformance with the Wilsonville General Comprehensive Plan and define permitted, accessory, and conditional uses. As noted in the 1991 Decision, these code provisions were still in effect in the development code and Ordinance No. 55 applicable to development at the Location in 1991 (Attachment 3b, pages 107-110).
- The zoning ordinances in effect at the time of the 1991 Decision, including Ordinance No. 55, are totally irrelevant to both the Class I and Class II proceedings.
- The portion of the staff report quoted by Appellant on page 6 of its Notice of Appeal, regarding Ordinance No. 55, was written simply to clarify Appellant’s incomplete understanding of the City’s zoning regulations that were in effect at the time of the 1991 Decision, and to respond to an inaccurate statement made by the Appellant in its written materials to the Development Review Board. This analysis is not the basis of Development Review Board Resolution No. 432. The basis of Development Review Board Resolution No.

432 is captured in the section titled “Conclusory Findings” of the staff report that was adopted by the Development Review Board (Attachment 2, page 24).

To summarize, the City has not violated Oregon’s codification requirement in either the Class I or Class II proceedings.

3. There Is No “Common Nucleus” Test that Is Dispositive in this Matter

Appellant has repeatedly cited *Hendgen v. Clackamas County*, 115 Or App 117 (1992), for the proposition that there is a “common nucleus” test that would allow all of Proposed Occupant’s uses to occur at the Location as a continuation of use. *See, e.g.*, Notice of Appeal, page 8. Appellant argues that the City is compelled to recognize a “common nucleus” of “commercial retail use” in this matter based on the “test” created in this case.

This issue is beyond the scope of this Class II appeal proceeding because it relates to the scope of non-conforming use that has been recognized in the Class I proceeding. However, the City responds here to preserve its response to this argument.

Appellant focuses on one phrase within this opinion – and totally overlooks portions of the opinion that do not support its argument. In the cited opinion, the Court of Appeals wrote to correct the reasoning that was used by LUBA and the county: they had both declined to recognize a non-conforming use for “storage” because they reasoned that at one point in time, the storage use was incidental to on-premise, affiliated businesses, whereas the use that petitioners were seeking recognition for was storage related to an off-premise business. *Id.* at 120-21 (emphasis added). The Court of Appeals wrote to correct this reasoning, saying that the “common nucleus of both activities is storage.” *Id.* at 120 (emphasis in original). In other words, the Court of Appeals said that the fact that the storage use in one instance related to on-premise, affiliated businesses, and in the other instance, related to off-premise businesses, by itself was not enough to find that there was a lack of continuity in the storage use. *See id.* In the same opinion, the Court of Appeals stated that it does not follow that these two storage uses are “necessarily” equivalent; it directed the county to consider whether factors such as the impact of moving goods on to the property from another location support a finding that there has been some “fundamental change in the nature of the use.” *Id.* at 121.

The City has determined that multiple factors support a finding that there has been a “fundamental change in the nature of the use.” In simple terms, even if there are some commonalities between the use that Current Occupant made of the Location as of June 5, 2019, and the use that Proposed Occupant proposes to make of the Location, these few commonalities (e.g., the fact that they both sold chairs, the fact that they both had bathrooms), do not require the City to recognize a more generalized non-conforming use for “commercial retail use.” Further, a recognition of these common uses does not entitle Proposed Occupant to engage in additional uses. The *Hendgen* opinion recognizes this: the Court of Appeals stated that other uses such as “on-premises sales and other business activities would not come within the scope of an existing nonconforming use that consisted only of storage.” *Id.* at 120.

The City's position in both the Class I proceeding, and this Class II proceeding is based on a thorough review of the many cases that are briefed in this staff report. Appellant's emphasis and reliance on the "common nucleus" phrase within the *Hendgen* Court of Appeals opinion ignores not only other key language within that opinion, but also these other cases.

CONCLUSORY FINDINGS:

Based on the relevant facts, background and considerations, summarized above and discussed in detail in the Development Review Board Decision in Case File No. DB24-0003 (see Attachment 2), the Development Review Board found the following in its Conclusory Findings in the adopted staff report:

"Proposed Occupant's operation at the Location would not be a mere continuation of the non-conforming use previously recognized by the City." (Attachment 2, p. 24).

Staff Recommendation

Staff recommends the Council uphold the Development Review Board decision to deny the Proposed Occupant as a continuation of non-conforming use of the Location.

Staff recommendation is based on the following considerations:

- The 1991 Decision and the zoning regulations in effect when the 1991 Decision was granted are irrelevant to this decision. Even if they were relevant, they would result in the same decision.
- The 1992 CC&Rs are a private agreement with no bearing on development review by the City and are irrelevant to this appeal.
- Certificates of Occupancy are irrelevant to land use decisions and the Class II Review criteria that are the subject of this appeal.
- Appellant's evidence regarding parking and traffic impacts are not compelling and in fact, suggests that the Proposed Occupant's proposed use of the location is different than the Current Occupant's and supports a finding of a change of use.
- Proposed Occupant describes itself as a "home improvement warehouse store" (Attachment 3b, pages 89-90). This is not the same as an "electronics-related retail store," which is the legally established non-conforming use at the Location. Proposed Occupant's characterization of the non-conforming use approved by the City as "warehouse retail use" or general "commercial retail" is incorrect and is not persuasive (Attachment 2, pages 27-28).
- Current Occupant is an electronics-related retail use with small to mid-size electronics related products (such as computer, video gaming systems, office goods, audio equipment, televisions, and related accessories), displayed in a traditional department store fashion, and no retail operations, including storage, staging, or receiving/unloading of product or equipment, occurring outside of the structure (Attachment 2, pages 15-20).

- Proposed Occupant admits that its proposed use of the Location would include the sale of tools and construction products, a garden center, lumber pad, a paint center, transportation and equipment rental, technical expertise for home improvement projects, and both onsite and offsite installation, repair, and remodeling services (Attachment 3b, pages 89-90). Many of Proposed Occupant’s customers, totaling nearly half its sales, include contractors and professionals (Attachment 3b, pages 90), and in-store merchandise is displayed on floor-to-ceiling racking requiring an industrial step stool to reach high display levels, all typical of a home improvement warehouse (Attachment 3b, pages 468-484). A substantial amount of the products for sale require delivery due to size (both to homes and construction sites) and heavy merchandise that requires an exterior operational area for unloading and delivery to the store by flatbed and other large trucks (Attachment 5, pages 10-11). Appellant has not presented any evidence to prove that the Proposed Occupant’s activities existed at the Location as of June 5, 2019.
- The Proposed Occupant’s proposed use of the Location includes services, site operations, and products that extend beyond the scope and nature of those provided by the Current Occupant, including products substantially different in nature, use, scale, and deployment to the end user. The Proposed Occupant’s proposed use of the Location extends beyond the scope, nature and extent of the Current Occupant’s actual use of the Location as of June 5, 2019, and therefore, is not a continuation of non-conforming use.
- The legal standard regarding non-conforming uses supports a local government drawing these distinctions between various uses.
- Appellant has not provided an alternate legal standard of review for the continuation of non-conforming uses and in fact, asks the City to ignore established case law such as that in *Spurgin* and *Nehoda*.
- There is no violation of the codification requirement. The City’s determinations have been based on Oregon law and adopted, codified zoning ordinances. Appellant’s argument is unsubstantiated by evidence and is not compelling.

In its Notice of Appeal and other written materials, Appellant has persistently demanded the City recognize a non-conforming use for “commercial retail.” Council’s Order on Appeal (see Attachment 6) is a decision of the City; unless and until it is successfully appealed, it establishes the recognized non-conforming use permissible at the Location. Therefore, staff recommends that Council declines to disturb Council’s Order on Appeal of Resolution No. 429 (see Attachment 6) nor recognize any non-conforming use other than what was recognized in this Council order.

TIMELINE:

The decision made by the Council shall become effective immediately. There is a 21-day appeal period during which the Appellant could file an appeal with LUBA.

CURRENT YEAR BUDGET IMPACTS:

Cost is covered partially by fees paid by appellant, otherwise Staff time is non-billable within existing department budgets.

COMMUNITY INVOLVEMENT PROCESS:

Proper noticing was followed for the Development Review Board public hearing on the Class II Review Application. This included mailing the public hearing notice to property owners within 250 feet of the subject property, on-site posting, and publication in the Wilsonville Spokesman. All were provided an opportunity to submit testimony in advance of and at the public hearing. Further, the Town Center Plan, as well as the drafting and review process for the Town Center zoning, included comprehensive community involvement to gather input, which was integral in establishing the vision, goals, guiding principles, and design elements of the Town Center Plan.

POTENTIAL IMPACTS OR BENEFIT TO THE COMMUNITY:

The Town Center Plan and TC Zone regulations are intended to promote development that fulfills the community's vision for a more commercially vibrant, walkable, mixed-use Town Center. To support this vision, the community and policymakers established new standards that would limit new single-user retail uses to a scale (30,000 square feet footprint or less) more appropriate for pedestrians. As a result, several buildings in Town Center became non-conforming (use, structure, and/or site conditions) when the TC Plan and Zone became effective (June 5, 2019). While the uses may continue, the non-conforming provisions both ensure future uses of these locations and buildings become no more non-conforming with the TC Zone and also encourage the future uses to become more in line with the vision and standards of Town Center.

ALTERNATIVES:

The Council shall by order, affirm, reverse or modify in whole or part a determination or requirement of the decision that is under review. When the Council modifies or renders a decision that reverses a decision of the Commission or Board, the Council, in its order, shall set forth its findings and state its reasons for taking the action. When the Council elects to remand the matter back to the lower review body for such further consideration as it deems necessary, it shall include a statement explaining the error to have materially affected the outcome of the original decision and the action necessary to rectify such. **It should be noted that there is not sufficient time to remand the decision without the Appellant extending the 120-day period in which final action needs to occur on this application as required by ORS 227.178.**

ATTACHMENTS:

1. Council Appeal Order on Case File DB24-0003 (Resolution No. 432) dated May 6, 2024
2. Development Review Board Panel B Decision – Resolution No. 432
3. Development Review Board Panel B Record – Case File DB24-0003
 - a. Special Meeting Record – April 24, 2024
 - b. Meeting Record – April 8, 2024
4. Development Review Board Panel B Verbatim Minutes Excerpt dated April 24, 2024
5. Development Review Board Panel B Verbatim Minutes Excerpt dated April 8, 2024
6. Council Order on Appeal on Case File DB24-0002 (Resolution No. 429) dated April 15, 2024.

**ORDER ESTABLISHING THE PROCEDURE THAT CITY COUNCIL WILL FOLLOW
OF APPEAL PROCEEDING FOR ANTICIPATED APPEAL OF DEVELOPMENT
REVIEW BOARD RESOLUTION NO. 432 TO CITY COUNCIL**

WHEREAS, on December 15, 2023, the City received an application for Class II Review with respect to the real property located at 29400 SW Town Center Loop West (respectively, the “Location”) from applicant/appellant Dan Zoldak, of Lars Andersen & Associates, Inc. (“Appellant”) (this application is referred to as “AR23-0031” in City records); and

WHEREAS, in its application, Appellant requested a “Class II Staff Interpretation to confirm that The Home Depot and Fry’s Electronics are both warehouse retail uses” at the Location, and alternatively, a “staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for [the Location] constitutes a warehouse retail use and may operate in the existing structure”; and

WHEREAS, City staff interpreted the Appellant’s application to request confirmation that the Home Depot’s proposed use of the Location will constitute a continuation of the non-conforming use, as provided in Wilsonville Code Section 4.189(.01), which nonconforming use was confirmed in the related but separate Class I decision relating to the Location (which was established by the DRB in resolution no. 429, and later confirmed by order on appeal by City Council dated April 15, 2024); and

WHEREAS, the Planning Director chose to refer the application to the Development Review Board (the “DRB”) for a public hearing per WC 4.030(.01)B., and did not issue a Planning Director’s decision; and

WHEREAS, the DRB held a public hearing on April 8, 2024 (this proceeding is referred to as “DB24-0003” in City records); and

WHEREAS, the DRB closed the public hearing on April 8, 2024, but kept the written record open to allow the submission of evidence and legal argument, and reconvened to consider the application and issued a decision on April 24, 2024; and

WHEREAS, on April 24, 2024 the DRB unanimously adopted Resolution No. 432; and

WHEREAS, the City Council anticipates that Appellant will appeal the DRB’s decision in Resolution No. 432 to the City Council within the prescribed time frame for filing the appeal; and

WHEREAS, in anticipation of the appeal, the City Council seeks to establish the procedure for the appeal proceeding and date of appeal should Appellant timely file its appeal; and

WHEREAS, in considering the procedures applicable to the anticipated appeal proceeding, City Council has discussed and considered the factors set out in WC 4.022(.07)A.

NOW, THEREFORE, IT IS ORDERED, by the City of Wilsonville City Council, at its regular meeting on this 6th day of May 2024, with respect to the anticipated appeal:

1. Pursuant to WC 2.003(2), the City Council hereby orders a special-set meeting to address this appeal to occur on Friday, May 17, 2024, at 12:00 p.m. PT (the "Appeal Proceeding"). The scheduling of the Appeal Proceeding ensures the City's compliance with ORS 227.178. During this special-set meeting, the agenda will be limited to the following: Call to Order (roll call, Pledge of Allegiance, and approval of order of agenda); and the Appeal Proceeding.
2. Pursuant to its authority under WC 4.022(.05)A., City Council limits this appeal to a review on the record subject to WC 4.022(.06). City Council will not hold a public hearing or otherwise accept any additional evidence.
3. The review of the appeal will be limited to arguments raised by Appellant in its anticipated appeal that were raised before the DRB.
4. The schedule for the Appeal Proceeding will occur in the following order: (1) Staff presentation of the factual report required under WC 4.022(.06)A.1., (2) Appellant argument on the record under WC 4.022(.06)B., (3) Staff argument on the record under WC 4.022(.06)B.; (4) Appellant rebuttal on the record under WC 4.022(.06)B., which rebuttal will be limited to five (5) minutes; (5) Additional questions, if any, from City Council to either Appellant or staff; (6) Discussion by City Council; and (7) A decision by City Council, except, however, that further discussion and/or decision by the Council may be postponed to another meeting, the time, date, and place of which shall be announced before adjournment.
5. All persons who speak at the Appeal Proceeding who are not City staff shall identify themselves by name and address. Attorneys and other authorized representatives may speak on behalf of Appellant or City staff.
6. After considering the factors set out in WC 4.022(.07)A., City Council finds that the procedures outlined above will not prejudice Appellant.

DATED this 6th day of May 2024.

DocuSigned by:

 8A974AF3ADE042E...
 JULIE FITZGERALD MAYOR

ATTEST:

DocuSigned by:

 E781DE10276B498...
 Kimberly Veliz, City Recorder

SUMMARY OF VOTES:

Mayor Fitzgerald	Yes
Council President Akervall	Yes
Councilor Linville	Yes
Councilor Berry	Yes
Councilor Dunwell	Excused



VIA: Certified Mail, Return Receipt Requested

April 24, 2024

Dan Zoldak
Lars Andersen & Associates, Inc.
4694 W Jacquelyn Avenue
Fresno, CA 93722

Re: Planning Director’s Referral of a Continuation of Non-Conforming
Use Determination
29400 SW Town Center Loop West

Case File: DB24-0003 Planning Director’s Referral of a Continuation of Non-
Conforming Use Determination

The Development Review Board’s Decision and Resolution No. 432 are attached, denying the proposed occupant’s (The Home Depot) proposed use at 29400 S Town Center Loop West is a continuation of the existing non-conforming use.

Thank you.

Shelley White
Planning Administrative Assistant

CC: David Fry, Lumberjack LP

BCC via e-mail:

- Barry Simmons
- Kenneth Katzaroff
- Keenan Ordon-Bakalian
- Garet Prior
- Kristin Roche
- Shawn O’Neil
- Aaron Lemka
- Dave Wortman
- Bob LeFeber

CITY OF WILSONVILLE • COMMUNITY DEVELOPMENT DEPT.

Phone 503-682-4960
Fax 503-682-7025

29799 SW Town Center Loop East
Wilsonville, OR 97070

www.ci.wilsonville.or.us
info@ci.wilsonville.or.us

April 24, 2024

DEVELOPMENT REVIEW BOARD PANEL B

NOTICE OF DECISION

Application Nos.: DB24-0003 Planning Director’s Referral of a Continuation of Non-Conforming Use Determination

Owner: Lumberjack LP (Contact: David Fry)

Applicant/Authorized Representative: Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)

Request/Summary: Confirm or deny that the non-conforming use currently located at 29400 SW Town Center Loop West (the “Current Occupant”) and the “Proposed Occupant’s” (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use.

Location: 29400 SW Town Center Loop West. The property is specifically known as Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon.

On April 24, 2024, at the meeting of the Development Review Board the following action was granted on the above-referenced subject:

The Development Review Board denied the proposed occupant’s (The Home Depot) proposed use at 29400 SW Town Center Loop West is a continuation of the existing non-conforming use

Any appeals by anyone who has participated in this hearing, orally or in writing, must be filed with the City Recorder within fourteen (14) calendar days of the mailing of the Notice of Decision. *WC Sec. 4.022 (.02).*

This decision has been finalized in written form and placed on file in the City records at Wilsonville City Hall this **24th day of April 2024** and is available for public inspection. This decision shall become effective on the fifteenth (15th) calendar day after the postmarked date of the written Notice of Decision, unless appealed or called up for review by the Council in accordance with this Section. *WC Sec. 4.022 (.09).*

Written decision is attached

For further information, please contact the Wilsonville Planning Division at Wilsonville City Hall, 29799 SW Town Center Loop E, Wilsonville Oregon 97070 or phone 503-682-4960.

**DEVELOPMENT REVIEW BOARD
RESOLUTION NO. 432**

A RESOLUTION DENYING THE PROPOSED OCCUPANT'S (THE HOME DEPOT) PROPOSED USE AT 29400 SW TOWN CENTER LOOP WEST IS A CONTINUATION OF THE EXISTING NON-CONFORMING USE

WHEREAS, an application for Class II Administrative Review (AR23-0031), together with planning exhibits, has been submitted by Dan Zoldak of Lars Andersen & Associates, Inc. – Applicant, on behalf of David Fry of Lumberjack LP – Owner, in accordance with the procedures set forth in Section 4.008 of the Wilsonville Code; and

WHEREAS, the subject property is located at 29400 SW Town Center Loop West on Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon (“the Location”); and

WHEREAS, the Planning Director referred the Class II Administrative Review (AR23-0031) to the Development Review Board as authorized in Section 4.030 of the Wilsonville Development Code; and

WHEREAS, the subject of the Class II Administrative Review is to confirm or deny that the non-conforming use currently located at the Location (the Current Occupant) and the Proposed Occupant’s (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use; and

WHEREAS, the Planning Staff has prepared the staff report on the above-captioned subject dated April 1, 2024; and


WHEREAS, said planning exhibits and staff report were duly considered by the Development Review Board Panel B at a scheduled meeting conducted on April 8, 2024, at which time exhibits, together with findings and public testimony were entered into the public record; and

WHEREAS, the Development Review Board considered the subject and the recommendations contained in the staff report; and

WHEREAS, interested parties, if any, have had an opportunity to be heard on the subject.

