

DEVELOPMENT REVIEW BOARD MEETING

MONDAY, JUNE 24, 2024

6:30 PM

Consent Agenda:

1. Approval of minutes from the February 26, 2024
DRB Panel B meeting



**DEVELOPMENT REVIEW BOARD PANEL B
MEETING MINUTES**

February 26, 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 p.m. on Monday, February 26, 2024. Chair Rachelle Barrett called the meeting to order at 6:32 p.m., followed by roll call.

CHAIR'S REMARKS

ROLL CALL

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

Staff present: Daniel Pauly, Stephanie Davidson, Amy Pepper, Kimberly Rybold, Amanda Guile-Hinman, Miranda Bateschell, Georgia McAlister, 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

1. Approval of minutes of January 22, 2024 DRB Panel B meeting

Alice Galloway made a motion to approve the January 22, 2024 DRB Panel B meeting minutes as presented. John Andrews seconded the motion, which passed unanimously.

PUBLIC HEARINGS

2. **Resolution No. 428. PGE Memorial Substation.** The applicant is requesting approval of a Conditional Use Permit and Site Design Review for development of the PGE Memorial Substation adjacent to SW Parkway Avenue and the I-5 Freeway.

Case Files:

DB23-0012 PGE Memorial Substation

-Site Design Review (SDR23-0005)

-Conditional Use Permit (CUP23-0001)

Chair Barrett called the public hearing to order at 6:37 p.m. and read the conduct of hearing format into the record. All Board members declared for the record that they had visited the site. 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.

Georgia McAlister, 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.

Ms. McAlister presented the Staff report on the PGE Memorial Substation via PowerPoint, briefly noting the site's location and surrounding features, and reviewing the requested applications with these key comments:

- Currently a green field with a public sidewalk, the site also contained the Failmezger Heritage Tree, located along the east property line. The site was designated Industrial in the Comprehensive Plan and the proposed use was compatible with the PDI Zone and Comprehensive Plan designation. (Slide 2)
- Proper noticing was followed for this application. On February 6, 2024, notice was mailed to all property owners within 250ft of the subject property, published in the newspaper, and placed on the site and on the City's website.
 - No public comments were received during the comment period for the project.
- There were two requests before the DRB tonight for the PGE Memorial Substation application. The first request was objective in nature as it involved verification of compliance with Code standards. The other request for a Conditional Use Permit involved discretionary review.
- For the Site Design, the Applicant had used appropriate professional services to design the proposed substation and associated landscaping. The proposed structure would be screened from surrounding uses with landscaping and fencing. Plants selected for screening included a combination of cascara trees, large and small evergreen shrubs, and ground cover. The chosen species were selected to provide a variety of heights and sizes that would not be bare in winter. Landscape screening was proposed along the north, east, and south perimeter of the fence. Landscaping was also incorporated on the boundaries of the site and would provide shade, stormwater mitigation, and aesthetic value. (Slide 5)
 - Condition of Approval PDB 7 would require that landscape screenings installed along the western perimeter facing I-5 be substantially similar to the screening proposed on the north, east, and south perimeters. The site would be configured to allow for efficient use as well as for repairs and regular maintenance.
- Conditional use permits were intended for uses that might not be compatible with the surrounding uses, and therefore, certain uses were only permitted through Conditional Use Permits. (Slide 6)
 - Substations were only permitted through a Conditional Use Permit, and as such, were not an outright allowed use in any zone. The purpose of permitting substations solely through a Conditional Use Permit was to ensure the proposal was consistent with the Comprehensive Plan, Chapter 4, of the Wilsonville Development Code, the characteristics of the site were suitable for the proposed use, all required public facilities and services adequately met the needs of the proposed use, and that the proposed use would not alter the character of the surrounding area.