NOW, THEREFORE, BE IT RESOLVED that the Development Review Board of the City of Wilsonville does hereby adopt the staff report attached hereto as Exhibit A1, with findings and recommendations contained therein, denying the Proposed Occupant as a continuation of the existing non-conforming use at the Location.

ADOPTED by the Development Review Board of the City of Wilsonville this 24th day of April 2024, and filed with the Planning Administrative Assistant on April 24, 2024. This resolution is final on the 15th calendar day after the postmarked date of the written notice of decision per WC Sec 4.022 (.09) unless appealed per WC Sec 4.022 (.02) or called up for review by the Council in accordance with WC Sec 4.022 (.03).



Alice Galloway, Vice Chair - Panel B
Wilsonville Development Review Board

Attest:


Shelley White, Planning Administrative Assistant



Exhibit A1
Staff Report
Wilsonville Planning Division
Planning Director Referral of Case File No. AR23-0031
29400 SW Town Center Loop West

Development Review Board Panel 'B'
Quasi-Judicial Public Hearing
Amended and Adopted April 24, 2024
Added language ***underline***
Removed language ~~struck through~~

Date of Hearing:	April 8, 2024
Special Meeting Date:	<u>April 24, 2024</u>
Date of Report:	April 1, 2024

Application Nos.: DB24-0003 Planning Director Referral of Case File No. AR23-0031 as Authorized in Section 4.030 of the Wilsonville Development Code

Request/Summary: The request before the Development Review Board is to confirm or deny that the non-conforming use currently located at 29400 SW Town Center Loop West (the "Current Occupant") and the "Proposed Occupant's" (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use.

Location: 29400 SW Town Center Loop West (the "Location"). The property is specifically known as Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon.

Owner: Lumberjack LP (Contact: David Fry)

Applicant/Authorized Representative: Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)

Comprehensive Plan Designation: Town Center

Zone Map Classification: Town Center (TC); Sub-districts: Commercial-Mixed Use (C-MU), Mixed Use (MU), Main Street District (MSD)

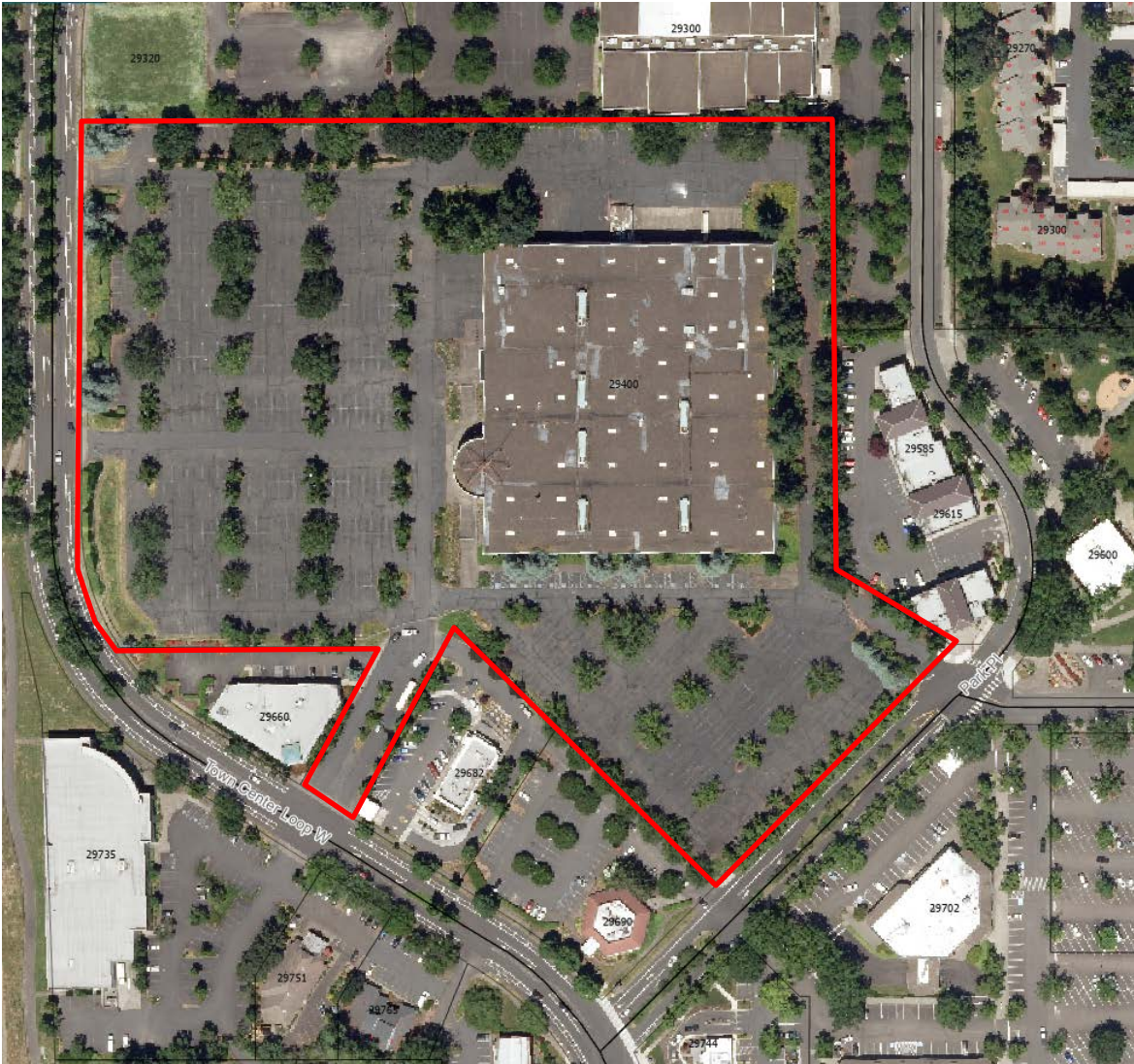
Staff Reviewers: Cindy Luxhoj AICP, Associate Planner
Miranda Bateschell, Planning Director

Staff Recommendation: Denial of Continuation of Non-conforming Use by Proposed Occupant

Applicable Review Criteria:

<u>Development Code:</u>	
Section 4.001	Definitions
Section 4.008	Application Procedures-In General
Section 4.009	Who May Initiate Application
Section 4.010	How to Apply
Section 4.011	How Applications are Processed
Section 4.014	Burden of Proof
Section 4.030	Jurisdiction and Powers of Planning Director and Community Development Director
Section 4.031	Authority of the Development Review Board
Section 4.034	Application Requirements
Subsections 4.035 (.04) A. and 4.035 (.05)	Complete Submittal Requirement
Section 4.102	Official Zoning Map
Section 4.110	Zones
Section 4.132	Town Center (TC) Zone
Subsection 4.140 (.10) C.	Planned Development Regulations – Adherence to Approved Plans and Modifications Thereof
Section 4.189	Non-Conforming Uses
<u>Other Planning Documents:</u>	
Ordinance No. 55 Town Center Plan Previous Land Use Approvals	

Site Location:



Existing Development:



Procedural Background:

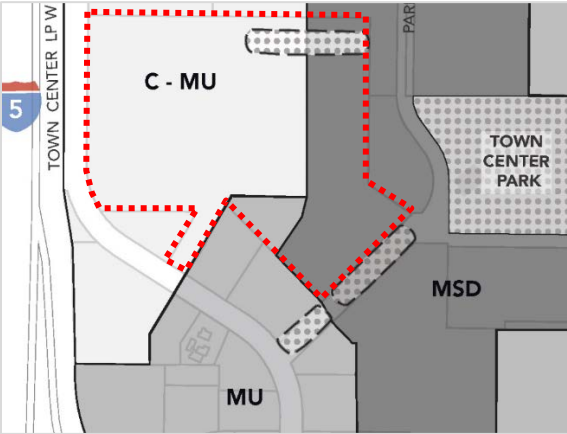
I. Town Center Zone

In 2019 the City adopted the Town Center Plan (Ordinance No. 835), a long-term, community-driven vision to transform Wilsonville's Town Center into a vibrant, walkable destination that inspires people to come together and socialize, shop, live, and work. As part of this work, a new zoning designation, the Town Center (TC) zone, and associated Development Code Section 4.132 were adopted for the entire Town Center Area to implement the Town Center Plan's recommendations. These standards support the creation of a walkable Town Center and main street, with design standards regulating building placement, building height, parking location, and drive through facilities. The plan and associated Zone Map and Development Code amendments went into effect on June 5, 2019.

After communicating with official representatives of the owner of the Location, Lumberjack LP, several times over the two-year planning process for the Town Center Plan, consistent with noticing requirements of ORS 227.186 and Subsection 4.012 (.02) of the Development Code, the City mailed the owner of the Location, notice of the Zone Map and Development Code amendments on February 7, 2019 (Exhibit A3). Lumberjack LP did not provide any testimony on the record raising objection to the Town Center Plan, Development Code Section 4.132, or the

rezoning of the Location from the Planned Development Commercial-Town Center (PDC-TC) zone to the TC zone during the adoption process.

The C-MU sub-district of the TC zone applies to roughly two-thirds of the Location. Permitted uses within this sub-district include retail sales and service of retail products, under a footprint of 30,000 square feet per use, office, personal and professional services, and single-user commercial or retail, such as a grocery store or retail establishment, that may exceed 30,000 square feet if located on more than one (1) story of a multi-story building, provided the footprint of the building does not exceed 30,000 square feet.



The existing structure at the Location has a footprint of 124,215 square feet in a single story (page 174, Exhibit B1) with a partial mezzanine, which exceeds the footprint of 30,000 square feet per retail user and footprint limitation that is allowed in the TC zone. As noted below, the Location also has a structure and site conditions that do not meet the requirements of the TC zone.

II. Class I Planning Director Determination (ADMN23-0029) and Appeal (DB24-0002)

On October 30, 2023, the City received an application for Class I Review (ADMN23-0029) to confirm the status of the existing non-conforming use and structure at 29400 SW Town Center Loop West (respectively, the “Class I Review Application” and the “Location”). The Location was previously occupied by Fry’s Electronics (the “Current Occupant”), an electronics retail store and has been vacant since 2021. The City deemed the application complete on November 29, 2023 and processed the request as a Class I Planning Director Determination per Subsection 4.030 (.01) A. 7. of the Development Code. On December 28, 2023, the City’s Planning Director issued their Decision on the Class I Review Application that “Fry’s Electronics, on the subject property at 29400 SW Town Center Loop West, is a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions in the TC zone.”

The Applicant submitted a notice of appeal of the Planning Director’s Decision on January 10, 2024 (the “First Notice of Appeal”). Specifically, the filed appeal grounds were stated: “An APPEAL of Planning Director Determination ADMN20-0029 [sic] determining that Fry’s Electronics is

a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions at 29400 SW Town Center Loop West". Per Code Section 4.022 (.01), a decision of the Planning Director on issuance of any Administrative Decision may be appealed, and such appeals must be heard by the Development Review Board (DRB) for all quasi-judicial land use matters. The matter at issue before the DRB, on de novo review, was a determination of the appropriateness of the action or interpretation of the requirements of the Code.

A public hearing before the DRB regarding the First Notice of Appeal was held on February 26, 2024. During the public hearing, the Applicant requested that the record be kept open for seven days to allow it to respond to testimony entered into the record. The DRB closed the public hearing and unanimously approved the request to keep the written record open for Resolution No. 429 until March 4, 2024, at 5:00 pm. On March 4, 2024, the Applicant filed a first written submittal, and on March 11, 2024, filed its final arguments to the record. The DRB held a special meeting on March 14, 2024, to consider all evidence timely submitted regarding Case File No. DB24-0002. Following deliberation on the matter, the DRB approved Resolution No. 429 (Exhibit A2) unanimously affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029) dated December 28, 2023, determining that:

1. *There is a legally established non-conforming use at the Location; specifically, that the protected use is "a 159,400 square-foot electronics-related retail store."*
2. *There is a legally established non-conforming structure at the Location.*
3. *There are legally established non-conforming site conditions at the Location.*

The Notice of Decision for Case File No. DB24-0002 was issued on March 15, 2024.

III. Class II Planning Director Interpretation (AR23-0031)

On December 15, 2023, the City received an application for Class II Review (AR23-0031; the "Class II Review Application"). Specifically, the request is stated as: *"A Class II Staff Interpretation to confirm that The Home Depot and Fry's Electronics are both warehouse retail uses"* (page 1 of Exhibit B1). Further, the Applicant describes the application (also on page 1 of Exhibit B1) as *"an application for a staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for 29400 Town Center Loop W, Wilsonville, OR 97070 constitutes a warehouse retail use and may operate in the existing structure"*.¹

The City deemed the Class II Review Application complete on January 12, 2024. The City is processing the request as a Class II Planning Director Interpretation, which is the subject of the current review, per Subsection 4.030 (.01) B. 3. of the Code. Given the public comment on the Class I Review Application and that there may be interested parties who may want to participate in review of the Class II Review Application, the Planning Director chose to refer the application

¹ Proposed Occupant, in its submission to the City dated March 29, 2024 (Exhibit B2), asks the DRB to recognize a non-conforming use for "commercial retail use," which is different than what is requested in its Application (Exhibit B1).

to the Development Review Board for a public hearing per 4.030(.01)B. The Case File No. is DB24-0003, and the public hearing is scheduled for April 8, 2024.

Scope of Review:

Proposed Occupant's application asks DRB to confirm Proposed Occupant's desired scope of non-conforming use (Exhibit B1). Proposed Occupant also submitted a letter to the City dated March 29, 2024 regarding "Applicant's Public Comment for AR23-0031" (Exhibit B2). In this letter Proposed Occupant invites DRB to "address" or "remedy" the flaws in DRB Resolution No. 429.

Resolution No. 429 is a City decision, and may be overturned only on appeal. There is currently an appeal pending before City Council. The issues that were resolved in Resolution No. 429 are beyond the scope of this matter. In particular, the Proposed Occupant's request for DRB to recognize a non-conforming use for "warehouse retail use" or "commercial retail use" ignores Resolution No. 429, which established the scope of the recognized non-conforming use, and is beyond the scope of this matter.

Further, Proposed Occupant has waived its right to address the issues that were addressed in Resolution No. 429 through this Class II Review Application proceeding. The City invited Proposed Occupant to withdraw its Class I application, both in writing on November 28, 2023, at the DRB hearing on February 26, 2024, and in the days following the DRB hearing on February 26, 2024 (Exhibit A7). The City offered to void and withdraw the Planning Director's determination in the Class I matter (and have the DRB not issue a decision), and make clear that the issues under review in the Class I proceeding would be addressed in the Class II proceeding. The City's goal in making this offer was to allow the City to address all issues pertinent to both the Class I and Class II proceedings in one combined proceeding. Appellant declined this offer (Exhibit A7).

Questions Presented:

Within the document titled "Applicant's Narrative and Exhibits" (Exhibit B1) Applicant states that it is requesting confirmation that The Home Depot ("Proposed Occupant") and Fry's Electronics ("Current Occupant") are both "warehouse retail uses." See pages 1, 2, and 7. Applicant also states that it is requesting confirmation that the Proposed Occupant may continue to operate at the Location.

Therefore, this decision must answer the following question:

If Proposed Occupant operates at the Location will this constitute a continuation of the non-conforming use?

The following steps will determine the answer to that question:

Step 1: What is the existing non-conforming-use?

Step 2: What is the proposed use?

Step 3: Is the proposed use a continuation of the current non-conforming use?

Based on the applicable legal standard, that the use at the Location is a legally established non-conforming use in the Town Center (TC) zone. On appeal, in Resolution No. 429 approved on March 14, 2024, the DRB determined as follows:

There is a legally established non-conforming use at the Location; specifically, that the protected use is “a 159,400 square-foot electronics-related retail store.”

The determination made by the DRB in the Notice of Decision for Case File No. DB24-0002 provided the answer to Step 1, must be adhered to, and is the basis of this Class II Review.

The applicable legal standard, relevant facts, and Planning Director’s recommendation on the Class II Review Application responding to this question are discussed in detail in the following section of this staff report.

Evidentiary Standard:

The DRB’s decision in this matter must be supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). This standard disallows LUBA from overturning a local government decision if a reasonable person could draw the same conclusion as the local government – even if a reasonable person could draw a different conclusion from the same evidence. *See Adler v. City of Portland*, 25 Or LUBA 546, 1993 WL 1473299 at *6 (1993); *Fraley*, 32 Or LUBA 27, 31-32 (1996), *aff’d*, 145 Or App 484 (1996).

Burden of Proof:

The proponent of a proposed non-conforming use, or expansion or change to a recognized non-conforming use, has the burden of proof. *See ODOT v. City of Mosier*, 36 Or LUBA 666, 671 (1999) (citing *Lane Cnty. v. Bessett*, 46 Or App 319 (1980)); *Sabin*, 20 Or LUBA 23, 30 (1990) (citing *Webber v. Clackamas Cnty.*, 42 Or App 151, *rev den*, 288 Or 81 (1979)).

In this matter, Applicant has the burden of proof, and the DRB’s decision is subject to the “substantial evidence” standard. *River City Disposal and Recycling v. City of Portland*, also a case regarding non-conforming uses, illustrates how these concepts should be applied together. In *River City Disposal and Recycling*, LUBA found that the City hearings officer’s decision satisfied the “substantial evidence” standard. *See* 35 Or LUBA 360 (1998). It was enough that the hearings officer found that evidence presented in an affidavit (aerial photographs) was not persuasive. *Id.* at 367-71. LUBA also clarified that the City of Portland was not obligated to present contrary evidence to counter the applicant’s evidence, and the “substantial evidence” standard was satisfied because the hearings officer found that the applicant failed to satisfy its burden of proof. *Id.*

Because Proposed Occupant has the burden of proof, the City may decide that not enough evidence has been provided by Proposed Occupant to satisfy its burden of proof. The City is not obligated to produce its own evidence to counter Proposed Occupant’s evidence. Further, the

City may determine the credibility of evidence in the record; in particular, when conflicting evidence exists, the City may decide that some evidence is credible and persuasive, and other evidence is not.

Legal Standard Regarding Continuation of Non-conforming Uses:

1. WC 4.189 (.01)

A non-conforming use may be continued subject to the requirements of WC 4.189. *See* WC 4.189 (.01). There are no other Code provisions regulating a continuation of a non-conforming use.

2. Caselow Regarding Continuation of Non-Conforming Uses

The following sections outline the legal authorities, in Oregon, that govern whether or not a use is deemed a continuation of a non-conforming use.

a. Non-Conforming Use Defined

Generally, a non-conforming use is understood to be “one that is contrary to a land use ordinance but that nonetheless is allowed to continue because the use lawfully existed prior to the enactment of the ordinance.” *Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (citing *Rogue Advocates v. Board of Comm. Of Jackson Cnty.*, 277 Or App 651, 654 (2016), *rev dismissed*, 362 Or 269, 407 (2017)); *see* Subsection 4.001 (196.) of the Development Code (defining a non-conforming use as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform”).

b. Non-Conforming Uses – and Expansion of Non-Conforming Uses – are Disfavored; Local Government has Broad Discretion to Resist Expansion of Non-Conforming Uses

“Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. . . . Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.” *Parks v. Bd. of Cnty. Comm’rs of Tillamook Cnty.*, 11 Or App 177, 196–97 (1972) (internal citation omitted). “[T]he law of nonconforming uses is based on the concept, logical or not, that uses which contravene zoning requirements may be continued only to the extent of the least intensive variations—both in scope and location—that preexisted and have been continued after the adoption of the restrictions.” *Clackamas Cnty. v. Gay*, 133 Or App 131, 135 (1995), *rev den*, 321 Or 137 (1995), *aff’d*, 146 Or App 706 (1997).

c. Whether a Proposed Use is a Continuation or Change (of Non-Conforming Use) Depends on the Nature and Extent of the Recognized Non-Conforming Use

It is helpful to think of a proposed use to either be within or beyond the scope of a recognized non-conforming use. A use that is within the scope of a recognized non-conforming use is a “continuation” of use. A use that beyond this scope is a “change” of use. A use that is deemed too expansive to be a “continuation” of use is necessarily a “change” of use – a use must be one or the other. The following cases are helpful in illustrating the line between “continuation” and “change” of use.

The nature and extent of the lawful use in existence at the time the use became nonconforming is the reference point for determining the scope of permissible continued use. *Sabin* at 30 (citing *Polk County v. Martin*, 292 Or 69 (1981)) (emphasis added). The focus of a review of whether or not a use is continuous must focus on the actual *use* of a property during relevant times – a change in the property occupant does not, by itself, cause a legally protectable non-conforming use to be abandoned when the use that the various parties made of the property is recognized to be the same. See *Vanspeybroeck v. Tillamook Cnty. Camden Inns, LLC*, 221 Or App 677 (2008) (LUBA did not err in recognizing a continuous residential use of a property when residency changed from tenant to owner, back to tenant).

A local government that is reviewing a proposed alteration of, change to, or expansion of a recognized non-conforming use should review evidence to determine the current actual use or proposed use (as applicable), and determine whether that use is within or beyond the scope of the recognized non-conforming use. In *Larson v. City of Warrenton*, 29 Or LUBA 86, 1995 WL 1773182 (1995), the City of Warrenton determined that a company had impermissibly expanded its operations beyond activities protected in a prior administrative decision. The prior administrative decision protected the following uses on the subject property: “[s]toring and repairing marine construction equipment and [a] base of operations for [the property owner’s] construction company.” *Id.* at *1. In 1994, the property’s neighbors complained to the city about these business operations, arguing that the intensity of the use had increased. *Id.* The city evaluated various forms of evidence (testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs). *Id.* at *2. The city determined that the property owner was impermissibly operating beyond the scope of the non-conforming use recognized in the 1991 administrative decision, and LUBA affirmed this decision. *Id.* As LUBA has stated in another case, “[w]e believe a change in use includes adding a new use to an existing nonconforming use.” *River City Disposal and Recycling* at 373 n. 11.

In this matter, the City may determine that the Proposed Occupant’s proposed use of the Location includes uses that are beyond the scope of the recognized non-conforming use; these uses would only be permissible if the City approved a “change” of non-conforming use. This proceeding is limited to the question of whether certain uses are a “continuation” of use – a potential “change” of non-conforming use is beyond the scope of what may be addressed in this matter.

- d. Local Government has Broad Discretion to Draw Distinctions Between Various Uses, and Allow Some Uses to Continue But Disallow Other Uses

A local government has broad discretion to reject an applicant’s characterization of a use, and to draw distinctions between various uses. For example, in *Fraley*, the applicant sought recognition of a property use involving the repair of diesel engines and tractor trailer trucks. In the local government decision at issue, the county found that a prior property owner “maintained a use significantly different in nature from the commercial vehicle repair business which the applicant seeks to verify.” *Id.* at 34. This prior property owner engaged in the structural repair of motorhomes, campers, RVs and camp trailers. *Id.* Testimony from this prior property owner did not mention vehicular engine repair. *Id.* On appeal, LUBA rejected the applicant’s challenge to the county’s finding and decision on this point, stating, “[w]e do not agree with [applicant] that the use was not interrupted because all of the commercial operations on the subject property since [the date more restrictive zoning regulations were applied] share the same essential nature or common nucleus. . . . [The mobile home repair business] had little in common with the present primary use, the repair of diesel engines and tractor trailer trucks.” *Id.* at 35. LUBA went on to note that these two businesses used the yard in different ways – one stored lumber in the yard, and the other stored large trucks in various states of repair. *Id.*

Further, a local government may specifically allow certain uses as non-conforming, but deny others, even when all such activities are related to the same business venture. In the Clackamas County Hearings Officer’s Findings and Decision, docket no. Z1155-91-E/A², the hearings officer determined that there was a protected non-conforming use for “the storage commercial goods in the two structures in question, including the storage of cedar wood fencing materials.” Findings and Decision of the Hearings Officer at 6, Z1155-91-E/A (Feb. 11, 1994). (attached hereto as Exhibit A5). The applicant in this case had also applied for a “change” (i.e., expansion) of this recognized use for an on-site office facility for this warehousing and repackaging business. *Id.* The reasoning and legal standard used by the hearings officer relates to only counties – and not cities, but the important point is that he declined to expand the recognized non-conforming use. *Id.* The Clackamas County Hearings Officer’s decision in docket no. Z1155-91-E/A is an example of a local government deliberately and selectively recognizing some activity to be within the scope of a recognized non-conforming use – and other activity to be beyond this scope of the recognized non-conforming use – even when both activities relate to the same business venture.

Relevant Facts, Background, and Considerations:

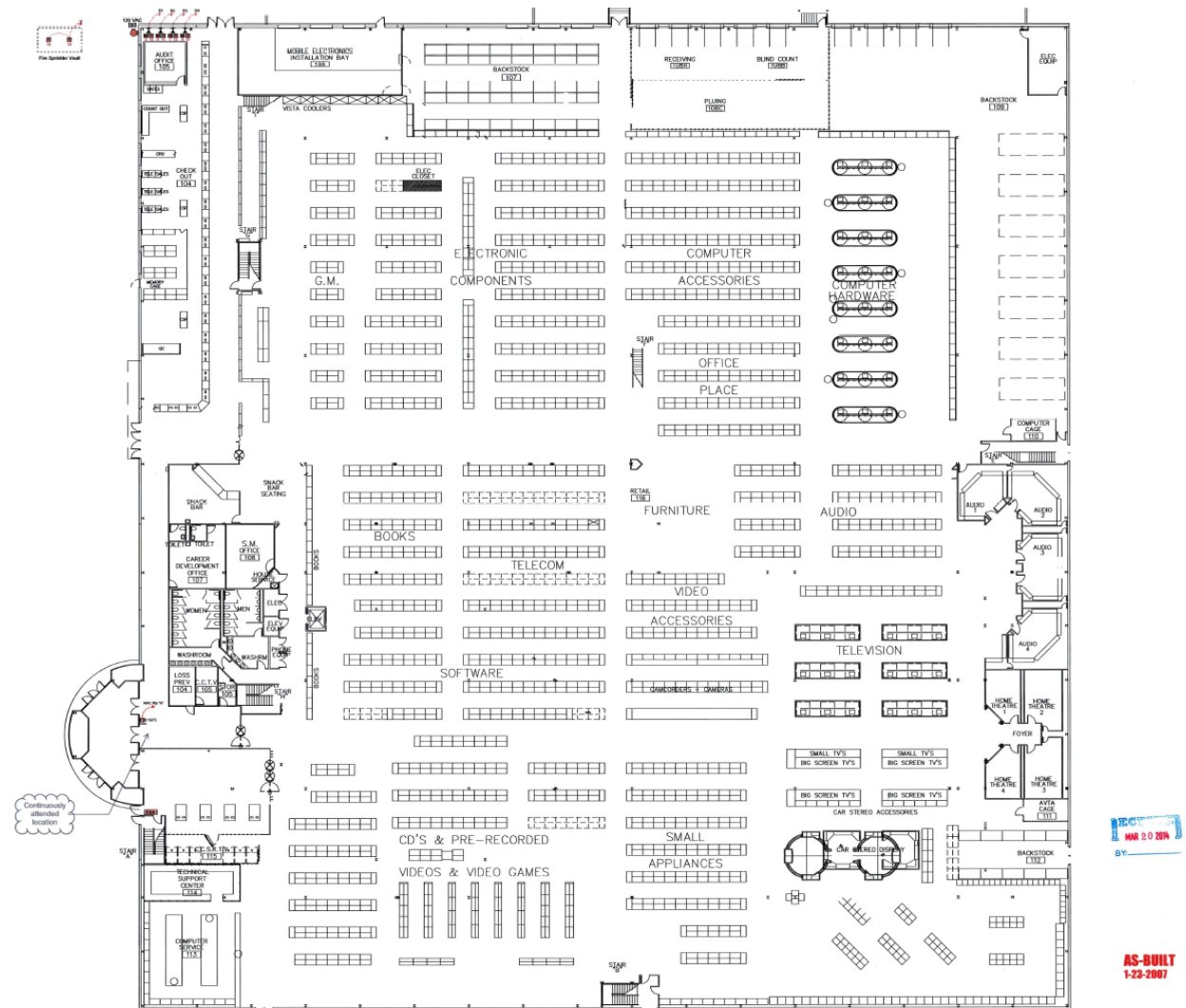
- 1. What is the non-conforming use?

As determined by the DRB Decision in Case File DB24-0002 (Resolution No. 429), there is a legally established non-conforming use at the Location; specifically, that the protected use is “a 159,400 square-foot electronics-related retail store” (referred to as the “Current Occupant” in this staff report).

² This Hearings Officer Decision is the remanded determination by Clackamas County following *Hendgen v. Clack. Cty.*, 115 Or App 117 (1992). See also 24 Or LUBA 355 (1992) (LUBA decision remanding the matter to Clackamas County following previously cited Court of Appeals opinion).

When the TC zone regulations went into effect on June 5, 2019, the occupant of the Location was Fry's Electronics. The application (page 3 of Exhibit B1) characterizes the Current Occupant as follows: "Fry's was a large electronics warehouse store that retailed software, consumer electronics, household appliances, cosmetics, tools, toys, accessories, magazines, technical books, snack foods, electronic components, and computer hardware. Fry's also had in-store computer repair and custom computer building services, and offered technical support to customers."

An as-built floor plan submitted by the Current Occupant to the City's Building Division in 2014 (Exhibit A4) illustrates the store's layout and product selection. The floor plan illustrates the sales area of computers, televisions, audio equipment, CDs and videos, computer software and hardware, small appliances and other related office and electronic components. A small snack bar and technical support and service areas were also included in the floor plan. Inventory storage components of the Current Occupant, identified as backstock, were located separate from the retail space. All components of this use were located in the interior of the building.



Fry's Electronics As-Built, submitted in 2014. Source: City of Wilsonville Building Division

The following images, posted to the Wilsonville Fry's Electronics *Yelp* page in 2019, illustrate store layout and product selection at the time the TC zone regulations went into effect.



Fry's Electronics Retail Space. Source: *Yelp – Fry's Electronics, Photos* (June 9, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: *Yelp – Fry's Electronics, Photos* (June 9, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Backstock Area. Source: Yelp – Fry's Electronics, Photos (October 26, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 27, 2024).

These images are generally consistent with the 2014 floor plan, illustrating that items available for sale at the Current Occupant were consistent with an electronics-related retail use, including computers, monitors, small electronics, and related accessories. Taken together, this information confirms that the store was operating in the same manner as what is shown on the 2014 floor plan at the time the TC zone regulations went into effect.

Based on the 2014 floor plan, the City concludes that the Current Occupant sold the following goods: Electronic components, computer accessories, computer hardware, computer software, office goods, telecom equipment, video accessories, audio equipment, televisions, small appliances, CD's, videos, and video games. This is consistent with the DRB Decision in Case File DB24-0002 (Resolution No. 429), that the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store" (referred to as the "Current Occupant" in this staff report).

2. What is the proposed use?

The application (pages 5-6 of Exhibit B1) characterizes the Proposed Occupant at the Location as follows: *"The Home Depot, Inc. ("HD") intends to operate a store within the existing structure that was previously occupied by Fry's, and therefore seeks confirmation from the City that a warehouse retail store can continue operating at the property... HD operates home improvement warehouse stores that retail tools, construction products, appliances, and services, including transportation and equipment rentals. HD's Home Services division also offers technical expertise for home improvement projects, and both onsite and offsite install, repair, and remodel services. Although the vast majority of HD customers are private individuals, contractors and other professionals account for close to half of HD's annual sales."*⁴

While the Applicant's materials do not provide detail on how all of these activities would occur at the Location, an examination of other area Home Depot locations reveals that components of the activities, including the garden center and transportation and equipment rentals, occur on the exterior of the building. See discussion responding to the question, Is the proposed use a continuation of the current non-conforming use?, under 3. below, for additional characterization of the Proposed Occupant's activities at the Location.



Home Depot – Tigard, OR (Source: Google Maps – 3/25/2024)



Home Depot – Tigard, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)

3. Is the proposed use a continuation of the current non-conforming use?

For a use to be deemed a continuation of a legally established non-conforming use, it must have the same nature and extent as the recognized non-conforming use. See *Sabin v. Clackamas Cnty.* In this matter, the reference point is the nature and extent of the Location as of June 5, 2019, as determined by the DRB in Case File DB24-0002 (Resolution No. 429).

The City is entitled to draw distinctions between uses. In *Fraley*, Deschutes County drew a distinction between the repair of motorhomes, campers, RV's and camp trailers, and storage of lumber, on one hand, and the repair of diesel engines and tractor trailer trucks, on the other hand. The County took the position that not all motor vehicle repair activities are the same. In this matter the City may draw distinctions between the uses carried out by Fry's Electronics and Applicant, just as the County did in *Fraley*.

Further, once the City draws distinctions between uses, it is entitled to determine that certain uses are beyond the scope of a recognized non-conforming use when there is no evidence of them at the relevant time – and therefore determine that there is no “continuation” with respect to those uses – just as the County did in *Hendgen*. Just as LUBA stated in *River City Disposal and Recycling v. City of Portland*, a new or additional use is a change of use rather than a continuation of use.

Based on the application materials provided by the Proposed Occupant, and an examination of how the Proposed Occupant operates locally, the City has concluded the following:

- Applicant acknowledges that the Proposed Occupant operates “home improvement warehouse stores” (page 5 of Exhibit B1).
- Applicant acknowledges that contractors and other professionals, not private individuals, account for close to half of the Proposed Occupant’s annual sales (page 6 of Exhibit B1).
- Applicant acknowledges that the Current Occupant and Proposed Occupant “carry different products” (page 6 of Exhibit B1) and includes a list of products and services provided by the Proposed Occupant, such as “tools, construction products, appliances, and services, including transportation and equipment rentals”, and “both onsite and offsite install, repair, and remodel services” (page 5 of Exhibit B1), that are not

electronics-related or included in the products and services provided by the Current Occupant.

- Applicant shows on the site plan included in its application materials activities that occur outside the structure at the Location, such as the proposed lumber pad at the back of the structure (see page 174 of Exhibit B1), or describes activities that are likely to occur outside, such as transportation and equipment rentals (see page 5 of Exhibit B1).
- Thus, Proposed Occupant is not an electronics-related retail store and contains products and activities that are different than those provided by the Current Occupant.
- Applicant has not presented any evidence to prove that Proposed Occupant's activities existed at the Location as of June 5, 2019.

In other words, the Proposed Occupant's proposed use of the Location, as described above, goes beyond a mere continuation of the non-conforming use of the Location that was recognized by the DRB. Proposed Occupant may engage in these uses at the Location only if it obtains a recognition of change of use, which is beyond the scope of what may be addressed in this matter.

Conclusory Findings:

1. Proposed Occupant's operation at the Location would not be a mere continuation of the non-conforming use previously approved by the City. Therefore, Staff recommends the DRB deny the Proposed Occupant as a continuation of non-conforming use of the Location. Staff recommendation is based on the following considerations:
 - a. The 1991 Decision and the zoning regulations in effect when the 1991 Decision was granted are irrelevant to this decision.
 - b. Proposed Occupant describes itself as a "home improvement warehouse store" (page 5 of Exhibit B1). This is not the same as an "electronics-related retail store," which is the legally established non-conforming use at the Location. Proposed Occupant's characterization of the non-conforming use approved by the City as "warehouse retail use" is incorrect and is not persuasive.
 - c. Proposed Occupant admits that its proposed use of the Location would include the sale of tools and construction products, the rental of transportation and equipment, technical expertise for home improvement projects, and both onsite and offsite installation, repair, and remodeling services (pages 5-6 of Exhibit B1). Some of Proposed Occupant's customers include contractors and professionals. These uses extend beyond the scope of the Current Occupant's actual use of the Location as of June 5, 2019.

Additional Discussion Regarding Proposed Occupant's Reliance on 1991 Decision; Planning Director's Interpretation of Ordinance No. 55:

Proposed Occupant's argument appears to rely heavily on the original land use approval in this matter, what they refer to as the "1991 Decision." Proposed Occupant states on page 6 of Exhibit B1 that it would be a use of the Location that falls within the approved 1991 Decision, and based

on its own characterization of its proposed use of the Location, it would have been allowed to operate at the Location under zoning regulations that were in effect in 1991. Proposed Occupant's understanding of the scope of the original land use approvals for the Location is incomplete.

As explained above, the only relevant point of reference when determining the scope of a non-conforming use is the nature and extent of the use of the subject property at the time the use became nonconforming. *Sabin* at 30 (emphasis added). It is clear from relevant Oregon cases that local governments, when determining the scope of a non-conforming use, consider evidence such as testimony from the property owner or neighbors. See *Larson* (considered evidence included testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs); *Fraley* (considered evidence included tax records, affidavits and interviews of previous site occupants, and photographic evidence); *Crook v. Curry County*, 38 Or LUBA 677 (2000) (considered evidence included photogrammetric evidence, testimony from site visitors, the age of certain building materials, and the fact that the county's assessor's office had no record of a structure on the subject site). Not one of the local jurisdictions in the many cases reviewed by the City in this matter considered either (1) what would have been allowed under a property's original zoning, or even (2) what was written in the subject property's original land use approvals when evaluating an application for recognition of a non-conforming use. Further, LUBA does not consider these factors when reviewing local jurisdictions' decisions regarding non-conforming uses. Applicant also has not cited any cases where original land use approvals served as the basis for determining a legally non-conforming use.

In summary, neither the 1991 Decision, nor the zoning regulations that were in effect in 1991, are relevant in this matter. However, for the sake of responding to Applicant's argument only, the City addresses the 1991 Decision.

Much of Wilsonville's development, including at the Location, was approved using a Planned Development review process. Planned Development generally consists of four phases of project approval – Rezoning, Stage I—Preliminary Plan, Stage II—Final Plan, and Site Design Review. Some of these phases may be combined during the land use review process, but generally the approvals move from the conceptual stage through to detailed architectural, landscape and site plan review in stages. Based upon the zoning designation of a location, Stage I plans establish “bubble diagram” level uses for development, and Stage II plans indicate the specific types and locations of all proposed uses enabling analysis of impacts of those uses for the purpose of traffic and other infrastructure impacts and concurrency evaluation.