- There was no evidence that the substation would alter the industrial character of the surrounding area as there was already an existing substation located just a few parcels south of the subject property. The immediate surrounding uses, such as the commercial use to the south and church to the north of the property, were not traditional uses within the PDI Zone. The substation fit well as a more static use that would not bring daily customers or traffic.
- The substation would fortify and enhance the performance of the electrical grid within Wilsonville, and benefit existing industrial users, and therefore it would not negatively impact the surrounding uses.
- To address potential noise impact, the PGE transformers would be the only equipment that would emit a consistent sound within the facility. The technical specifications set maximum sound levels for the transformers and the manufacturer would provide test data to confirm the actual values prior to the equipment leaving the factory.
 - It was anticipated that at its loudest, the decibel level would only be 10 decibels above a normal conversational level, and sound tests would be completed during the factory acceptance testing. Overall, it was anticipated that only a low level of noise would be produced by the substation.
- The project proposed high screen landscaping to mitigate any potential noise impacts on adjacent properties. Additionally, the site and its neighboring properties were directly adjacent to the consistent high level of noise from I-5. It was unlikely any sound emitted from the substation would impact adjacent properties greater than current conditions.
 - To mitigate the visual impact of the substation, the Applicant proposed landscaping that met the high screen standard on three sides of the substation, including along SW Parkway Ave where it was not in conflict with the Heritage Tree, along the boundary of the church property to the north, and along the boundary with the Garden Center to the south.
 - A partially-sight-obscuring fence 8 ft in height surrounded the development. Only storm water facilities and an access drive were proposed between the fence and the high screen landscape of the adjacent properties. Condition of Approval PDB 7 required that the High Screen Standard be met along the west property line that abutted I-5 as well.
 - Additionally, PGE designed all its new facilities with Dark Sky fixtures in an attempt to minimize light pollution as much as possible.
- The 100-year-old Failmezger Heritage Tree on the west property line of the site was an impressive White oak with a 42-inch DBH and had held the honor of Heritage Tree Designation since 2009.
 - The tree had been preserved through the construction of Parkway Ave as well as the sidewalk that looped to the east of the tree, and the tree's unique history was memorialized with a fencepost from the original Failmezger family farm which was melded into the trunk of the oak tree. Aside from that construction, the site had been largely undisturbed, and the tree had thrived to the best of its ability in the urban environment that had grown around it.
 - The installation of the substation would be a notable disruption in the long undisturbed parcel where the tree grew. Careful consideration had been taken to ensure the installation of the substation and associated underground lines would not negatively impact the Heritage Tree. The tree protection radius would extend 45 ft from the center of the trunk and 90 ft parallel to SW Parkway Ave.
 - A tree protection easement was proposed and would ensure that care of the Heritage Tree continued after construction.

Chair Barrett noted it was clear the Applicant had taken a number of protections into consideration and asked about fire mitigation.

Ms. McAlister replied she had not looked into that but understood TVF&R had been involved and deferred to the Applicant for further information.

Chair Barrett confirmed there were no further questions from the Board and called for the Applicant's presentation.

Jordan Messinger, PGE, 121 SW Salmon St, Portland, OR, 97204 thanked Ms. McAlister for her accurate portrayal of the project and provided some extra context with the following comments:

- The subject project, along with the existing substation to the south of the site, would benefit the City by bolstering Wilsonville's growth and would allow PGE to continue to provide more reliable power into the future and to accommodate that growth.
- Additionally, it was anticipated that the substation to the south would only be operational for approximately another decade, and the new facility would have the capacity for both future growth and to take over the load currently provided by the older substation.
- There was no space on the site of the existing substation to expand and bring the substation up to modern standards, which was why the Applicant had selected the site to the north.

John Andrews asked when construction would begin and approximately how long the project would take.

Mr. Messinger responded PGE's goal was to start in May or June provided that the Applicant could get through the permitting process before then. Total duration should be about six months.

Chair Barrett asked what steps had been taken to mitigate fire.

Mr. Messinger replied that PGE designed all substations by regulatory requirements and other electrical code requirements, such as no flammable materials inside the substation and transformers filled with a mineral oil. In addition, the facilities around it were designed to contain it should there be a leak. PGE also coordinated with local fire jurisdictions for mitigation efforts if there was an event.

Mr. Andrews noted that years ago, when walking under the overhead power lines on Canyon Creek Rd, he had heard a loud hum and his hair had moved around. He asked if PGE had used overhead grounding wires for the proposed substation to prevent that from happening.

Mr. Messinger answered no. He explained that the proposed facility would be converting 115 KV power down to 12.5 KV, the voltage distributed to homes and businesses. The aforementioned Canyon Creek Rd line was likely 230 or 500 KV, a higher voltage which could generate some sound and induction. Although the proposed transformers themselves could hum at times, specifically during hot weather when there was higher usage, a standard had been set for maximum sound level. Additionally, because it was next to I-5, it would be unlikely that any noise would be heard above the freeway noise.

Chair Barrett called for public testimony regarding the application.

Kerry Gillespie, Owner, Gillespie Properties, noted his company was directly east of the subject property. He asked if any overhead power lines would flow east of the substation, as he was concerned about hums, buzzing, and possible interference with power equipment in his business. He asked if any shielding would be in place to mitigate those issues.