In 1991, Capital Realty Corporation submitted an application for approval of a Stage I Master Plan Modification and Phase II Stage II Site Development Plan for the Wilsonville Town Center Master Plan area (File No. 91PC43). The application was submitted on behalf of a retail business with the anonymous name “Project Thunder”. The retail business desired to develop 14.75 acres (Phase II of the Wilsonville Town Center Master Plan) for “a 159,400 square foot electronics-related retail store”. The proposed Project Thunder Stage II Site Development Plans necessitated the requested application by Capital Realty Corporation to modify and resubmit the Stage I

Development Review Board Panel 'B' Staff Report April 1, 2024

Exhibit A1

Amended and Adopted April 24, 2024

DB24-0003 Planning Director Referral of Case File No. AR23-0031

Page 21 of 31

Wilsonville Town Center Master Plan to reflect the expanded master plan area, reclassify overlay zones associated with Ordinance No. 55 (adopted February 9, 1976, and incorporated into the Planned Development Commercial (PDC) zone), redesign the phasing sequence, and establish approximately 5.4 acres for open space.

Specifically with regard to the Location, action in 91PC43 adjusted the Phase II area and changed the land use classification of the site to Central Commercial (CC) replacing the previous classifications of Motor Home (MH), Office Professional (OP), Service Commercial (SC), and Residential (R). As the CC use designation is the basis of the Stage I approval, approved uses for the Location were those identified as CC in the Stage I Wilsonville Town Center Master Plan as defined by Ordinance No. 55.

Description of the proposed development, Project Thunder, in the application is “a 159,400 square foot electronics-related retail store” or a “commercial retail store,” and there is no reference to “warehouse retail” use or “commercial retail center.” There is also no reference to “warehouse retail” or “commercial retail center” in the Ordinance No. 55 land use categories, also referred to as overlay zones, or in the Stage I Master Plan. While the Applicant asserts that “warehouse retail” or “commercial retail center” is the approved use and that the Current Occupant and the Proposed Occupant are the same, Project Thunder was never approved as such. The Planning Commission had the authority to make changes to the application of approved overlays consistent with Ordinance No. 55. This was done via a land use application and action, and is what was done in 91PC43 to classify the site as Central Commercial.

The Stage II Plan evaluates, among other development requirements, minimum parking space needs, which were evaluated for the Location as the sum of individual uses within the development. In the case of Project Thunder, the primary use was evaluated along with accessory components of that use, which included service, office, restaurant, and storage. Evaluation of these components of use for the purpose of determining minimum parking requirements did not change the overall Stage I Master Plan for this Location, which was Central Commercial.

Project Thunder, a commercial retail store (electronics store), was considered consistent with the CC use category when it was approved in 1991. While electronics store was not a use listed specifically in CC, modification to the Stage I Master Plan for the development was approved by the Planning Commission under the authority granted to them in Ordinance No. 55. Conversely, uses more closely associated with the Proposed Occupant were not listed in the CC use category but included in other land use categories, as follows:

- Under the Service Commercial (SC) category - Building materials, retail outlet only, and Cabinet or carpenter shop
- Under the Food and Sundries (FS) category - Hardware store

It is a well-established rule of statutory interpretation that one must not insert language that has been omitted – or omit language that has been inserted. *See* ORS 174.010.

Hypothetically speaking, before a tenant like the Proposed Occupant could have engaged in uses listed in the SC and FS categories at the Location, prior to the 2019 Town Center rezone, a Stage I Master Plan modification for the Location, approved by the Planning Commission, would have been required. Therefore, the argument that Proposed Occupant should be deemed a continuation of use of the Location not only ignores applicable case law, but also ignores the zoning in place at the time of the original land use approval as well as the scope of the land use approval itself.

In summary, neither the 1991 Decision, nor the zoning regulations that were in effect in 1991, are relevant in this matter. Applicant has not cited any legal authorities that say otherwise. Therefore, Proposed Occupant's reliance on the 1991 Decision is inappropriate and misleading. Further, to the extent that the DRB considers Proposed Occupant's argument, it should be cautious: Proposed Occupant has an incomplete understanding of the scope of the 1991 Decision, and what uses would have been allowed at the Location under the City's zoning regulations.

Additional Discussion Regarding Points Beyond the Scope of this Class II Review Application

Applicant, in both Exhibit B1 and Exhibit B2, invites DRB to revisit points that were addressed in the DRB approved Resolution No. 429 (Exhibit A2). As a reminder, the determinations made by the DRB in Resolution No. 429 must be adhered to and are the basis of this Class II Review. This Class II Review process is not an opportunity for Proposed Occupant to relitigate these determinations. However, to fully inform the DRB and respond to Proposed Occupant's written materials, the City explains below why Proposed Occupant's arguments are baseless.

Proposed Occupant's Unsubstantiated Retail Warehouse Use Characterization

Proposed Occupant characterizes the Location as an "electronics warehouse store" and "warehouse retail use" in the application materials. The City rejects this characterization for the following reasons:

- Applicant has not provided any evidence to support its characterization of the Location as of June 5, 2019.
- The 2014 floor plan and 2019 *Yelp* images confirm that the Current Occupant sold electronics, and do not support the assertion that this was a warehouse store.
- As illustrated in the 2019 *Yelp* images of Current Occupant, there was no warehouse shelving present except in the portions of the building designated as "backstock." Additionally, nothing in the images indicates that merchandise was being stocked and sold at a high volume or in bulk to the public. Furthermore, the above descriptions generally do not discuss the type of retail use or user; rather, they focus on the manner in which a retail product is displayed and sold.
- The City's Development Code does not define "warehouse retail use" or "warehouse store," nor do these terms appear in any prior land use approvals for the Location.
- Likewise, there is not a clear, commonly accepted term for "warehouse retail" or "warehouse store."

- *Cambridge Dictionary* defines “warehouse store” as “a large store that sells large quantities of products at low prices to the public.”
- *Wikipedia* defines “warehouse store” as “a food and grocery retailer that operates stores geared toward offering deeper discounted prices than a traditional supermarket. These stores offer a no-frills experience and warehouse shelving stocked well with merchandise intended to move at higher volumes.”
- *SPC Retail* defines “warehouse retail” in the following manner: “Warehouse retailers, such as Costco or Sam’s Club, are food and product retailers that offer large quantities of items at attractive discounts. These stores create a no-frills experience and instead focus on moving products in higher volumes.”
- The *Institute of Transportation Engineers (ITE) Trip Generation Manual, 11th Edition*, which assesses trip generation rates specific to different categories of uses, including retail uses, does not specify “warehouse store” or “warehouse retail” as a specific type of retail use.

But as stated above, the scope of the non-conforming use recognized at the Location as of June 5, 2019 was stated in Resolution No. 429, and is beyond the scope of this Class II Review Application.

Hendgen Clarified: There is no “Common Nucleus” Test

Proposed Occupant attempts to use the Court of Appeals’ opinion in *Hendgen v. Clackamas County*, 115 Or App 117 (1992), to argue that “the common nucleus in activities for both [Proposed Occupant] and [Current Occupant] is commercial retail use” (pages 4-5 of Exhibit B2). This reflects a gross misreading of the Court of Appeals’ opinion in *Hendgen*.

After the Court of Appeals issued the opinion referenced above (115 Or App 117), but before the county could address the issues that were remanded, the appellant in *Hendgen* again appealed to the Court of Appeals, arguing that it was error to remand this case to the county for further proceedings because – in its reading of the Court of Appeals’ opinion – the Court of Appeals held that storage was a valid non-conforming use. *See Hendgen v. Clackamas Cnty.*, 119 Or App 55, 57 (1993). The Court of Appeals wrote:

“[Appellants] are mistaken in their understanding of what we held. We concluded that the legal *test* that the county and LUBA applied in determining whether a nonconforming use existed was too restrictive; we did not-and could not-resolve the factual question of whether the nonconforming use does exist. . . . Like us, LUBA cannot make that factual determination; it may only review the county's findings.” *Id.* at 57-58.

Under the Court of Appeals’ opinion, the City of Wilsonville is the only party that may determine whether a non-conforming use exists, and the scope of that use. Further, the Court of Appeals’ opinion cannot properly be read to announce a “common nucleus” test that binds local

governments when they determine whether a non-conforming use exists, its scope. Finally, it is important to note that *Hendgen* was based in part on an interpretation of Clackamas County's code, and using a statute that applies to only counties and not cities. Therefore, it is irrelevant to these proceedings that Clackamas County recognized a non-conforming use in *Hendgen*.

But as stated above, the scope of the non-conforming use recognized at the Location as of June 5, 2019 was stated in Resolution No. 429, and is beyond the scope of this Class II Review Application.

The City and Proposed Occupant Agree That the Identity of the Party that Engaged in the Use is Irrelevant

Proposed Occupant cites *Vanspeybroeck v. Tillamook Cnty. Camden Inns, LLC*, 221 Or App 677 (2008), to argue that a change in characteristic of a tenant – whether owner or renter – does not result in the abandonment of a non-conforming use (page 4 of Exhibit B2). The City agrees that the identity of the party that engaged in the use is irrelevant to this matter.

The City's position in this matter, which is stated in Resolution No. 429, and which is beyond the scope of this Class II Review Application, was based on an examination of the use of the subject property at the time the more restrictive zoning regulation became effective.

Neighborhood and Public Comments:

No public comments were received during the public comment period for this application. However, comments were received after publication of the staff report and are included in Exhibits D1 through D4. In addition, the applicant submitted additional information and evidence related to their application, which is included as Exhibits B2 through B5 of this staff report.

Master Exhibit List:

The following exhibits are hereby entered into the public record as confirmation of consideration of the application as submitted. The exhibit list includes exhibits for Case File No. AR23-0031 (referred by the Planning Director to the DRB as Case File No. DB24-0003).

Planning Staff Materials

- A1. Staff report and Findings (this document)
- A2. Development Review Board Resolution No. 429
- A3. Town Center Plan Adoption Notice
- A4. Fry's Electronics As-Built, submitted in 2014 (Source: City of Wilsonville Building Division)
- A5. Decision of the Hearings Officer, Z1155-91-E/A (Feb. 11, 1994)
- A6. Ordinance No. 55
- A7. Email Correspondence with Applicant regarding DRB Resolution No. 429, dated February 28, 2024
- A8. Staff's Presentation Slides for Public Hearing (to be presented at Public Hearing)

Materials from Applicant

- B1. **Applicant's Materials** – *Available Under Separate Cover*
Signed Application Form
Applicant's Narrative and Exhibits Documents
- B2. Applicant's Additional Submittal dated March 29, 2024 – *Available Under Separate Cover*
- B3. Applicant's Presentation Slides for Public Hearing**
- B4. Applicant's First Open Record Submittal Dated April 15, 2024**
- B5. Applicant's Final Arguments Dated April 22, 2024**

Public Comments

- D1. G.Prior Comment Dated April 5, 2024**
- D2. K.Roche Comment Dated April 8, 2024**
- D3. D.Wortman Comment Dated April 8, 2024**
- D4. Lumberjack, LP/D.Fry Comment Dated April 11, 2024**

Procedural Statements and Background Information:

- 1. The statutory 120-day time limit applies to this application. The City received the application on December 15, 2023, and deemed it complete on January 12, 2024. The City must render a final decision for the request, including any appeals, by May 11, 2024.
- 2. Surrounding land uses are as follows:

Compass Direction	Zone:	Existing Use:
North:	TC	Commercial
East:	TC	Commercial
South:	TC	Commercial
West:	Not zoned	Interstate 5 Right-of-Way

- 3. Land use actions regarding the Location:
 - 91PC43 Modified Stage I Master Plan, Phase II Stage II Site Development Plans, Amending Condition of Approval 8 of 90PC5
 - 91DR29 Site Design (Architectural, Landscaping) and Signage
 - 92DR21 Revise Condition of Approval 15 of 91DR29 regarding placement of containerized dumpsters
 - 01AR01 Minor Architectural Revisions
 - AR09-0053 Zoning Verification
 - ADMN23-0029 Class I Review of Use and Structure Conformance Status (per Section 4.030 (.01) A. 7. of Wilsonville Development Code)
 - DB24-0002 Appeal of Administrative Decision ADMN23-0029 (currently in process)
- 4. The Applicant has complied with Sections 4.008 through 4.035 pertaining to review procedures and submittal requirements. The required public notices have been sent and all proper notification procedures have been satisfied.

Findings:

NOTE: Pursuant to Section 4.014 the burden of proving that the necessary findings of fact can be made for approval of any land use or development application rests with the Applicant in the case.

General Information

Application Procedures - In General Section 4.008

The application is being processed in accordance with the applicable general procedures of this Section.

Initiating Application Section 4.009

The Class II Review Application has the signatures of David Fry of Lumberjack LP, owner, and Dan Zoldak of Lars Andersen & Associates, Inc., Applicant and authorized representative, has the owner's permission to submit the application on their behalf.

Pre-Application Conference Subsection 4.010 (.02)

A pre-application conference (PA22-0004) for the subject property was held on March 24, 2022.

Lien Payment before Approval Subsection 4.011 (.02) B.

No applicable liens exist for the subject property. The application can thus move forward.

General Submission Requirements Subsections 4.035 (.04) A. and 4.035 (.05)

The Applicant has provided all of the applicable general submission requirements contained in this subsection.

Zoning - Generally Section 4.110

The subject property is located in the Town Center (TC) zone, in three (3) TC sub-districts: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU). Applicable zoning district and general development regulations, as appropriate, have been applied in accordance with this Section, as discussed in more detail in the Findings in this staff report.

Request A: Class II Review Request (AR23-0031)

Planned Development Regulations

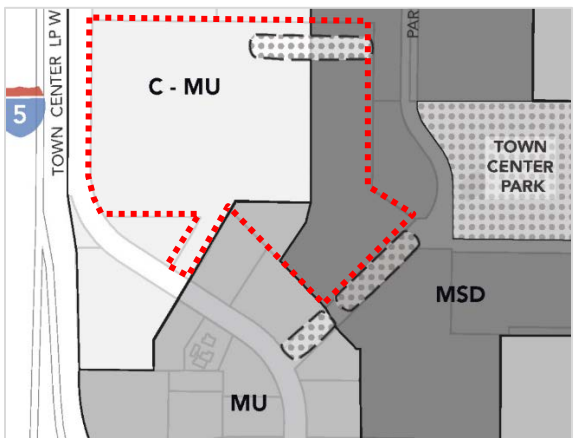
Adherence to Approved Plan and Modification Thereof
Subsections 4.140 (.10) C. and 4.030 (.01) B. 3.

A1. Per Subsection 4.140 (.10) C., when the zoning of land within a planned development area changes subsequent to the planned development approval, development that is consistent with the approved plans (in this case, the Stage I Master Plan approval, which applies the CC designation) is considered legal non-conforming subject to the standards of Sections 4.189 through 4.192. The zoning changed with adoption of the Town Center Plan, effective June 5, 2019, and subsequent to the approval of Case File 91PC43. Thus, development that is consistent with the approved plan, but not complying with current zoning standards (Current Occupant), shall be considered legal non-conforming and subject to the standards of Sections 4.189 thru 4.192. The Proposed Occupant is not consistent with the established non-conforming use and, therefore, is not a continuation of non-conforming use as noted in Section 4.189 (.01).

Town Center (TC) Zone

Purpose of Town Center Zone
Subsection 4.132 (.01)

A2. The TC Zone in which the Location is located is divided into four sub-districts that contain recommendations for building form and use to achieve the vision set forth in the Town Center Plan. The Location is located in three (3) TC sub-districts, as shown in the map below: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU). There are two (2) proposed open space areas within or adjacent to the property. All adjacent property is also zoned TC.



Allowed Uses in TC Zone

Subsection 4.132 (.02) F.

- A3.** With regard to use, per Subsection 4.132 (.02) F., “retail sales and service of retail products, under a footprint of 30,000 square feet per use” is an outright allowed use in the TC zone. Although the Current Occupant at the Location is a retail store and, thus, consistent with allowed use in the TC zone, its footprint of 124,215 square feet exceeds the 30,000 square feet per use limitation of the TC zone.

Permitted and Prohibited Uses in Specific Sub-districts in TC Zone

Subsection 4.132 (.03) A. 1.

- A4.** Per Subsection 4.132 (.03) A. 1., single-user commercial or retail (e.g. grocery store or retail establishment) that exceeds 30,000 square feet if located on more than one story of a multi-story building is an additional permitted use allowed in the C-MU sub-district. The Current Occupant at the Location does not meet this additional permitted use standard due to its large format footprint of 124,215 square feet square feet in a single story, exceeding the maximum footprint of 30,000 square feet.

Other Development Standards

Non-Conforming Uses in General

Subsection 4.001 (196.) and Section 4.189

- A5.** A Non-Conforming Use is defined as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform” (Subsection 4.001 (196.)). The Current Occupant at the Location has a footprint of 124,215 square feet in a single story with a partial mezzanine, which exceeds the footprint of 30,000 square feet per retail user and footprint limitation that is allowed in the TC Zone. The Current Occupant is a legally established non-conforming use in the TC zone.

Non-Conforming Uses – Continuation of Use

Subsection 4.189 (.01) A.

- A6.** Per Subsection 4.189 (.01) A. of the Code, “A non-conforming use may be continued subject to the requirements of this Section”. Therefore, if another “159,400 square-foot electronics-related retail store” were to occupy the Location, this would be considered a continuation of non-conforming use at the Location. Conversely, were any other use than the protected use to occupy the Location, this would not be considered a continuation of non-conforming use. As demonstrated elsewhere in this staff report, the Proposed Occupant is not the same use as the Current Occupant at the Location. Therefore, operation of the proposed occupant at the Location is not a continuation of non-conforming use.

Non-Conforming Uses – Change of Use

Subsection 4.189 (.02) A.

- A7.** Per Subsection 4.189 (.02) A. of the Code, “A non-conforming use may not be changed unless the change or replacement is to a use that is determined by the Planning Director to be no less conforming to the regulations for the zone district in which the use is located than the existing use.” This determination is outside the scope of review of the current application.

Non-Conforming Uses – Abandoned Use

Subsection 4.189 (.03)

- A8.** Per Subsection 4.189 (.03) of the Code, “If a non-conforming use is abandoned for a period of 18 consecutive months, the use shall not be re-established without fully complying with the use requirements of the zone. Mere vacancy of a site or building while it is being marketed or other plans for its use are being readied, does not constitute abandonment. In order to be considered abandoned, a site must not be receiving City utilities and must not actively be marketed for rent, lease, or sale.” The Location has not been abandoned, as the owner has continued to pay utilities and market the site.

Non-Conforming Uses – Damage or Destruction

Subsection 4.189 (.04)

- A9.** Per Subsection 4.189 (.04) of the Code, “When a structure that is a non-conforming use or a building containing a non-conforming use is damaged by any cause, exceeding 75 percent of its replacement cost, as determined by the Building Official, the structure shall not be re-established unless the owners of that structure promptly and diligently pursue its repair or replacement. If all required building permits have not been received within 18 months of the damage or destruction, the non-conforming use shall not be re-established without meeting all of the requirements of Chapter 4.” The Location has not been damaged or destroyed.

Non-Conforming Uses – Enlargements and Moving

Subsection 4.189 (.05)

- A10.** Per Subsection 4.189 (.05) of the Code, “A non-conforming use, may be permitted to enlarge up to 20 percent in floor area on approval of a conditional use permit by the Development Review Board.” The Current Occupant/protected non-conforming use is not seeking this, and determination is outside the scope of review of the current application.