- He noted the proposal had stated that the grading was relatively flat; however, Mentor had increased the grading approximately 15 feet approaching I-5. He asked if the Applicant would bring that back to street level.

Chair Barrett confirmed with Staff that no one else present at City Hall or on Zoom wanted to testify. She called for the Applicant's rebuttal.

Mr. Messinger responded that onsite grading would be done to remove the fill that had accumulated over the years to pull that grading back down, noting that when PGE was finished, the grading would be lower than it was currently. He confirmed that new overhead power lines would go into the site to feed the substation for the higher voltage, but they would come from the west, across I-5, via an existing 115 KV line on Boones Ferry Rd. Ultimately, there would be two new, short taps that crossed the freeway directly into the substation site but nothing going east.

Ms. McAlister noted there had been a question about noise and shielding across the site and whether it would be noticeable across the street to the east.

Mr. Messinger reiterated that noise levels would be low, and no interference should extend beyond the boundary of the fence around the subject property.

Mr. Andrews noted that a lot of high-powered transformers contained fluorinated hydro-carbonated liquids and asked if the proposed transformers would contain any such material.

Mr. Messinger explained that although Mr. Andrews was correct regarding older transformers, PGE had shifted over to mineral oil for new ones.

Mr. Andrews understood that immature trees and shrubbery would be planted that would grow to eventually screen the facility from the roadway.

Mr. Pauly received confirmation from Mr. Messinger in the audience that Mr. Andrews was correct.

Chair Barrett confirmed there were no additional questions or discussion and closed the public hearing at 7:02 pm.

Alice Galloway moved to adopt the Staff report as presented. Kamran Mesbah seconded the motion, which passed unanimously.

John Andrews moved to adopt Resolution No. 428. The motion was seconded by Alice Galloway and passed unanimously.

Chair Barrett read the rules of appeal into the record.

- 3. Resolution No. 429. Appeal of Administrative Decision.** The applicant is appealing the Planning Director's determination of non-conformance in Case File ADMN23-0029.

Case File:

DB24-0002 Appeal of Administrative Decision

Chair Barrett called the public hearing to order at 7:05 p.m. and read the conduct of hearing format into the record. Alice Galloway and John Andrews declared for the record that they had visited the site. 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.

Kamran Mesbah noted for the record that he served on the Planning Commission when the Town Center Plan was adopted.

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 exhibit was entered into the record:

- Exhibit C1: Written comments received from the Home Building Association (HBA) after publication of the DRB B February 26, 2024 meeting packet.

Ms. Luxhoj presented the Staff report via PowerPoint (Exhibit A2), briefly noting the subject property's address, referenced as the Location, and zoning, and reviewing the procedural background and key considerations of the appeal as follows:

- On October 30, 2023, the City received a Class 1 Review application to confirm the status of an existing non-conforming use and structure at the Location previously occupied by Fry's Electronics, an electronics retail store vacant since 2021. The City deemed the application complete on November 29, 2023, processing the request as a Class 1 Planning Director Determination per Development Code Section 4.030(.01)A7, and provided notice of Planning Director Determination on December 28, 2023. (Slide 3)
 - The Appellant submitted a notice of appeal of the Planning Director's decision on January 10, 2024.
- Development Code Section 4.030(.01)A gave the Planning Director authority to address non-discretionary matters, including Class 1 Review applications, and to process these applications as a ministerial action without public notice or public hearing.
 - Per Section 4.030(.01)A7, a determination that an existing use or structure is a non-conforming use or non-conforming structure was to be processed as a Class 1 Review, however in cases where any uncertainty exists as to the history of the property, the Planning Director may choose to process such determinations as Class 2 Review.

- The appeal of the Class 1 Review application ADMN23-0029, currently before the Development Review Board (DRB), was a de novo review under Development Code Subsection 4.022(.01), meaning the DRB must approach the Class 1 Review Application as a brand-new application. The DRB's decision should be based on testimony, evidence, and other materials submitted by the Applicant to the City in the Class 1 Review application as well as affirm, reverse, or modify in whole or part a decision under review.
 - The decision under review was the Planning Director's decision in Case File Number ADMN23-00 29. To apply the applicable 120-day time limit, a final decision on the Class 1 Review application, including any appeals must be rendered by March 28, 2024.
- Staff noted that the City was currently processing a separate but related Class 2 Review application, Case File AR23-0031, per Development Code Subsection 4.030(.01) B3, filed by the Applicant on December 15, 2023. Any issues subject to the Class 2 Review, such as the scope of what non-conforming use may be continued at the Location, were beyond the scope of this appeal proceeding.
 - Staff further noted that the findings related to general submission requirements on Pages 13 to 14 of the DRB Staff report for tonight's public hearing included a list of documents and/or testimony contained within the Appellant's Exhibit B1 that were deemed rejected or excluded from the record because the materials were beyond the scope of and/or not relevant to the Class 1 Review. Staff respectfully requested that the DRB kept this in mind during tonight's public hearing as testimony was presented. If this raised any questions related to the scope of review, Board members were invited to ask Staff what was relevant to tonight's proceedings.
- The applicable legal standards related to non-conformance were discussed in detail in the DRB Staff report; however, Staff believed summarizing some key points of case law would be helpful (Slide 7):
 - Before a use can be deemed non-conforming, it must be impermissible under a current land use ordinance. Generally, a non-conforming use was understood to be one that was contrary to a land use ordinance, but that, nonetheless, was allowed to continue because the use lawfully existed prior to the enactment of the ordinance.
 - Non-conforming uses were not favored because by definition they detract from the effectiveness of a comprehensive zoning plan. Accordingly, provisions for the continuation of non-conforming uses were strictly construed against continuation of the use, and, conversely, provisions for limiting non-conforming uses were liberally construed to prevent the continuation or expansion of non-conforming uses as much as possible.
 - Once use was determined to be impermissible under a current land use ordinance, the question becomes, "May the use continue because it was legally protectable as non-conforming?" The purpose of a local government proceeding to determine the existence of a non-conforming use is to determine what use existed on the date restrictive regulations were applied.
- As stated in the DRB Staff report, Staff believed the Applicant in the Class 1 Review application requested an answer to three questions (Slide 8). Because tonight's public hearing was a de novo review of the Class 1 Review application, DRB should address each question; however, the notice of appeal does not challenge the Planning Director's decision on the second and third questions. The main point of disagreement between the Applicant and the City is the Planning Director's decision regarding the first question of non-conforming use.
 - The Staff report addressed each question in order, outlining the legal standard that applied to the question, then highlighting facts Staff believed were relevant to the question, and finally,

quoting the determination of the question as stated in the Planning Director's decision. She briefly summarized Staff's responses to the questions but asked the DRB to refer to the detailed findings in the Staff report as the basis for tonight's deliberation and decision.

- Is the Location a non-conforming use? Generally, a non-conforming use was understood to be one that was contrary to a current land use ordinance but allowed to continue because the use lawfully existed prior to the enactment of the ordinance. (Slide 9)
 - As stated, the Location was currently in the Town Center Zone. The ordinance implementing the Town Center zoning became effective on June 5, 2019. Permitted uses include retail sales and service of retail products under a footprint of 30,000 sq ft per use, office, personal, and professional services. The Commercial Mixed-Use Subdistrict of the Town Center zoning applied to roughly two-thirds of the Location, which also allowed single-user commercial or retail, such as a grocery store or retail establishment that may exceed 30,000 sq ft if located on more than one story of a multi-story building, provided the footprint of the building does not exceed 30,000 sq ft. The existing structure at the Location had a footprint of 124,215 sq ft in a single story with a partial mezzanine, which exceeded the footprint of 30,000 sq ft per retail user and the footprint limitation allowed in the Town Center Zone.
 - As of June 5, 2019, the actual use at the Location was a Fry's Electronics store, an electronics retail store with a total interior square footage of 159,400 sq ft and a footprint of 124,215 sq ft.
 - The Planning Director's decision addressed the non-conforming use inquiry as follows: the use is a legally established non-conforming use in the Town Center Zone.
- Does the Location contain a non-conforming structure? The structure as it currently existed did not conform to many of the Design and Development Standards in Subsection 4.132(.06), such as building placement and frontage requirements, location of parking in relation to the building, building setbacks, height and number of stories, facade design, and architectural materials and treatments. A waiver to these standards for the existing structure had not been applied for, nor had a waiver been granted.
 - The Planning Director's decision addressed the non-conforming structure inquiry as follows: the structure is a legally established non-conforming structure in the Town Center Zone. (Slide 10)
- Does the Location contain non-conforming site conditions? The existing site conditions did not comply with at least two City Code sections, including Subsection 4.132(.04)A, which required that all development in the Town Center Zone be consistent with the street network and multimodal network, and Subsection 4.132(.05)A, which required that all development be consistent with the open space network. Other site improvement standards of the Town Center Zone addressed such features as walkway connection to building entrances, parking location, landscape design, and plaza areas. Existing site conditions did not comply with these applicable standards.
 - The Planning Director's decision addressed the non-conforming site conditions inquiry as follows: the existing site conditions are legally established non-conforming site conditions in the Town Center Zone.
- Staff recommended that the DRB affirm the Planning Director's Determination of non-conformance in ADMN23-0029, determining that there is a legally established, non-conforming use at the

Location, specifically that the protected use is a 159,400 sq ft electronics related retail store; there is a legally established non-conforming structure at the Location; and there are legally established non-conforming site conditions at the Location.