Non-Conforming Uses – Repairs

Subsection 4.189 (.06)

- A11.** Per Subsection 4.189 (.06) of the Code, “Normal maintenance of a structure containing a non-conforming use is permitted provided that any exterior additions meet the requirements of this Section.” Current Occupant may maintain and repair the structure as needed to operate its non-conforming use and is not relevant to the scope of review of the current application.

ORDER ON APPEAL:
DRB RESOLUTION NO. 432
ATTACHMENT 3

Development Review Board Panel B Record – Case File DB24-0003

- a. Special Meeting Record – April 24, 2024

Link:

https://www.ci.wilsonville.or.us/sites/default/files/fileattachments/city_council/meeting/128362/attach_3a_drb_special_meeting_record_04.24.2024.pdf

- b. Meeting Record – April 8, 2024

Link:

https://www.ci.wilsonville.or.us/sites/default/files/fileattachments/city_council/meeting/128362/attach_3b_drb_meeting_record_04.08.2024.pdf



**DEVELOPMENT REVIEW BOARD PANEL B
SPECIAL MEETING VERBATIM MINUTES**

April 24, 2024 at 4:00 PM

City Hall Council Chambers & Remote Video Conferencing

CALL TO ORDER

A special meeting of the Development Review Board Panel B was held at City Hall beginning at 4:00 p.m. on Monday, April 24, 2024. Vice Chair Alice Galloway called the meeting to order at 4:00 p.m., followed by roll call.

CHAIR'S REMARKS

The Conduct of Hearing and Statement of Public Notice were read into the record.

ROLL CALL

Present for roll call were: Alice Galloway, John Andrews, Kamran Mesbah, and Megan Chuinard. Rachelle Barrett was absent.

Staff present: Daniel Pauly, Stephanie Davidson, Kimberly Rybold, Miranda Bateschell, Cindy Luxhoj, and Shelley White

PUBLIC HEARINGS

- Resolution No. 432 - Planning Director's Referral of a Continuation of Non-Conforming Use Determination:** The Planning Director has referred Case File AR23-0031 to the Development Review Board for determination regarding the continuation of an existing Non-Conforming Use.

On April 8, 2024, the Development Review Board moved to keep the record open until April 15, 2024. This item will be for deliberation and decision only based on the evidence in the record. No further testimony or written comments will be accepted.

[Verbatim Transcription Starts Here]

Vice Chair Galloway: Well, some Board members did not attend the prior hearing on this matter but can participate so long as they have reviewed the recording of the hearing and reviewed the materials. For those Board members not present at the prior hearing, please confirm whether you have reviewed the recording and the application materials.

And, I am one Board member, who was not at the April 8th meeting, and I reviewed the recording, listened to the entirety, and I reviewed all the materials.

Megan Chuinard: I also was not at the April 8th meeting but did listen to the full recording and reviewed all materials related to this case.

Vice Chair Galloway: Do any members of the Development Review Board wish to declare a conflict of interest or bias or report any ex parte contact or any information gained outside of the hearing?

Kamran Mesbah: None.

Vice Chair Galloway: No.

John Andrews: No.

Ms. Chuinard: No.

Vice Chair Galloway: With the public hearing and the record closed, it is now time for the Board to entertain a motion to deliberate and make a decision on the application before us. I will begin by calling for a motion regarding the Staff report and then the resolution. Next, I will call for a motion to adopt the Staff report, including all findings and exhibits and enter it into the record. If a Board member wishes to amend the Staff report in any way, including adding a new condition, removing a condition, or modifying a condition. It should be included in the motion.

I would like to amend the Staff report. We need to add Exhibits B3, 4, and 5 and D1, 2, 3, and 4.

Daniel Pauly, Planning Manager: So that'd be included in the motion when it's made.

Vice Chair Galloway: Okay. Is there any further discussion on the Staff report?

Mr. Pauly: Or you want to make a motion first?

Vice Chair Galloway: Okay. Do I have a motion on the Staff report?

Mr. Andrews: Yes. Yes. I'll move to accept the Staff report. Is that adequate?

Mr. Pauly: You'd want to amend it with these—adding the exhibits if you want to.

Mr. Andrews: Oh, okay. Well, I need the list of the exhibits.

Vice Chair Galloway: Right there.

Mr. Andrews: Oh, this is it. Oh, okay. Okay. So, I'll move to accept the Staff report but include the Applicant materials, which is B3, B4, B5 and public comments D1, D2, D3, D4. Is that adequate?

Mr. Pauly: Just conferring with legal counsel.

Stephanie Davidson, Assistant City Attorney: Let's just clarify and do it again. I think the motion should be to adopt the Staff report with the following amendments, and then you would read off all of the added exhibits.

Mr. Andrews: Okay. So, I guess I'm moving to accept the Staff report –

Ms. Davidson: Adopt.

Mr. Pauly: Adopt.

Mr. Andrews: –adopt the Staff report and – you're pretty good at this; maybe you should say it, and I can –

Ms. Davidson: So if – I would move to adopt the Staff report with the following amendments, including the incorporation of Exhibits B3, B4, B5, D1, D2, D3, and D4.

Mr. Andrews: So moved. So moved.

Ms. Chuinard: Second.

Mr. Andrews: Thank you.

Vice Chair Galloway: Okay. It has been moved and seconded that we adopt the Staff report with the following amendments, including incorporation of Exhibits B3, 4 and 5 and D 1,2,3, and 4.

Ms. Davidson: Great. Yeah.

Vice Chair Galloway: Any discussion among the Board members?

Mr. Mesbah: I'm wondering if Staff have any additional comments in response to the material received yesterday from the Applicant.

Mr. Pauly: I think it's at a point of discussion for the Board, so – doing that –

Mr. Mesbah: So you want us to discuss that?

Mr. Pauly: Yes.

Mr. Mesbah: Okay. That one of the points that was brought up again, and I would like to have, I guess, a conversation about it, is this bifurcation of the application; that the Applicant is stating the City is requiring it, when I very clearly offered for them to withdraw their first application and combine all of their efforts in the current one, and apparently they refused. I feel...miffed that

they are blaming the City for something they decided to do. And I'm wondering what benefit this bifurcation would have had for the Applicant. There must have been some strategic advantage; otherwise, why do it the long way? They're not here to respond to any questions about this. But it seems to me that if the Applicant is trying to get us to believe that this is a good faith effort on their part to work with the City and all of that, this kind of gaming of the system is not, to me anyway, consistent with that approach. And that, to me, is an affront as a member of this Board. So I just wanted to bring that up.

Vice Chair Galloway: You know, I agree. I think it took a lot more time, and you had to kind of differentiate Class 1 from Class 2. And it was confusing why we were doing both, and now we're back here again, after we've already made a decision about Class 1.

Mr. Mesbah: Right.

Vice Chair Galloway: Any other conversation or discussion?

Mr. Andrews: Well, the only thing is the last submittal was more like a legal brief than like something for this Committee or even the City Council, who's probably next on the list of people who will – or groups that will review this. So anyway, that, I found not very satisfying either.

Vice Chair Galloway: Ms. Chuinard, do you have anything?

Ms Chuinard: It was quite a lot to review, and I did notice that a lot of the materials were duplicative of previous packets and a little bit confusing as to the germaneness to the argument. So, I found it not conclusive, the additional documents that were provided.

Vice Chair Galloway: Any other discussion.

Mr. Mesbah: The other aspect of the approach or the strategy that has been kind of reinforced over the several meetings, to me, has being this clear effort to over generalize on the one hand, whitewash the differences on the other hand, and create this kind of nebulous environment where anything from a Super Walmart to the corner grocery store that has rows and aisles and signage and shelving is all in the same category and acceptable.

The statement from a traffic count gets generalized to, “this has less impact than Fry's.” A very universal statement. As a civil engineer, I can tell you that the wear and tear on the streets is a function of the weight of the vehicles that go on and not the number. The number tells us whether we're going to have a traffic jam. But the wear and tear, which is a significant impact for the city, has to do with heavy trucks. When I go to Home Depot, I go with my big SUV and a trailer and fill it to the gills with lumber and rock and bark dust and whatnot. That is a heavier load on the streets than when I go to Best Buy to pick up a computer wire. So, this kind of statement that generalizes it from a traffic count to “oh, we have less impact”, hoping that nobody will pay attention to the details, to me, is also a – it tells me that the Applicant is not transparent and forthcoming with what is being proposed. The whole idea of showing beautiful pictures of what the development could be like, to me, is again, a promise that once the foot is

in the door is probably going to be an entitlement, like their approach has been. So, the overall materials that have been provided to me were not satisfying, not at all convincing.

Vice Chair Galloway: You know, I felt that there was a disregard for all of the time and energy and input that Wilsonville's citizens had to the Town Center Plan. I mean, a lot of people worked for a long time on coming up with this vision that we want for our community, and I didn't really hear much from the Applicant on how important that vision is to a city and a town.

Mr. Andrews: So, one other thing, which was really that they—the Applicant had kind of described a vision of all sorts of other buildings and housing and all that, but I saw nothing in the form of a commitment that those things actually were going to be done. They were just sort of like the dangling something in front of us as a possibility, rather than as a fact, because that was not in their proposal.

Vice Chair Galloway: Any other discussion.

Ms. Chuinard: Yeah, I would say in the additional documents from the Applicant, I also don't feel like they had addressed the legal cases that the City provided as direction for why they have the conclusory findings listed in our original packet from the City. I also think that there was a grand use of the commercial, retail kind of building description in – even in the 1991 documents. Though those are irrelevant to this discussion, there still was an electronics-related retail store use called out in those documents. And so, it's kind of a 'you could pick whatever wording you'd like' and kind of make an argument for it there.

In terms of how they described the use of the building, it is very clear that the – it would be a home improvement warehouse, in their own description. And, you know, in terms of the – there's the PowerPoint that describes the use of products that are very similar to what was in the old store's space, and it's something where you could say like, "Oh, hey, this store has candy, so it's the same as a grocery store" kind of very broadly, those are things that many stores might have, but not clearly defined in that electronics retail use piece. So, I felt that they did not clarify that better in the additional commentary.

Vice Chair Galloway: Any other discussion, then, among our panel? Okay, hearing no further discussion, I will call the question. All in favor of – is it accepting the Staff report?

Mr. Pauly: Adopting.

Vice Chair Galloway: Adopting, sorry –

Ms. Davidson: As amended.

Vice Chair Galloway: Adopting the Staff report. Aye?

Ms. Chuinard: Aye.

Mr. Andrews: Aye.

Vice Chair Galloway: Aye.

Mr. Mesbah: Aye.

Vice Chair Galloway: Okay. So moving on the resolution –

Ms. Davidson: Oh, can you clarify that the motion carried by a certain number of votes?

Vice Chair Galloway: The motion carries by four to nothing.

Ms. Davidson: Great. Thank you.

Vice Chair Galloway: Thank you. Okay. Do I have a motion on the Resolution Number 432? And I invite all of us to do provide your thoughts on the resolution.

Ms. Davidson: Can we have a motion on the resolution first?

Vice Chair Galloway: I was just coming to that. Do I have a motion to adopt the resolution?

Mr. Mesbah: I move that we adopt Development Review Board Resolution Number 432.

Vice Chair Galloway: 432.

Mr. Mesbah: Yes.

Ms Chuinard: Second.

Vice Chair Galloway: Okay. Any discussion?

Transcriptionist: Just for clarification on the record, are we also – that also includes with the amended Staff report?

Mr. Pauly: Yeah, that's what the resolution states.

Transcriptionist: Oh, great. Thanks.

Vice Chair Galloway: Do we have any discussion on the resolution?

Mr. Mesbah: There is a date of filing that is still open in the resolution I have. Is that date going to be filled in the resolution? There's a blank. Is the date today or yesterday? What is the date?

Shelley White, Planning Administrative Assistant: So the date –

Ms. Davidson: I'm pulling up the packet right now.

Ms. White: The blank on the resolution is when that decision is mailed. The resolution – the date on the resolution is the date that that will be mailed out.

Mr. Mesbah: Mailed out, okay.

Ms. White: That will either be today or tomorrow.

Mr. Mesbah: Okay.

Vice Chair Galloway: Any other discussion or thoughts you might have about the resolution?

Ms. Chuinard: My comments have been stated.

Mr. Mesbah: None.

Vice Chair Galloway: Okay. All right. It has been moved and seconded that the – that we adopt the Resolution Number 432. Any other discussion?

All right, hearing no further discussion. I will call the question. All in favor?

Ms. Chuinard: Aye.

Mr. Andrews: Aye.

Vice Chair Galloway: Aye.

Mr. Mesbah: Aye.

Vice Chair Galloway: And the motion carries four to zero. If you desire to appeal this decision to the City Council, you must file an application stating the grounds for the appeal to the City Council and submit any applicable fee within 14 days of mailing the decision notice.

STAFF COMMUNICATIONS

Vice Chair Galloway: Okay. We can adjourn?

Mr. Pauly: Yeah, there are no other agenda items, so we can move –

Vice Chair Galloway: No other items from the Staff?

Mr. Pauly: Yes, so we can adjourn.

ADJOURNMENT

Vice Chair Galloway: Okay. It's 4:19, and we are adjourning the DRB panel to –

Mr. Pauly: Do you want to move to adjourn or—

Ms. Davidson: It's not technically necessary, but you can if you would like to. There's no additional agenda item so you can adjourn. Yeah.

Vice Chair Galloway: Okay. Okay, it's 4:19, and we are adjourning the Panel B – the DRB meeting today. Thanks.

Respectfully submitted,

Paula Pinyerd, ABC Transcription Services, LLC. for
Shelley White, Planning Administrative Assistant



**DEVELOPMENT REVIEW BOARD PANEL B
MEETING VERBATIM EXCERPT**

April 8, 2024 at 6:30 PM

City Hall Council Chambers & Remote Video Conferencing

CALL TO ORDER

A regular meeting of the Development Review Board Panel B was held at City Hall beginning at 6:30 pm on Monday, April 8, 2024. Chair Rachelle Barrett called the meeting to order at 6:30 pm.

CHAIR'S REMARKS

The Conduct of Hearing and Statement of Public Notice were read into the record.

ROLL CALL

Present for roll call were: Rachelle Barrett, John Andrews, and Kamran Mesbah. Alice Galloway and Megan Chuinard were absent.

Staff present: Daniel Pauly, Stephanie Davidson, Kimberly Rybold, Miranda Bateschell, Amanda Guile-Hinman, Cindy Luxhoj, and Shelley White

CITIZEN INPUT

This is an opportunity for visitors to address the Development Review Board (DRB) on items not on the agenda. There were no comments.

CONSENT AGENDA

PUBLIC HEARINGS

1. **Resolution No. 432 - Planning Director's Referral of a Continuation of Non-Conforming Use Determination:** The Planning Director has referred Case File AR23-0031 to the Development Review Board for determination regarding the continuation of an existing Non-Conforming Use.

Chair Barrett called the public hearing to order at 6:35 pm and read the conduct of hearing format into the record. John Andrews declared for the record that he had visited the site recently. No board member, however, declared a conflict of interest, bias, or conclusion from a site visit. No board member participation was challenged by any member of the audience.

Cindy Luxhoj, AICP, Associate Planner, announced that the criteria applicable to the application were stated starting on Page 2 of the Staff report, which was entered into the record. Copies of the report were made available to the side of the room and on the City's website.

The following exhibits were entered into the record:

- Exhibit B3: Applicant's PowerPoint presentation
- Exhibit D1: Comment letter from Garet Prior dated April 5, 2024
- Exhibit D2: Comment from Kristen Roche dated April 8, 2024
- Exhibit D3: Email read into the record from Dave Wortman dated April 8, 2024 (added later)

[Verbatim Transcript Begins @ 7:56]

Cindy Luxhoj: The subject property, referred to as 'the location' in my presentation, is located at 29400 SW Town Center Loop West, outlined in red in the aerial photograph on the left of this slide (Slide 2). Existing development at the location is shown in the photograph on the right. The Comprehensive Plan designation is Town Center, and the location is zoned Town Center.

As the Development Review Board is aware, on October 30th, 2023, the City received an application for Class 1 Review, Case File Number ADMN 23-0029, to confirm the status of the existing non-conforming use and structure at the location. On December 28th, 2023, the City's Planning Director issued their decision on the Class 1 Review. The Applicant submitted a Notice of Appeal of the Planning Director's decision on January 10th, 2024. A public hearing before the Development Review Board regarding the Notice of Appeal was held on February 26th, 2024, at which time the hearing was closed, but the record left open for the Applicant to submit arguments and evidence.

The DRB held a special meeting on March 14th, 2024, and following deliberation, approved Resolution No. 429, unanimously affirming the Planning Director's determination of nonconformance. The notice of decision was issued on March 15th, 2024. Development Review Board Resolution No. 429 is a City decision and may be overturned only on appeal. There is currently an appeal pending before City Council.

The location is shaded in blue, and the notice area is outlined and shaded in green on the map on this slide (Slide 4). Proper noticing was followed for this application and the public hearing notice mailed to property owners within 250 ft of the subject property on site posting and publication in the Wilsonville Spokesman. No public comments were received during the comment period. However, two comments were received after publication of the Staff report, and those have been entered into the record as Exhibits D1 and D2.

On December 15th, 2023, an application for Class 2 Review, AR 23-0031, was submitted by the same Applicant as filed the Class 1 Review application. The application for Class 2 Review is stated as, *"A Class 2 Staff interpretation to confirm that the Home Depot and Fry's Electronics are both warehouse retail uses. Further, the Applicant described the application as an application for a Staff interpretation of the Wilsonville Development Code to confirm that the Home Depot store proposed for 29400 Town Center Loop West constitutes a warehouse retail use and may operate in the existing structure."*

To clarify language used in this and subsequent presentation slides, Fry's Electronics is referred to as the current occupant, and the Home Depot is referred to as the proposed occupant. The City deemed the Class 2 Review application complete on January 12th, 2024, and is processing the request as a Class 2 Planning Director Interpretation.

Given the public comment on the Class 1 Review application discussed earlier, and that there may be interested parties who may want to participate in the Class 2 Review, the Planning Director chose to refer the application to the Development Review Board for a public hearing.

In addition to the application materials submitted with its application for Class 2 Review, the proposed occupant also submitted a letter to the City, dated March 29th, 2024, inviting the Development Review Board in this Class 2 Review to address or remedy the flaws in Resolution No. 429 on the Class 1 Review. The issues that were resolved in Resolution 429 are beyond the scope of this Class 2 Review application. Further, the Applicant has waived its right to address the issues that were addressed in Resolution 429 through this Class 2 Review application. The City invited the Applicant to withdraw its Class 1 Review application in writing on November 28, 2023.

At the Development Review Board hearing on February 26, 2024 and in the days following the DRB hearing on February 26, the City offered to void and withdraw the Planning Director's determination in the Class 1 Review and have the Development Review Board not issue a decision and make clear that the issues under review in the Class 1 proceeding would be addressed in the Class 2 Review. The City's goal in making this offer was to allow the City to address all issues pertinent to both the Class 2—the Class 1, and Class 2 Review in one combined proceeding. The Applicant declined this offer. Staff notes that consideration of any future development of the location would be subject to additional land use review that also is beyond the scope of this Class 2 Review application.