Chair Barrett confirmed there were no questions from the Board and called for the Applicant's presentation.

Keenan Ordon-Bakalian, Schwabe Williamson & Wyatt, Portland, OR, representing the Applicant/Appellant, Home Depot, thanked the DRB members for their time and Staff for their work on the project.

Dan Zoldak, Lars Anderson & Associates, Fresno, CA introduced himself, along with Barry Simmons.

Mr. Ordon-Bakalian noted his team had not been provided and therefore had not read a comment that was received after the development review packet was submitted, so he requested that the record be held open for written testimony after this hearing. He presented the Appellant's presentation via PowerPoint (Exhibit B2) with the following comments:

- He briefly reviewed the background of the procedural history for the appeal as follows:
 - On October 30, 2023, Home Depot applied for a Class 1 Review to confirm the non-conforming use status of the existing use and structure at the property. Within this application, Home Depot indicated that its intention was to operate a Home Depot within the existing structure at the property once the property's non-conforming use status was confirmed.
 - On November 28, 2023, the City emailed the Appellant, Home Depot, stating that the Appellant's request for confirmation that Home Depot could continue operating at the property under the scope of the non-conforming use required an interpretation of the City's Development Code under the City's Class 2 procedures. The City provided the Appellant with several options, including an option where Staff proceeds with the Class 1 Review and in addition, Home Depot applies for a Class 2 Review, requesting a written interpretation regarding the classification and scope of the non-conforming use of the property. That email was in the record as well as in Staff's packet.
 - Home Depot chose to proceed with the option for a Class 2 Review and submitted the application on December 15, 2023. The application was deemed complete on January 12, 2024. On December 28, 2023, the City issued its decision for the Class 1 application which was before the DRB on appeal today.
- He reviewed the City's findings, which were also contained in the Applicant's notice of appeal, with the following comments (Slide 2):
 - The City's decision for a Class 1 application approved the non-conforming use of the property but contained several findings that the Appellant took issue with.
 - Some of the findings stated the non-conforming use is a 159,400 sq ft electronics retail store; a large format, single-story with partial mezzanine, single-user electronics retail store; or that it is a Fry's Electronics. In fact, Staff's decision was inconsistent because a Fry's Electronics and a single-user electronics retail store are two very different things. Although Fry's Electronics is an electronics retail store, the scope of the use is very different for those two purposes. Regardless, the Applicant disagreed with both of those conclusions within the Staff decision.

- The City's findings regarding the nature of the non-conforming use of the property were entirely unsupported within its decision. Staff did not cite to any evidence for coming to these conclusions, only that the non-conforming use is what Staff said it is.
- Moreover, Staff's packet for tonight's appeal hearing was also inconsistent because it contained a draft resolution that would have the DRB find that non-conforming use of the property is a 159,400 sq ft electronics related retail store; whereas the Staff report requested the DRB affirm the Planning Director's decision that the non-conforming use is a Fry's Electronics. Those again are two very different things.
- What should be controlling in this appeal is the 1991 Decision, which approved the original use of the subject property, and contained findings that conflicted with Staff's findings related to the Planning Director's Determination. The 1991 Decision was prepared on the basis of an anonymous company and Fry's Electronics was not included within that decision whatsoever; so, the fact that the non-conforming use could be a Fry's Electronics was inconsistent with the controlling document that approved the underlying use.
 - The request for the 1991 Decision sought approval of a 159,400 sq ft retail commercial building, not a single-user electronics retail store, and throughout the Staff report for the decision, which was adopted as part of the City's approval, the use being approved was repeatedly stated as a commercial retail use.
 - Comments in the Staff report stated that the building uses (Slide 4) related to parking standards, but the decision itself, which was on Page 3 (Slide 5), made no reference to parking standards whatsoever. The use of the building was the use of the property, which was a commercial retail use at that point.
 - Other findings and comments within the Staff report, which again, were adopted as the decision, stated that the use was a commercial retail use. Page 3 of the 1991 Decision stated, "It is apparent the remaining undeveloped property has become very desirable as reflected by this application for a 159,400 sq ft commercial retail store." A conclusionary finding also stated it was a retail commercial center. Other statements throughout the record and in the application materials for the 1991 Decisions discussed a commercial retail anchor store.
 - Sections 4.130 to 4.140 were the findings within the 1991 Decision related to zoning consistency, whether the use was allowed in underlying zone, which he believed at the time was Planned Development Commercial. (Slide 5) Finding 39 included a statement, "The proposed commercial/office uses were permitted in the overlay zones as part of the Town Center Master Plan." So, there was no reference to a single-user electronic retail store and certainly not to Fry's Electronics, which was nowhere in the decision. This was really where the Appellant took issue with the Planning Director's Determination.
- The Appellant respectfully disagreed with the Planning Director's Determination of the nature of the non-conforming use of the property as it was a commercial retail use controlled by the 1991 Decision. It was surprising that the Planning Director's Determination contained interpretations of use because the Appellant was under the impression, based on the November 28th email, that this would be addressed in the Class 2 proceeding. When the Class 1 Determination found non-conforming use, but then went as far as to find what the nature and scope of the use was, the Applicant was effectively forced to appeal to preserve their rights here.