In the current application, the Applicant is requesting confirmation that the proposed occupant and the current occupant are both warehouse retail uses. The Applicant also states that it is requesting confirmation that the proposed occupant may continue to operate at the location. Therefore, the Development Review Board's decision in the Class 2 Review must answer the following question, "Is the proposed occupant—if the proposed occupant operates at the location, will this constitute a continuation of the non-conforming use?" The following steps will determine the answer to that question: Step 1, what is the existing non-conforming use? Step 2, what is the proposed use? And Step 3, is the proposed use a continuation of the current non-conforming use?

I'll discuss each of these steps in subsequent slides following a brief review of the legal standard regarding continuation of non-conforming uses. Pursuant to Code—Wilsonville Code 4.189.(01), a non-conforming use may be continued subject to the requirements of Section 4.189. There are no other Code provisions regulating a continuation of a non-conforming use.

With regard to case law, some key points for the DRB to keep in mind, as you consider the current application, are listed on this slide (Slide 8) and discussed in detail in the Staff report. Briefly, non-conforming uses and expansion thereof are disfavored. Local government has

broad discretion to resist expansion of non-conforming uses. Whether a proposed use is a continuation or change of non-conforming use depends on the nature and extent of the recognized non-conforming use. And local government has broad discretion to draw distinctions between various uses and allow some uses to continue but disallow other uses.

As determined by the DRB decision in Case file No. DB24-0002, Resolution No. 429, there is a legally established non-conforming use at the location. Specifically, that the protected use is a 159,400 square-foot, electronics-related retail store. This determination made by the Development Review Board provides the answer to the question in Step 1. The Staff report includes additional information to substantiate this determination.

With respect to the question in Step 2, based on the application materials provided by the proposed occupant and an examination of how the proposed occupant operates locally, the City has concluded the following: the Applicant acknowledges that the proposed occupant operates home improvement warehouse stores. The Applicant acknowledges that contractors and other professionals, not private individuals, account for close to half of the proposed occupant's annual sales. The Applicant acknowledges that the current occupant and the proposed occupant carry different products and includes a list of products and services provided by the proposed occupant, such as tools, construction products, appliances and services, including transportation and equipment rentals, and both on site and off site install, repair, and remodel services that are not electronics-related, or included in the products and services provided by the current occupant. The Applicant shows on the site plan included in its application materials activities that occur outside the structure at the location, such as the proposed lumber pad at the back of the structure, or describes activities that are likely to occur outside, such as transportation and equipment rentals. Thus, the proposed occupant is not an electronics-related retail store and contains products and activities that are different than those provided by the current occupant. The Applicant has not presented any evidence to prove that the proposed occupant's activities existed at the location as of June 5th, 2019, when the Town Center zoning went into effect.

In consideration of the question in Step 3, for a use to be deemed a continuation of a legally established non-conforming use, it must have the same nature and extent as the recognized non-conforming use. In the current matter, the reference point is the nature and extent of the location as of June 5th 2019, as determined by the Development Review Board in Case File No. DB24 0002, Resolution No. 429. The City is entitled to draw distinctions between uses. Further, once the City draws distinctions between uses, it's entitled to determine that certain uses are beyond the scope of a recognized non-conforming use when there is no evidence of them at the relevant time and therefore determine that there is no continuation with respect to those uses. In other words, the proposed occupants proposed use of location, as described on the previous slide (Slide 10) goes beyond a mere continuation of the non-conforming use of the location that was recognized by the Development Review Board. The proposed occupant may engage in these uses at the location only if it obtains a recognition of change of use, which is beyond the scope of what may be addressed in the matter currently before the DRB.

The City's conclusionary findings include the following: the proposed occupant's operation at the location would not be a mere continuation of the non-conforming use previously approved

by the City. Therefore, Staff recommends the DRB deny the proposed occupant as a continuation of non-conforming use of the location.

The Staff recommendation is based on the following considerations: The 1991 decision and the zoning regulations in effect when the 1990 decision was granted are irrelevant to this decision. The proposed occupant describes itself as a home improvement warehouse store. This is not the same as an electronics-related retail store, which is the legally established non-conforming use at the location. The proposed occupant's characterization of the non-conforming use approved by the City as warehouse retail use is incorrect and is not persuasive. The proposed occupant admits that its proposed use of the location would include the sale of tools and construction products, the rental of transportation and equipment, technical expertise for home improvement projects, and both on site and off site installation, repair, and remodeling services. Some of the proposed occupant's customers include contractors and professionals. These uses extend beyond the scope of the current occupant's actual use of the location as of June 5th, 2019, when the Town Center zoning went into effect. The proposed occupant relies heavily on the 1991 decision to substantiate its argument that the proposed use would be a continuation of non-conforming use of the location. The only relevant point of reference when determining the scope of a non-conforming use is the nature and extent of the use of the subject property at the time the use became non-conforming. However, for the sake of responding to the Applicant's argument only, the City has addressed the 1991 decision, and I'm providing a brief synopsis of the detailed discussion in the Staff report.

As the Development Review Board is aware, based upon the zoning designation of a location, Stage 1 Plans establish bubble diagram level uses for development, and Stage 2 Plans indicate the specific types and locations of all proposed uses, enabling analysis of impacts of those uses for the purpose of traffic and other infrastructure impacts and concurrency evaluation.

In 1991, Capital Realty Corporation submitted an application for approval of a Stage 1 Master Plan Modification and Stage 2 Site Development Plan for the location. This action changed the land use overlay classification of the location to Central Commercial, or CC, as the CC Use designation is the basis of the Stage 1 approval. Approved uses for the location were those identified as CC in the Stage 1 Wilsonville Town Center Master Plan as defined by Ordinance No. 55. The proposed development called Project Thunder, an electronics-related retail store, was considered consistent with the CC use category when it was approved in 1991.

While 'Electronics Store' was not a use listed specifically in CC, modification to the Stage 1 Master Plan for the development was approved by the Planning Commission under the authority granted to them in Ordinance No. 55. Conversely, uses more closely associated with the proposed occupant of the location were not listed in the CC use category, but included in other land use categories, including Service Commercial and Food and Sundries. There is no reference to warehouse retail use or commercial retail center in the 1991 decision, in the Ordinance No. 55 land use categories, or in the Stage 1 Master Plan.

While the Applicant asserts that warehouse retail or commercial retail center is the approved use and that the current occupant and the proposed occupant are the same, Project Thunder was never approved as such. Thus, neither the 1991 decision nor the zoning regulations that

were in effect in 1991 are relevant in the matter before the Development Review Board, and the Applicant has not cited any legal authorities that say otherwise.

This concludes tonight's presentation by Staff. The Applicant is participating in the hearing and is prepared to make a presentation when invited by the Development Review Board. I'm happy to take questions for a few moments and then we can move on to the Applicant's presentation. Additional questions can be asked of Staff after the Applicant's presentation. Thank you.

Chair Barrett: Should we move on to the Applicant and save our questions? All right will the Applicant please come to the podium with the microphone or commence your presentation when unmuted on Zoom? State your name and address and present any testimony you would like to present to the Development Review Board.

Ken Katzaroff: Good evening. For the record, my name is Ken Katzaroff. I'm attorney at Schw—an attorney—oh, I can't talk this evening; this is going to be long. I'm attorney at Schwabe, Williamson Wyatt and I'm here on behalf of the Applicant. My address is already on the speaker card form, so I'm not going to repeat it here. Thank you for the detailed Staff report and for the DRB taking the time tonight. I will try to keep my remarks quick, so that we can hear from the actual Applicant. But I do have a, a couple of pieces that I want to highlight. The first of which is that clearly, we have a disagreement with Staff regarding the relevancy of the 1991 decision, as well as the scope of what the Applicant's request was for, I think several things are read out of context or very narrowly, and so, I just want to be clear here that the proposed use that we are continuing is a, is a retail use, writ large. And the 1991 decision, specifically approved a commercial retail development or commercial retail use. There's a comment that we hadn't provided any legal authority for why that's relevant. I disagree with that. We've already provided our evidence towards that, as well as legal analysis.

I'd also raise a particular requirement that we haven't briefed yet, which is, there's a thing called a Codification Requirement in Oregon, where anything in a land use code actually has to be codified and that would include the different types of uses. And, I'll make this easy for legal Staff that might be here, the two cases that you might want to look up are Waveseer versus Deschutes County, which is 308 Or. App. 494, or Nemzow versus Deschutes County 308 Or. App 533. And although those are County cases, the statute is essentially the same. It's the same language, and it requires that any particular use has to be specifically codified, and in this case, the specific codification was for retail use, not a difference in between electronic use or a hardware use, and so I would just say that that's a burden that we're gonna—quite frankly, the City's gonna have to address.

And, I'll put one additional piece of context on that Waveseer case, which is that Deschutes County tried to invent a new use in its code and actually got hit with attorney fees in that case, which is very rare at LUBA. So, this stuff is real and it's important. So again, we just kind of—

[\[off mic comment 27:54\]](#)

Mr. Katzaroff : Yep, and we'll provide it to you in the open record and final legal argument, but Waveseer versus Deschutes County, which your former law firm was involved in, 308 Or. App

494, and Nem—I think it's Nemsow, I don't know how to say it, versus Deschutes County, which is 308 Or. App 533. Okay, so that's going to be potentially important to the legal analysis that it's provided to this Board.

I'm also not clear on something that Staff said about there would be future land use need or review required, because the entire point is that we're here for a continuation of an existing use, and so, in our view, we haven't seen or heard about an additional land use requirement that would be overlaid to continue an existing use. So that's one thing I think we're going to have to figure out.

The status of the Class 1 is something I'd like to bring up here. We have appealed that decision to City Council. Right now, it's scheduled to be heard I think on Monday. We'll see whether that dates slides or not. But, I note that in the Staff report, largely the authority for the positions taking is based upon that decision, which is still kind of pending. So, we believe that this Board can nevertheless make a determination that it is a valid and continuation of the existing use should it choose to do so.

Now I'm going to get to the fun stuff, which is talking about what the Applicant actually wants to do here because I think that's really relevant to this entire discussion about the use and what the previous or existing use is, quite frankly, and how Home Depot fits that exactly. And now we're going to play musical chairs for a second, so you can run the slide deck.

Barry Simmons: All right, my name is Barry Simmons with I'm a real estate manager with Home Depot, address is 2455 Paces Ferry Road in Atlanta, Georgia, and we'll get the slides up here in a second.

So, I guess as part of the Applicant, we were told we had the burden of proof to show that the current occupant and the proposed occupancy are the same commercial retail uses. So go ahead, next slide, please.

This is the fixture plan that was provided by the City. (Slide 2) On your left, this was the current occupant or previous occupant in the commercial retail spaces. Their fixture plan included all their walls. On the right, I apologize for it being a little darker print, but this is what we are proposing to use. I want to make note that there is no exterior garden center, as alluded to in the Staff report, and we are only using the existing building as it exists. Next slide.

And I want to make a point that this is definitely not an expansion of the existing use based off of the previous documentation that's been referenced. The previous commercial user had about 4,100 trips on their traffic study. We're not going to generate nearly that much traffic. We're going to save potentially about 1,800 daily trips off the roads.

We also have a much lower parking requirement than the current or previous user. They had nearly 840 parking stalls. We are not going to require that many. We only asked for about 400 as our typical stores and the benefit of that reduction from 840 down to 400 will leave about five acres of current parking today that then could be redeveloped for other uses that could align with the Town Center Plan, and we'll come back to that. All right, so next slide.

(Slide 4) So now, here we get into how does the proposed occupancy for commercial retail and the current and previous occupancy for commercial retail, how do they align? Well, the first I want to show is how we have similar points of sale. Both retailers, both commercial retailers, ask their customers to pick up their merchandise, bring it to the front, make a transaction and exit to the front of the building; similar as what we would propose. This is the last interaction with the customers within the store. As far as the customer experience. And typically, you know, between us and the previous user, it'd be located adjacent to the exits. Next slide.

The other side of commercial retail is the necessary, necessary function of processing returns. And it just so happens that our processing—our returns section and their return sections falls almost within the same side of the store. In addition to the returns processing, as you can see by the banner on your left, Fry's offered a store pickup service. We also offer a store pickup service. You can order product online and pick it up in the store. We refer to that function as buy online, pick up in store, BOPIS. You can see on the left that Fry's—or the previous user, excuse me—used cages to protect that material, we use lockers on our side. Next slide.

(Slide 6) If this is a continuation of the commercial retail use, I want to talk about the customer experience and the navigation through the store. We both use signage for wayfinding to assist our customers on finding the products that they come to the store to purchase. The signage on aisles indicate exactly, usually based off of a numerical identifier, shows exactly what the products that would be available within that aisle. So, this is a continuation of a commercial retail use and a commercial retail use. Next slide.

Our products displayed in our aisles are laid out very similar between the previous retail—commercial retail occupant and our proposed commercial retail occupancy. The merchandise is organized within aisles related by related projects, and they have similar layouts. The products are displayed for easier customer access. And, and we even see within these, these pictures between what was available in our previous retail user and our current retail—or our proposed retail user what we, what you'd call in the retail world an end cap, so we're maximizing the space that we can show product to our customers. Next slide.

(Slide 8) This is the services offered. I think the Staff implied that we offered services that somehow the current and previous commercial retailer didn't offer. We don't believe that's true. In this photo you'll see what looks like a computer work desk where—and a what we would call a paint desk, but those are customer service locations that are located throughout the store. These are just two examples. Both the previous and the proposed commercial retailers offer technical expertise and customized products. No doubt that the previous commercial retailer, you could have bought a software package and had it installed, whatever software package you want, installed on whatever hardware you want. In this example, A customer could come in and have a technical expertise from a sales associate mix paint to whatever color that you were seeking. So there is a level of service and a level of technical expertise that are found in both uses.

Additional services. This is for—and we see the similarities between the current previous user, and the proposed user, where we have signage hanging from the roof deck or from the fixtures indicating advertising available services. And that there are both delivery services. So, both the

previous user and the proposed user would provide off-site services to their customer base. And, and in both cases, you'll see where sales associates were available for customer assistance.

Again, we, we believe this is a continuation of retail use between the two services, or between the two users. In these comparisons, you're seeing major end items, or hardware, for desk desktop computers with monitors, and on the other side, we're seeing appliances, which are major end items for a retailer, for us as a retailer. This is a, like I said, this is a continuation of commercial retail use. Even the layouts are similar within the store.

(Slide 11) The next indicating the continuation of commercial retail use, we have similar merchandising display techniques. As you can see on both of these photos, the previous commercial retailer used product displays with the product to purchase underneath the display. In the photo on the right for the proposed use, you have product displays so customers can look at, see, touch, feel, and then the item is available underneath for purchase.

And again, a continuation of similarities between the two uses. This is how merchandise would be displayed. We're even using similar fixtures. I refer to this as pegboard with the hangers. But you see how both the previous retailer and the proposed retailer would display their products on similar fixtures, and that includes the product information and price posted for each individual item.

(Slide 13) The next: component items. Now, looking at these two photos, Nintendo games, where a game cartridge is a component to a gaming system. We have effectively, saw blades as a component to a circular saw. Now, still commercial retail use. We sell the end items; we sell components to those items. So again, we're arguing this is a, that's a fair analogy that it's a continuation of the commercial retail use. And yeah, we're good.

Another aspect of similarities between the two stores and, while we believe it's a continuation of commercial retail, both the proposed user and—or both the current user, previous user, and the proposed user will be dedicating floor space to what we consider seasonal sales areas. So, this is product that is basically floor stacked with sales signs for easy customer access, walk by, pick it up, put it in your cart. The product quantities vary based off of seasonal demand and the, you know, and then the floor space dedicated seasonal sales and often are associated with discounts and holiday, you know, I'd say holiday shopping seasons. For the previous user, that holiday was more along the end of the year, for the proposed user, our holiday is the spring season.

(Slide 15) So again, showing a continuation of a commercial retail use between the two users. Both have furniture. Theirs were gaming chairs, as an example, ours are patio furniture. And, yeah, and both of us had areas dedicated and floor space associated with those particular furniture offerings.

Both the previous user and the proposed use also have ancillary sales. Items that may or may not be directly related to either, in this case, electronics or home improvement, but here we have an example of both the previous and the proposed user selling hats, one for winter

conditions, the other for gardening. I also want to talk to how this merchandise is displayed. So, if you look carefully, both of the products are displayed from packaging that was direct from the manufacturer in containers that were effectively set up, ready to go, and to be placed in locations such as aisles for—to be in the customer path, so as customers walk by, they would be enticed to pick up those items. So it's a continuation of the use and again for increased visibility and for, for a brief moment of levity, I will say that the pricing is almost identical as well.

(Slide 17) All right. So, continuing on the customer retail—we talk about the experience from beginning to end, I started with the point of sale, and now I'm going back to the customer walking into the store, and, these two experiences are identical even down to the carts that we provide as a service to our customers to carry their products to the front. And you'll notice that both of them are branded, the red for the previous user, the orange for the proposing.

(Slide 18) Now, I've provided a summary here of the items that I've gone through to give you a sense of how we believe that this is a continuation of use from the previous user to the proposed use, and it's all commercial retail. The one thing I would like to call out based off of the Staff's comment is marketed to professionals. We believe that the previous user also marketed to professionals. There was comments that their tagline or slogan, if you will, was from the hobbyist to the Silicon Valley professional. The proposed user tagline is from the do-it-yourselfer to the pro. I don't see a significant difference between those two approaches. I believe reasonable people would agree that both the previous user and the proposed use are both commercial retail uses. Next slide.

(Slide 19) So, this store would be planned as a non-prototypical Home Depot store, so any comparisons necessarily to other stores, would not be fair because we understand that we are moving into an existing building. We're not able to change the exterior of the building. We're not able to, maybe not do other functions and I will say that not all stores carry the exact same products or services; sometimes that's the compliance with local requirements; sometimes that's a regional differences in products, and then sometimes it's just a physical arrangement of the store. On the second bullet there, we believe this is a sustainable reuse of the existing building. The proposal from others may be that we would have to demo and remove a perfectly good building and then come back with a four story, 30,000 square feet replacement. Doesn't make much sense.

We do not have an exterior garden center. It's never proposed. Our live goods are inside the existing building.

The lumber pad that the Staff referred to is not exterior storage. It is not a part of the customer experience. The lumber pad is an internal term that we use where we have product that may come to the store that's not in a box truck or a 53-foot trailer that could back into a loading dock. We have to unload some of our heavier products off of a flatbed. That's the difference. But that is a, that is effectively a receiving function for the store, not associated with the customers, and, and not changing any of the product. Home Depot has not applied for sidewalk sales, outdoor seasonal sales, exterior shed displays, or exterior rental staging. So, any comparisons to other stores to say, “Hey, look at that store” that's unfair because we have not asked for that at this store.

Also, I want to call out the Home Depot direct to customer delivery capability. I say it reduces the volume through our stores. Home Depot has opened about 50 million square feet of new distribution centers over the past five years. As a part of that includes what we call flatbed distribution centers and market delivery operations. So, what people may not understand this, so I'll explain, when a pro comes to our store, or I'll use the example, of a parent and a child comes to the store and wants to buy enough lumber to buy to build a tree house, we probably have that in the store. When a pro comes to the store and says, "I want enough lumber to buy – to build a house." Well, sales associates going to say, "Where do you want it delivered? And what day do you want to deliver? Because we don't carry that volume through our store." The sales will be attributed to the store and the product will go directly from our distribution center straight to his job site. Now, it's more efficient for us. We don't have to handle it multiple times. It's more efficient for our customers. They don't have to handle it multiple times. So yeah, so again, I think I've said the large orders never pass through our store. So, you will find that some of our product selections, particularly on the pro side, the quantity that we keep it in stores is much, much less. So yeah, they're called flatbed distribution centers. That's what the pros would use primarily.