- The City's interpretation of the non-conforming use was wrong; it was neither a single-user electronics retail store or Fry's Electronics because that was an impermissibly narrow interpretation of what was proved in the 1991 Decision, and it was not in accordance with any of the findings that were adopted.
- The Applicant noted for the record that City's interpretation of a prior decision was not afforded any deference were there to be an appeal to the Land Use Board of Appeals (LUBA) as determined in *Gould v. Deschutes County*; though several such cases exist. This was important because, generally, local jurisdictions may have deference in interpreting their land use code, but because this was a decision and not the land use code, it would be reviewed effectively as a clean slate before LUBA. (Slide 7)
- The DRB had the responsibility of reviewing the 1991 Decision in the first instance, as noted by this de novo hearing procedure. From the unambiguous request statement in the 1991 Decision, where it references a commercial retail use to the numerous references of the use being reviewed and approved, it was absolutely clear that the use approved within the 1991 Decision was commercial retail.
 - Due to the City's adoption of the Town Center Plan, the commercial retail use had been rendered non-conforming. Staff did a good job detailing why it conflicted with the current zoning designation for the subject property.
 - The Applicant was not disputing the non-conforming use, but just the nature of that use. They believed the commercial retail use was lawfully established, and why they had appealed the Planning Director's Determination narrowing the non-conforming use to a single-user electronics retail store or even a Fry's Electronics.
- While Staff might dislike the idea of a Home Depot at the subject property, believing it was inconsistent with the adopted 2019 City's Town Center Plan; however, Staff's position was inconsistent with the legal authorization and non-conforming use law in the State of Oregon, and certainly, Home Depot had the right to continue its lawfully established commercial retail non-conforming use of the property.
- He noted the Applicant was not talking about a traditional big-box retail use of the property, and since the DRB would likely see Home Depot's Class 2 application in the near future, the Applicant team would show Home Depot's vision of the site, which they believed were consistent with the vision and goals for the City's Town Center Plan.

Barry Simmons, Home Depot, Atlanta, GA, stated after reviewing the Town Center Plan, the Applicant believed they were actually in alignment with the Plan and hoped to further the Plan in partnership with the City of Wilsonville. He continued the Applicant's presentation via PowerPoint with these comments:

- Table 3.1 from the Town Center Plan showed the 300,000 existing commercial square footage that was adopted back in 2019. The City had no way of knowing Fry's would no longer be operating as of 2021. But today, Home Depot would like to reoccupy, re-energize, and make use of the existing 125,000 sq ft for its purpose. (Slide 9)
- Based on the size of its out parcels around the store, Home Depot's vision was to add 250 to 300 housing units around the store, a vision which closely aligned with the Town Center Plan for multi-family use in the area in the future. He noted the Town Center Plan was a 40-year plan, adding the first sentence in the lower right corner under Table 3.1 stated Town Center's

evolution would take time and contain many steps. Home Depot believed a future partnership with Wilsonville could be one of those steps to further that vision.

- On the displayed Town Center Future Scenario, he explained the image on the left was Phase 1, directly from the Town Center Plan, which indicated the existing 125,000 sq ft building with the purple indicating some infill of new housing, new street level, retail, etc. On the right was the site plan Home Depot envisioned for the 200 to 300 multifamily units with street-level retail within the four or five acres of out lots. (Slide 10)
- Two aerial renderings showed what the Applicant believed the development might look like within the 15-acre property in the future, with the Home Depot store tucked in behind multifamily residences in the Town Center. (Slide 11-12)
- Some might think no one would want to live next to a Home Depot; however, there were several places where a Home Depot was located in the middle of live-play-work communities. He briefly described three specific, relatively recent examples where Home Depots were part of larger development multifamily and multifamily/street retail developments in a high performing store in Atlanta, Georgia, as well as in Surrey, Canada, and Lynnwood, Washington. The store in Atlanta was built in 2006 with the housing completed in 2008, and the Lynnwood store was built in 2021 with the housing finished in 2022. Such developments, which included multifamily units and street-level retail closely aligned with what was expected with the Town Center Plan. (Slides 13-16)
- He appreciated the opportunity to share Home Depot's thoughts, noting the potential benefit for everyone to walk hand-in-hand with the Town Center Plan and reiterating that Home Depot was more in alignment with than opposed to the Town Center Plan.

Mr. Ordon-Bakalian reiterated the appeal proceeding was only necessary because the Applicant believed the Planning Director Determination impermissibly narrowed the scope of the approval in the 1991 Decision, which is controlling for the property. As stated, the Applicant wanted to be a collaborative partner with the City and did not intend for this process to be adversarial. However, based on the findings of the decision, the Appellant was obligated to file this appeal and certainly disagreed with the scope and nature of the non-conforming use decision within the Director's Determination.

- The Appellant respectfully requested the DRB find that the legally established non-conforming use of the subject property is a commercial retail use as approved in the 1991 Decision, not a Fry's Electronics, not a single-user electronics retail store.
- He repeated the Appellant's request to keep the record open so they could respond to the comment received earlier tonight and to provide additional written testimony. He also asked for the opportunity to provide rebuttal or final argument should Staff have any additional testimony.

John Andrews noted the community had changed a lot since 1991 and Fry's had abandoned ship. He asked why the Board needed to continue with the 1991 Decision.

Mr. Ordon-Bakalian responded the Appellant could certainly provide more detailed in their written response, and explained Oregon's non-conforming use law allows certain uses that may no longer be consistent with the underlying zoning of a property to continue. The 1991 Decision approved a commercial retail use, so although Fry's might be gone and bankrupt, a commercial retail use is still allowed at the subject property. Based on what Mr. Simmons detailed, Home Depot would be a willing

and able partner to achieve both the City's vision under the Town Center Plan, while also providing an anchor commercial retail use at the property stepping into Fry's shoes.

Mr. Andrews asked if there had been some kind of formal proposal for the residential areas or was that something that might happen if Home Depot decided not to layout more parking.

Mr. Simmons replied Home Depot had not marketed those spots yet, since the store had not even been built, but it certainly was their plan as done in other locations. Home Depot would market the excess property or out-parcels to multifamily home builders to get that work done. If in alignment with the Town Center Plan's vision, Home Depot would look more specifically at targeting that type of use for that land if Home Depot got a store at this location.

Mr. Ordon-Bakalian reiterated Home Depot was trying to approach this as a collaborative partner with the City. There had been initial discussions about Home Depot's vision for the site, but those discussions were on hold until the issue with the non-conforming use was sorted out to gain certainty for both the City and Home Depot, which was open and willing to have those discussions, but there needed to be alignment together as partners.

Chair Barrett asked what an effective date for non-conforming use was and when it went into effect.

Mr. Ordon-Bakalian responded that effectively, a use became non-conforming when it is prohibited by the underlying zoning district. The use only became non-conforming when the Town Center Zone was adopted for the subject property, which had the 30,000 sq ft maximum, and several other standards that neither the subject property nor the structure complied with; however, uses that were lawfully established prior to the change of the zoning were allowed to continue. In this case, the Appellant's position is that the commercial retail use approved in 1991 was lawfully established, approved by the City, has never been abandoned. City Code actually had provisions for abandonment, which were detail in the Appellant's application, and he believed both the City and the Appellant believed those were met. Because the use was established in 1991, it may continue. The effective date for non-conformance was when the zoning designation changed in 2019 with the adoption of the Town Center Plan.

Stephanie Davidson, Assistant City Attorney, stated Staff agreed, noting the effective date of that zoning regulation was June 5, 2019.