The other is the market delivery operations. So, the idea that somebody would walk in and walk out with a washer, a dryer, refrigerator, we're—those don't leave our store like they, like we would maybe a smaller item. We have market delivery operations, including in, in this market, where if you would order an appliance, the refrigerator, the washer and dryer, the microwave, whatever else you can think of, that's going directly from that facility to the point where you want it delivered. It's not passing through the store either. So, I want to go ahead and make sure that everybody's aware that any preconceived notions of the volume of materials that may be moving customers in and out, is probably different today because I believe it's the same—we are capitalizing on the same market forces that honestly, I believe that are that the previous user was not able to capitalize on. So okay.

(Slide 20) So, the next is, and I think some of this was brought up at our previous briefing, but I want to go through it again. We are looking at the Town Center Plan, this is Figure 3.6, directly out of the Town Center Plan and I've highlighted in orange a little dash line, the insert and I'll come back to that of exactly, you , how we want to—I guess develop that I guess is the word I'm looking for.

So to familiarize you with the figure here. The white buildings are existing buildings, the purple buildings are new infill development. So, it's a part of the Town Center Plan, that existing building that 100—I think it's 125,000 square foot footprint. It may be higher than that based off the mezzanine that's in the building; that footprint was anticipated to be a part of the Plan, at least for the next 20 years or more. Alright, so next slide.

(Slide 21) What Home Depot has proposed in furtherance of the Town Center Plan, we know one of the things you guys are looking at is additional multifamily housing. Now, again, going back to that five acres of parking lot that we don't need, we are able to use that to develop the multifamily housing, etc. that the Town Center Plan was looking for. So, we're proposing that we believe that based off of the five acres—now these are rough numbers, we obviously we haven't fully finalized any design, but we believe that would be about 275 plus or minus

housing units that would be added to the market. And we believe this would be fully in alignment with the Town Center Plan.

(Slide 22) This is another view of the same I guess high level proposal and now the next slide I want to show the two next to each other and hopefully that you guys can see and understand the alignment that we're talking about and that we're willing to work with the City Staff and want to be a partner with getting this vision of the Town Center Plan to a reality.

(Slide 23) Obviously to the left you're seeing the insert from the previous Town Center slide, and on the right, you're seeing a rendering of what we believe this 15 acres could be for the for the City of Wilsonville.

Now, the question is, has this ever happened before? How many multifamily, mixed use developments are around, you know, Home Depots. We have, there's several around the country. We've highlighted, I believe two of them, for this presentation. Both of them in relatively close proximity to where we are.

(Slide 24) The first is Linwood, Washington. This was opened, this is Store No. 4233. It opened in August of 2021; actually, some of our team members here worked on that project. But this is an example of a Home Depot being integrated with a mixed-use multifamily development.

(Slides 25-26) The next is North Surrey, Canada. This is an artistic, or I guess an architectural rendering. I guess artistic too, but this is the architectural rendering of what that space was planned to be. And on the next slide, this is what it looks like today. This is—this store opened in April of 1994. And again, we can show you other examples in other parts of the country. Certainly, want to be respectful of time, and I believe some of those may be in the evidence already. So, next slide.

(Slide 27) Just to, just to talk about us as a commercial retail user. In the, and maybe in the benefits that we could offer. A couple of things I want to highlight here. There's one, about middle on the right side, it says, "Home Depot has a goal by 2028, 85 percent of our lawn equipment, outdoor equipment, handheld mowers, et cetera, will all be battery powered or electric." We are trying to eliminate gas equipment. Also want to call out on the kind of the top left of that is 90 percent of our store leaders and managers started as hourly employees for our business. We've donated you know, \$450 million to veterans causes since 2011; 1.5 million hours of service hours to veterans causes, and I think it's \$3.4 billion spend—diversity spend. Next slide.

Now let's talk about, you know, other things that we try to contribute to any community that we're in, much along just Wilsonville, but overall and collectively. Home Depot is making strides to reduce packing material, whether that's cubic feet of packing foam or 81 million of PVC film, we're trying to remove that from our products. And we're also, I think there's a note here of 9—940,000 pounds of reduced damage products that had to go to landfills. We are a Energy Star Retail Partner of the Year. We've—that's an award that we have, and we talk about how we constantly want to be looking at sustainable functions, whether from our sourcing, where we're getting our materials and packaging, the waste management, and the products that we

offer as far as water and energy saving, and then even what I would consider responsible chemistry from our cleaning products to our gardening products.

(Slide 29) And then the last slide here is the you know, just some general notes on economic impact. And this is, this is specifically for the Home Depot in the state of Oregon. I wish I had it narrowed down more to maybe the—

Mr. Katzaroff: Willamette Valley.

Mr. Simmons: Portland Market. But anyway, this is not necessarily numbers associated with across the country. This is numbers associated with the state. So, I guess I want to leave it with that, that I believe it is reasonable to believe that the previous user and the proposed use are both commercial retail uses. And, I believe that Home Depot would be a benefit a benefit to the community economic and, you know, for sustainable reasons. So, I appreciate your time. Thank you. Thank you so much.

Mr. Katzaroff: I can just sit here. You look better on screen anyway. I just have one more point, and I'm the lawyer, so I have to say one other thing, which is we really believe that this is a continuation of the commercial retail. And we do understand that Wilsonville spends a large amount of community hours, Staff time, etcetera, designing the Town Center Plan. And what we're trying to show here is that at least for the first 20 years of the Town Center Plan, this was already planned to be there. And what happens in the 20 years after that? Who knows, the world changes pretty quickly nowadays, but this is not inconsistent with that plan. So, I just I Just want to be clear in that.

I also this is where my job gets a little uncomfortable, because one of the things in order to effectuate that Plan is there are an existing set of CC&R's that overlay the Town Center, and those CC&Rs right now are problematic to effectuate that Plan. There are uses like residential uses that aren't allowed, and so one of the things that's going to need to happen in order for the Plan to be implemented at all is for partners like our partner, Home Depot, to work together to amend those CC&Rs so the Town Center Plan can actually be effectuated, and we're committed to doing that. There's a memo, a memorandum from City Staff that we're going to be submitting to this record during the open comment period that specifically addresses this and how the Town Center Plan really can't come into fruition without an amendment to these CC&Rs. And so, we'll be providing that for this body to look at as well; as well as probably portions of the CC&Rs or all of them. So, I want to make you aware of that because we are a partner in this project, and we want to be a partner with the City, and that's a piece that is going to have to be figured out to effectuate that Plan to begin with. With that, I'm happy to answer any questions that you may have for the Applicant at this time, or we can wait and see if there's a rebuttal period. So,

John Andrews: So, you show a development that has the central store and all the buildings around that are residential. I mean, is that like, committed or can you, when you when you get your

approval you can change your mind and say we want to use the property a little differently than that.

Mr. Katzaroff: We want to develop the property in conjunction with the City, so what the City wants to effectuate the Town Center Plan, whether it's five-over-one retail or mixed-use, or whatever, what we're trying to do is create an opportunity to effectuate that Plan, and what we have done in many other jurisdictions is worked with cities in the form of a development agreement or other conditions of approval in order to make that happen. And so, we have the ability to change this site to free up at least five acres of property, or about that amount, and use it for something else. And I'll let Barry answer the question, if he's got other things to add.

Mr. Simmons: No, no, I would agree that as far as, I mean, that's a vision that we would have that we believe aligns with the Town Center Plan. And certainly if the City or City Staff would be interested in developing a development agreement with us and we would certainly be open to that and from a, I guess from a perspective of focusing in on what those out parcels—those out lots would be used for, absolutely.

Mr. Katzaroff: And I'd also say, and I'm going to put Barry on the spot here, Home Depot spends a lot of money when they're looking at redeveloping these sorts of sites and a lot of money on infrastructure improvements and whatnot. And I, and I think a soft number that you're willing to put on this record of something that would be realistic on this particular piece of property is how much?

Mr. Simmons: Probably about \$20 million. You know, that we would normally put into a—the site work and infrastructure to associate with the store, and so yeah.

Mr. Katzaroff: It's a big budget.

Mr. Andrews: What does that mean? So, \$20 million, but what would that \$20 million do?

Mr. Katzaroff: It's upgrades to roads, to water system, to sewer, everything to serve this site and every other use that's going to be out there. We're going to be the first major redevelopment in this area potentially, and we're going to have to set the stage a little bit, and we're prepared to do so.

Chair Barrett: Any other questions?

Kamran Mesbah: Not for me.

Chair Barrett: I think I'll wait until later.

Mr. Katzaroff: Thank you.

Chair Barrett: Thank you.

[62:00]

Chair Barrett called for public testimony regarding the application and confirmed with Staff that no one was present at City Hall to testify and no one on Zoom indicated they wanted to testify.

[64:30]

Chair Barrett: Sean O’Neil

Shawn O’Neil: Hi folks, my name is Sean O’Neil. I’m a community member of the City of Wilsonville for about 16 years, former member of DRB—DRBB for six years, two years as chair. I’m coming here as a community member and speaking against this Applicant and asking you to support the planning of the City to oppose this development. I have a law firm right down the street from where this development's going to be. It's at an offshoot of Citizens Drive and Town Center Loop West. The traffic currently is a challenge, and for Home Depot to suggest that Fry’s traffic is similar or identical to theirs or even less is to me a misstatement. The volume of traffic that would occur with a Home Depot store there would be far more. And unlike Fry’s, where a lot of people can get electronic equipment easily through Amazon and other online ways, Home Depot customers, both contractors, as well as family and locals and traveling from other cities to come to this location will have to physically go there more often and that it would impact trying to get on Citizens Drive on to Town Center Loop, which is already problematic given the redesign that's occurred when we go from a two-lane—or a one-lane to a two-lane right at that location. So, to me, it's just not a good fit from a traffic point of view.

I also think the whole concept of the Town Center Plan, it's inconsistent, and I frankly, I hear them saying these promises, if you will, that they're going to invest all this money. And to me, it sounds like a car salesman pitch. And I would not view that offering as something that I would rely on unless it's written in stone and it could impact generally a lot of us that have small businesses in the area just trying to get our customers to see us.

And also we have a lot of, and I know there'll be a position because I used to have to recognize that when I was on your Board, there'll be a lot of small business owners that will be impacted because of a Home Depot. And those small business owners employ a lot of people in this community, some that have given a lot to our local schools and their time, and Home Depot is not as connected as those small business owners. And I know that it's not a planning issue, but I've sat in your shoes before, and I've looked at things, and I look at this community that we all live in. These people that are coming in don't live here, you know, they bring in their law—lawyer that threatens attorney fees. Okay, well, being a fellow lawyer, you know, I look at that and say, “Gee, you know, why would we have a bully come in presenting it in this way to us, saying if we—you don't go our way, we're going to sue you.” And I just have a problem with that. And, I love Home Depot; now they probably won't let me in their store anymore after what I'm saying, but I like them in Sherwood and I like them in Tigard. And if you look at how those stores operate, okay, look at the road designs. They're not the loop what we have, which encompasses a great deal of things that we have around there. We have the city hall, we have small pop stores, we have food stores. It just won't fit. In the concept that they would like you to believe.

So I'm sorry I'm not as elegant as I could be in front of a jury, but I'm just really concerned about the thought that we would let this conglomerate in this community and dictate how we design our city is which they are presenting now. You know, they're just coming in here and it really kind of ticks me off that they would bring their law firm from downtown and drive up the time and effort that our good City planners do, and to present this, usually I've seen our Staff from the City endorse things. When I think, oh boy, you know, why are they doing this? But they have essentially honored the plan that was designed for our city and our community. And I'd ask you to support them. Thank you. I'm sorry I took too much time.

Daniel Pauly, Planning Manager: Excuse me, Mr. O'Neil, for the record, can you state your address or that it's on the card?

Shawn O'Neil: No, boy, he did that on purpose because it's on the card. Thank you.

Chair Barrett: Are there any questions for Mr. O'Neil? Okay. Thank you, Mr. O'Neil. Next, Mr. Aaron Lemka.

Aaron Lemka: Good evening, my name is Aaron Lemke. I am a 25-year resident of Wilsonville and I manage the Ace Hardware over on Town Center Loop. I am in opposition to Home Depot coming in here because it would dramatically impact our business, quite possibly could kill our store. So, and I second his, uh, sentiment on the traffic. The traffic that we deal with on Wilsonville Road and Town Center Loop is problematic now. I think that having a Home Depot come in there would further that, especially with the large trucks, delivery trucks that are involved in a Home Depot. The Town Center Loop recently being downgraded from two lanes to one to incorporate a bike lane. It's just, I don't think it's ideally set up for large delivery trucks and I think the Home Depot in there is not a great fit. And that's all I have.

Chair Barrett: Are there questions for him? I have a question for you.

Mr. Pauly: And again, a reminder to state—

Aaron Lemka: Aaron Lemka and my address is on the comment card.

Chair Barrett: So, you work for Ace Hardware?

Mr. Lemka: Thanks. Yes, ma'am.

Chair Barrett: Is it an electronics store?

Mr. Lemka: No, ma'am.

Chair Barrett: Okay, thank you. Okay. Let's see. Is there anyone online?

Shelley White: There's nobody online.

Chair Barrett: All right.

Mr. Pauly: I do have one email to read into the record.

Chair Barrett: Okay.

Mr. Pauly: Let me, let me make sure there's no others that have popped up recently. So, when you're ready, I can do that.

Chair Barrett: Are you ready?

Stephanie Davidson, Assistant City Attorney: Yeah. Are you ready? Okay. Just making sure.

[01:09:28]

Mr. Pauly: Okay. So, this was from Dave Wartman. "I'm opposed to Home Depot locating in the Town Center. This runs completely counter to the City's Town Center Master Plan. What's more, Oregon is in a housing crisis. The City has climate friendly equitable communities, obligations that both strongly point to this being a mixed-use development. Wilsonville has enough big—chain big boxes, what we really need is a vibrant walkable city center. Respectfully, David Wartman, Wilsonville."

So, that'd be Exhibit D3 that we can put in the record.

Transcriptionist: That was received during the meeting?

Mr. Pauly: That was received just prior to the meeting.

Transcriptionist: Thank you.

Chair Barrett: All right, is there anyone wishing to deliver testimony that we have not already asked? Okay. Having heard all public testimony, does the Applicant have any rebuttal or responsive testimony that the Applicant wishes to present?

Mr. Katzaroff: For the record, Ken Katzaroff. My address is on the card—or the sign-in sheet. Just two quick things. Traffic. We've submitted evidence from a traffic engineer, which is controlling on this issue; it's the only evidence in the record. We're happy to do additional analysis and provide that if it's relevant. And with that is a third request, I think, to leave the record open. . And then, I just wanna clarify one thing. I, I wasn't threatening attorney fees. What I was saying is that those cases....that it's a real issue in Oregon law, number one, and that the way LUBA decided that case particular, the Waveseer case, was required under statute. It's very rare. So that's not what I was doing or threatening. I was just saying that, hey, this is—this codification requirement is real, and it's not something that's been addressed either by the Applicant or City Staff at this point in time. That's all I was saying. Do you have additional questions for the Applicant?

Ms. Davidson: I just want to acknowledge that we hear your request to leave the record open.

Chair Barrett: Okay. Do you want to start with the questions or, do you?

Mr. Mesbah: I don't want to start.

Chair Barrett: Okay. I have questions. I have lots of questions. Hold on. Looking for my—I was taking notes. Okay. The Staff report addresses a case that's [Fralely/Deschutes County](#) that talks about the scope of uses being narrow in nonconformance cases. And I was wondering, you're asking for us to consider a use that's broader than what the City Planner [undesignates](#). [1:15:22] So, is there a case law that supports that ask?

Mr. Katzaroff: Keenan, you want to address this?

Keenan Ordon-Bakalian, Schwabe Williamson & Wyatt, P.C: We'd be more likely to respond in writing on this, but, I mean, I'm happy to address, just generally the case law.

Mr. Katzaroff: Sure.

Mr. Ordon-Bakalian: So, don't have the citations in front of me, we're—

Mr. Pauly: --And could you speak more directly into the mic so it's clear on the record? Thanks.

Mr. Ordon-Bakalian: Yeah. And also, for the record, Keenan Ordon-Bakalian also with Schwalbe, Williamson & Wyatt. My address remains the same. Also, counsel for Home Depot. So again, we'll follow up with citations on this, but there is case law, non-conforming use case law in Oregon that does address the scope of non-conforming uses, and continuations of use, even if the distinction is necessarily different between the occupants and the activities they are conducting. I believe we put those in the record again, understanding it's not on the record for this case, but in our final legal argument that you reviewed for the Class 1 application. We're happy to kind of elaborate on those and apply them to this application specifically. But again, yes, there are cases that do address that, and I do think they are controlling in this instance.

Mr. Katzaroff: And I would add to that you have to also put it through the lens of the codification requirement. So, the actual use that is allowed, or was permitted, still has to be something that's articulated in the Code.

Chair Barrett: And is that in the scope of our decision or is that something that City—who decides that?

Ms. Davidson: So, I believe that this issue has already been decided by the DRB in the Class 1 proceeding, which is currently on appeal to City Council. As we said in the Staff report, the scope of the non-conforming use is Step 1, so...

Chair Barrett: Okay, what else?

Mr. Katzaroff: And I would just say, I'm not, I'm not sure we agree on that, but we can address that further in writing. And—

Chair Barrett: Well, you keep saying CC&Rs, and I don't think that's what we are allowed to make a decision on in this proceeding.

Mr. Katzaroff: I mentioned the CC&Rs once and that was at the end of our testimony and it's not relevant to the question about continuation of use.

Chair Barrett: Okay.

Mr. Katzaroff: My entire point of raising that issue was to let the this Board know that there's an additional thing to consider when we're looking at the Town Center Plan as a whole, because we—the City went through a monumental planning effort that should be applauded, and everybody is trying to develop and the Town Center Plan should be trying to do it consistently with that. Right now, that Plan cannot be effectuated period based upon these CC&Rs. And, that is something that has to be amended in order for the Town Center Plan to actually be effectuated for multifamily development or many of the other uses that are planned for it. And as a prospective tenant continuing a use there, we want to be a part of making those amendments occur so that we can be a partner with that.

Right now, the way those CC&Rs are drafted, and I wasn't going to get into this too much in the weeds, but I will tell you, right now, the way those CC&Rs are drafted, any particular user that has more than 30,000 square feet, i.e. a Fry's Electronics or Home Depot or a Safeway, can deny an amendment to those CC&Rs. And so, rather than being a party to stand in the way of that, we'd much rather be a partner with the City and have both our store continue its use and effectuate the rest of the plan, which is something we can help bring to the table.

Mr. Ordon-Bakalian: I think one thing to add as well, too, is we're talking about a non-conforming use analysis here. But there also has been mention about future development applications, and the application of the Town Center Plan and the existing zoning of the subject property. Those CC&Rs are directly relevant to that. So, I think there's a reason that it was raised here.

Mr. Katzaroff: Yeah, so different than the continuation of use, but certainly relevant to the consideration of whether or not it's consistent with the Plan.

Chair Barrett: So, you are considering a continuation of use currently, but if you were to develop, you would have to submit all of the proposals and requests, and then it would be a not continuation of the use of the land, right?

Mr. Katzaroff: That, that is not what we're saying. No, what we're saying is, is that there are other uses in the Town Center Plan. There's other uses on the properties that are covered by these CC&Rs, including this one, that in order to effectuate development on them, the CC&Rs will have to be amended. Okay? That's all I'm saying. [1:19:53]

Chair Barrett: Okay. Okay, my last question for you is kind of a broad one. There's a lot of procedures in place to develop in Wilsonville, why are you going about it this way when you could have just submitted us a master plan on a place that would fit the Home Depot.

Mr. Katzaroff: I'm, not sure I have an answer to that other than—

Mr. Simmons: Yeah, is that a site selection question? Why do we want to be in Wilsonville, or...?

Chair Barrett: I'm just trying to figure out why we have, why it's—why this difficult process?

Mr. Simmons: Oh, I don't know that we're the ones making it difficult to be honest. So the—what Home Depot has identified is an empty box that would fit our store. And, you know, the procedures to get our business into that box, you know, vary based off of jurisdiction, but in this case, we had to first apply for the Class 1 for the non-conforming use of that existing structure, and then two, for the Class 2, that we are a—I guess for a layman's term, continuing of the same commercial retail use. So, the process associated with Home Depot going into the empty box is really being driven by the City of Wilsonville, not necessarily us.

Chair Barrett: Makes sense. Thank you. Sorry, I hogged all the questions. You guys have some questions for them?

Mr. Mesbah: Not for the Applicant.

Chair Barrett: Not for the Applicant, okay. Thank you for your time.

Mr. Ordon-Bakalian: Thank you very much. We appreciate it.

Mr. Katzaroff: Thank you.

Chair Barrett: Do Board members have any additional questions of Staff and Staff report based on the testimony and information provided by the Applicant?

Mr. Andrews: I have a question for the City Staff, I guess. So, there's this large building sitting in the middle of town. Is there any acceptable use for that, that according to current regulations and stuff?

Ms. Luxhoj: Well, so one continuation, if it were a continuation of use, for instance if another electronics-related retail store were to want to locate there; so, something like a Best Buy, that would be a similar use to, you know, consistent with that, what has been determined to be the legally established non-conforming use at the property.

Kimberly Rybold, Senior Planner: And I'll add to that as well. So, the Town Center Zone now regulates permitted uses in the Town Center. The footprint limitation applies in the Town Center Zone only to retail uses. There are other uses that are allowed under the Town Center Zone that do not have a footprint limitation. So, conceivably uses within that zone that are permitted, that

are larger than a footprint of 30,000 square feet could potentially also locate it into that building. As this Board has discussed and been provided information with on previously, there's other considerations at play beyond the use. So, the site conditions on the structures also come into play, and so that is where the Applicant has chosen to pursue this process that falls under the non-conforming standards.

Alternatively, one could also apply through the Town Center Zone to get a new planned development approval for the site. That is not what the Applicant has elected to do at this time. There are provisions to apply for things like waivers. There is actually a provision that is built into the Town Center Zone that contemplates the possibility of a waiver process, specifically for retail users that are having a footprint greater than 30,000 square feet, so that is another option. But again, that is separate land use approval process than what the Applicant has elected to apply for at this time. And so, I would just note that the Applicant's choice has been to go through the non-conforming process in terms of this particular use and user. I would also note that—so there is the continuation of use under the non-conforming standards. There's also a process whereby a non-conforming use can go through a change of use process. Again, that is not what the Applicant has applied for. But that is another option for someone who seeks to change a currently existing non-conforming use. But again, as Cindy noted in her presentation, that is outside the scope of this particular proceeding.

Chair Barrett: More questions?

Mr. Mesbah: Well, I have a general question to Staff. In response to what you heard from the Applicant, do you have any additional information or response for the record?

Ms. Rybold: Sure. I think probably Stephanie and I both do. I'll high highlight a couple of things and then turn it over to you.

I would like to clarify the statement that Cindy made in her presentation about an additional land use application process. Again, I would just clarify that she noted that that was for any additional proposed development, so not what they have applied for right now, but for instance, future residential development, that is what she stated was subject to an additional land use process. But again, based on the application materials that we had and what the Applicant applied for, we are processing this purely as a request for a continuation of use.

I would like to note that even though it is not part of this decision, just to clarify, Figure 3.6 in the Town Center Plan, I would just need to note that's an illustrative image. There's a series of illustrative images in the Town Center Plan that illustrate concepts of how the Town Center could build out over time. I would clarify that this image is in no way construed to imply that just because that existing building footprint is there in that image, that that actually gives it a status in the Plan that it is planned to be there. That is merely a conceptual drawing.

And so, just to be clear we do not have any proposed development in this current development application and so anything that would be something conceiving of how to use the site in line with the Town Center Zone would go through a planned development process before the Development Review Board and would apply the standards of Section 4.132.

I would also just note, and Stephanie will likely be able to speak to this more, but in terms of CC&Rs, this is not a development criteria that the City uses in determining whether or not we should be approving development applications. So, these are not under our purview. And so any decisions made by the Development Review Board should not consider the presence or absence of CC&Rs and how they may or may not have standards for use.

I would also note any implication that we're looking at, changes in parking usage or changes in trip generation, inherently apply a change of use as opposed to a continuation of use. And, in terms of image comparisons that were presented in the Applicant's materials, I would just note that you know, we kind of look at it like a Venn diagram where there might be some components of the electronics-related retail store and some components of the home improvement warehouse that might look the same or function the same. In the recommendation that Staff has, we do highlight that it's really the differences that have been presented within the Applicant's materials, including statements within their narrative about the types of functions that they have that do vary from what the current occupant had and functioned as on June 5th, 2019. That's all I have to say for right now. I'll turn it over to Stephanie for some additional clarification.

Ms. Davidson: Thank you. I just want to put on the record that we looked up the case citations that were provided by Ken Katzaroff with the Applicants team. In our opinion, the statute at issue in those cases applies to only counties. There are some other distinctions that we would draw, so just want to put it on the record that we disagree with the statement that was made about those cases earlier. And I just want to emphasize that Staff still supports what we wrote in our Staff report in terms of what the analysis is. The fact that the Applicant has the burden of proof, the City is not obligated to produce evidence to support its position in this case. And again, the scope is pretty narrow. The only thing before the DRB tonight is whether or not Home Depot constitutes a continuation of use.

Chair Barrett: Any further questions? What, if any, discussion does any Board member wish to have to help ensure they have gathered all the information they need to make a decision? I note this is different than the discussion we'll have to deliberate once a motion is made. Discussion at this point should focus on ensuring understanding of the facts presented and clarifying particular points, rather than expressing conclusions, which we may do in a few moments.

I think we're leaving the record open? Okay, so we're just having discussion if we have any.

Mr. Andrews: I'm trying to formulate exactly my question, which is probably for you—

Transcriptionist: Excuse me, Mr. Andrews, could you speak into your microphone? I'm sorry. Thank you very much.

Mr. Andrews: Yeah, okay. So, the proposed use then, does, does not, was not permitted by the original 19—what was it, 1991 agreement is that—?

Ms. Davidson: Well, I would say in Staff's opinion, based on our analysis of the case law, the 1991 land use approvals are irrelevant to this decision. Also—

Mr. Andrews: What was the later one? There was a—the later...okay. Go ahead.

Ms. Davidson: Sorry, what was the second part of your question?

Mr. Andrews: Well, so there was a later time period where the City was making a specific use decisions, right? What was that?

Mr. Pauly: So, the original decision was in 91, as noted, and then the City changed the zoning in 2019, and when it changed the zoning, that original approval now essentially is, is irreverent because it doesn't—it's not based on that—irrelevant—because it's a legal non-conforming use. So, it can continue, the use that existed on that day in 2019 can continue, but any—you're not looking back at that 91.

Mr. Andrews: Okay.

Ms. Rybold: So, just to clarify on what Dan said. Essentially, you're not looking back on 1991 and anything that is legally non-conforming then falls under the requirements of Sections 4.189 to 4.192 of the Development Code.

Mr. Andrews: Okay, thank you.

Ms. Davidson: Sorry, just to chime in as well. I think the thing that you're asking about, I also want to emphasize, is beyond the scope of what's happening at DRB tonight. The starting point for tonight's decision is the existing DRB decision, which you know, is on appeal to City Council, but currently is a City decision. I believe it was that the non con—the scope of the non-conforming use in this case is a 159,400 square foot, electronics-related retail store. So, that is the starting point for tonight's decision.

Mr. Andrews: Thank you. Thank you all.

Chair Barrett: Okay, so I want to respect the 120-day period of time that we have to get this filed, so I want to ask, how do we close out this meeting in such a way to respect the evidence that I know wants to be submitted?

Ms. Davidson: So, you'll close the public hearing tonight, but we need to leave the record open until 5pm on next Monday, April 15th.

Chair Barrett: Is that acceptable to the Applicants?

Mr. Katzaroff: For the record, Ken Katzaroff, that's, that's acceptable in terms of new evidence, but I just want to be mindful that the Applicant still gets final legal argument, which technically isn't counted on the clock. Just FYI.

Chair Barrett: Do we have final legal argument in these kinds of cases? Sorry.

Ms. Davidson: Yeah, that's under—

Mr. Katzaroff: —977.97. [1:35:27]

Ms. Davidson: Okay, yeah.

Mr. Andrews: Meaning, we will review this again? Is that—

Ms. Davidson: Yes, you all will need to reconvene after the record is closed. So, they'll get, you know, everyone will get seven days to submit additional evidence. Then, depending on what happens, it could play out in a couple different ways, but ultimately, Applicant will have seven additional days to submit final legal argument. We will—Staff will work with you all to schedule you for that additional hearing when you make a decision—meeting. Sorry.

Mr. Andrews: Thank you.

Chair Barrett: Okay. So, scheduling wise, we can, I'm prepared to close the public hearing portion of this. Is there any other evidence that I need to—

Mr. Katzaroff: Oral hearing portion of it, not the written.

Chair Barrett: Yes, sorry, public, in person hearing tonight. Is that, is that sufficient? Okay. At 8:06 pm Did I do that right?

Ms. Davidson: Can you make clear that the record is held open until 5 pm on April 15th?

Chair Barrett: I move that the record remain open until 5 pm on, what's the date?

Mr. Pauly: April 15th.

Mr. Katzaroff: Tax day.

Chair Barrett: April 15th.

Ms. Davidson: Ken, can you go back to your seat? Thank you.

Mr. Mesbah: Can we have a short break?

Chair Barrett: What?

Mr. Mesbah: Can we have a short break?

Chair Barrett: Well, I think we're, we're getting to the end.

Mr. Mesbah: Are we?

Chair Barrett: Yes. Yes. Okay. So, we closed the record, so we don't have to decide tonight because we still need to wait—

Mr. Pauly: Closed the hearing, not the record.

Chair Barrett: Sorry. Hearing.

Mr. Pauly: It's clear in context, yes.

Ms. White: Sorry. I have one question. Do we need to move to add Exhibit D3 that was read into the record tonight as well?

Mr. Pauly: Well, we can move as part of the adoption. That would be part of the adoption.

Ms. White: Okay. Thank you.

Chair Barrett: Write those things down. Because we're not adopting anything yet.

Mr. Pauly: Correct.

Chair Barrett: Okay. Great. What did I miss? Okay, we close that. I think we're free to go, correct? I'm so sorry.

Transcriptionist: Was there a motion to close? We need—I heard move to, we need a second or a vote.

Chair Barrett: Please help. I'm sorry it's late.

Amanda Guile-Hinman, City Attorney: Thank you. Amanda Guile-Hindman, City Attorney. Chair, you have made a motion. You need a second, discussion, and then you can vote.

Chair Barrett: Thank you. I have moved to close this public forum.

Mr. Pauly: Well, so you closed the public forum, and then moved to hold the record open.

Chair Barrett: I move to hold the record open for seven days until 5 pm on April 15th. Do I have a second?

Mr. Andrews: Second.

Chair Barrett: Got it, okay. All in favor?

Mr. Andrews: Aye.

Mr. Mesbah: Aye.

Chair Barrett: Aye. Motion carries. We're opening—keeping the record open. Thank you for the clarification. I'm sorry. All right. What—do you need any other clarification? Okay, well great.

BOARD MEMBER COMMUNICATIONS

1. Recent City Council Action Minutes

Chair Barrett: The next item on our agenda is Board Member Communications. Do we have any?

Kamran Mesbah: Not me.

STAFF COMMUNICATIONS

Chair Barrett: All right. So that Staff Communications.

Daniel Pauly, Planning Director: None.

Chair Barrett: Do we need to on the record plan a date for the meeting?

Stephanie Davidson, Assistant City Attorney: I don't think we can at this point.

Chair Barrett: Okay.

Mr. Pauly: We will coordinate with you.

ADJOURNMENT

The meeting adjourned at 8:09 pm

ORDER ON APPEAL: DEVELOPMENT REVIEW BOARD RESOLUTION NO. 429
(Transcribed from Council President Akervall’s Oral Order):

WHEREAS, on October 30, 2023, the City received an application for Class I Review to confirm the status of the existing use and the structure at 29400 SW Town Center Loop West (the “Location”) from applicant/appellant Dan Zoldak, of Lars Andersen & Associates, Inc. (“Appellant”), requesting a Class I Review to confirm the status of the existing *non-conforming* use at the Location (this application is referred to as docket no. ADMN23-0029 in City records and hereinafter referred to as the “Application”); and

WHEREAS, on December 28, 2023, the Planning Director issued a Notice of Planning Director Determination (the “Planning Director’s Decision”); and

WHEREAS, Appellant submitted a notice of appeal of the Planning Director’s Decision to the Development Review Board (the “DRB”) on January 10, 2024 (this appeal is referred to as docket no. DB24-0002 in City records and hereinafter referred to as the “DRB Appeal”); and

WHEREAS, the DRB held a public hearing for the DRB Appeal proceeding on February 26, 2024 (the “DRB Hearing”); and

WHEREAS, the DRB closed the public hearing on February 26, 2024, but kept the written record open to allow the submission of evidence and legal arguments, and reconvened to address the appeal on March 14, 2024; and

WHEREAS, on March 14, 2024 the DRB unanimously adopted Resolution No. 429, which was a written decision regarding all issues reviewed during the DRB Hearing; and

WHEREAS, on March 27, 2024, the Appellant submitted the document titled “Appellant’s Notice of Appeal” to the City (the “Notice of Appeal”) within the prescribed appeal period; and

WHEREAS, pursuant to the Notice of Appeal (*see* Notice of Appeal, p. 2), Appellant challenges the following DRB actions:

1. Rejection of certain materials and information from the record on March 14, 2024;
2. Adoption of the staff report presented to it in preparation for the February 26, 2024 meeting; and,
3. Finding that the legally established non-conforming use at the Location is “a 159,400 square-foot electronics-related retail store” (together, the “Challenged Actions”); and,

WHEREAS, on April 1, 2024, City Council adopted an order establishing the scope of this appeal proceeding and the procedure that City Council would follow during this appeal proceeding on April 1, 2024 (the “Procedural Order”); and,

WHEREAS, City Council held an appeal proceeding to address this matter on April 15, 2024 in accordance with the Procedural Order.

FINDINGS:


1. June 5, 2019 is the date of restrictive zoning (i.e., the point in time when the use of the Location must be evaluated to determine what uses are protectable as non-conforming uses).
2. Appellant asked City Council to recognize a non-conforming use for either a “commercial retail center” or “retail, office, warehouse, manufacturing, and service store” use (the “Proposed Scope of Non-Conforming Use”). Appellant has the burden of proof in this appeal to establish the nature and extent of the actual use of the Location as of June 5, 2019: Appellant must prove that the actual use of the Location as of June 5, 2019 supports the recognition of the Proposed Scope of Non-Conforming Use. City Council finds that Appellant has not satisfied its burden of proof.
 - a. Appellant has not provided any evidence that City Council deems relevant to the determination of the Proposed Scope of Non-Conforming Use. Furthermore, Appellant requested recognition of different types of uses throughout this Class I review process – initially from “retail, office, warehouse, manufacturing, and service store” in its Application to “commercial retail center” in its DRB Appeal.
 - b. City Council deems the 1991 Decision irrelevant to this decision. Appellant’s position that the 1991 Decision is the controlling authority is not supported by any legal authority, and it is contrary to extensive legal authority presented by City staff.
 - c. City Council deems the zoning regulations in place in 1991 irrelevant to this decision. This includes, but is not limited to, what uses were allowable in the Planned Development Commercial zone.
 - d. City Council deems evidence, information, and testimony regarding Home Depot, or any proposed or future occupant, of the Location, irrelevant to this decision. This includes, but is not limited to, the letter dated March 4, 2024 from Lars Andersen & Associates, Inc. regarding “Home Depot, Wilsonville, OR . . .” and the Memorandum dated March 4, 2024 from Amy Wasserman and Chis Forster, P.E. of Transportation Engineering Northwest.
 - e. City Council deems any argument regarding an alleged taking irrelevant to this decision.
3. DRB followed correct procedures, and in particular, the DRB did not err when it adopted the staff report dated February 15, 2024, and rejected certain materials and evidence from the record. But for clarity, the record for any appeal of this order to the Land Use Board of Appeals shall be the unredacted record reviewed by City Council.
4. The City Council finds relevant Appellant’s admission that a “Fry’s Electronics” operated at the Location from 1991 to 2021. *See* Attachment 3 (in the City Council Record), p. 84. The City Council further finds relevant certain descriptions of electronics retail uses

occurring at the Location, as consistent with an electronics-related retail store. Also found on page 84.

- 5. Assuming, for the sake of argument only, that consideration of the 1991 Decision is determined to be relevant by future reviewing body or bodies, the City Council finds that the facts described in point 4 above are consistent with the 1991 Decision’s adopted staff report, which describes, on the first page, that the approved development is “a 159,400 square foot electronics-related retail store.” Attachment 3 (the City Council Records), p. 98.


IT IS THEREFORE ORDERED, by the City of Wilsonville City Council, at its regular meeting on this 15th day of April 2024, that the Development Review Board decision in Resolution No. 429, determining the scope of the legally established non-conforming use at the Location is “a 159,400 square-foot electronics-related retail store,” is affirmed, and further, that this was correct and appropriate decision made based on applicable laws, policies, and standards. The Appeal is therefore respectfully denied.

DATED this 15th day of April 2024.

DocuSigned by:

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 JULIE FITZGERALD MAYOR

This Order may be appealed to the Oregon Land Use Board of Appeals, within the allowed time frame and in accordance with the requirements set forth by the Oregon Land Use Board of Appeals.

ATTEST:

DocuSigned by:

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 Kimberly Veliz, City Recorder

SUMMARY OF VOTES:

Mayor Fitzgerald	Yes
Council President Akervall	Yes
Councilor Linville	Excused
Councilor Berry	Yes
Councilor Dunwell	Yes

APPELLANT'S MATERIALS

APPELLANT'S MATERIALS

Notice of Appeal (DRB Resolution No. 432) with Exhibits A-E

Link:

https://www.ci.wilsonville.or.us/sites/default/files/fileattachments/city_council/meeting/128362/appellants_materials_-_notice_of_appeal_drb_res._no._432_with_exhibits_a-e.pdf