Chair Barrett asked what the use was. Was it the Fry's retail store in 2019?

Ms. Davidson replied the legal standard was outlined in the Staff report, and one key case was the Nehoda LUBA Case, from which she read, "The purpose of the local government proceeding to determine the existence of a non-conforming use is to determine what use existed on the date the restrictive regulations were applied." So essentially, the question was "What was the actual use of the property as of June of 2019?"

Mr. Ordon-Bakalian replied from the Appellant's position, the use was commercial retail. The Planning Director's Determination narrowed it to a Fry's Electronics, and in some instances, maybe a single-user electronic retail store. Again, the information shared in his presentation was taken directly from the

1991 Decision, which clearly, the use approved was a commercial retail use. Electronic stores, including Fry's, fall within that subset of uses, but he did not believe the 1991 Decision intended to narrow such a use to that level.

Chair Barrett asked how the structure/property had been since Fry's—the retail use went out of business in 2021.

Mr. Ordon-Bakalian responded the property itself has been vacant, but due to the City's non-conforming use standards, the use had continued and not been abandoned. More details could be provided in writing; however, he believed the standards for continuance of a non-conforming use included continuing to pay utilities, taxes, and other facets of continuing to employ the site, and the current owner of the site had done so. There was no evidence that they had stopped doing any of those things. So, the position of the Appellant, and the City based on the findings in the Planning Director's Determination, was that the existing non-conforming use had not been abandoned, the question regarded the nature of that use.

Mr. Mesbah asked why the Applicant was essentially forced to appeal the decision of the Planning Director.

Mr. Ordon-Bakalian believed "compelled" might be a better word than "forced", noting the Applicant could have chosen not to appeal the decision and that it all went back to the City's November 28th email.

The Applicant had requested confirmation there was a non-conforming use of the property and had stated the Applicant's intention to operate a Home Depot at the site. In response, Staff stated the second part of the Applicant's request required a Planning Director interpretation, which should be processed under a Class 2 application, so the Applicant believed the Class 1 would essentially confirm whether it was a non-conforming use or not; a non-conforming structure or not; however, the Planning Director determined that the non-conforming use, the nature of the use, was a Fry's Electronics or a single-user electronic retail store, which meant if that decision was not appealed, that would be the only use allowed at the site under its non-conforming use rights. As the Appellants, they were not denying Home Depot was not a single-user electronic retail store or a Fry's, so they were obligated to appeal because they believed that 1991 Decision approved a commercial retail use; not something as narrow as was in the Determination.

Mr. Mesbah asked if a Class 2 Review, which would be coming before the DRB, would deal with that specific question and what was the difference.

Mr. Ordon-Bakalian confirmed it would address that specific question and explained the difference was if the decision had not been appealed within the allotted appeal timeline, the decision would become final. And, the decision in the Class 1 Determination, which the Appellant believed may have been outside the scope of what should have been decided, was that the use is a Fry's Electronics or a single-user electronic retail store, so in effect, the Class 2 decision had already been made, even though the Appellant had not understood that was to occur. If the Applicant had let the decision stand that the non-conforming use was a Fry's Electronics, the Class 2 process would effectively be mute; there would be no reason for the Applicant to proceed at that point.

Mr. Mesbah explained as someone who needed to figure out the complexity of this issue, he did not feel there was enough information, other than the Appellant's say so, to determine whether this was conforming or a continuation of use. He would rather wait for a Class 2 Review with a thorough evaluation. He did not know if there was an option of withdrawing the Applicant's Class 1 application, so the DRB could go forward with Class 2 with an open slate or something like that instead of prejudicing it, as the Applicant was worried would happen.

Mr. Ordon-Bakalian replied that made perfect sense and was an astute observation. Again, the Appellant was open to discussing potential solutions with the City, in terms of what could be done to focus the process before DRB, so two different processes were not proceeding at once. As noted, Home Depot was not forced, but obligated to appeal, based on the substance of the Determination of the Class 1 decision.

Ms. Davidson explained there had been negotiations with the Applicant, even late on Friday afternoon, with discussion about the Applicant potentially withdrawing the Class 1 application. One of the resolutions within the circulated documents noted the Planning Director would modify her December 28, 2023 letter to say that no determination of non-conformance was made, to which the Applicant would have to agree. City Staff agreed the record was a little confused between the Class 1 and Class 2 applications proceeding at the same time.

- She confirmed it was possible to have a clean slate for a Class 2 Review as long as the Applicant agreed.

Mr. Ordon-Bakalian confirmed he saw the same correspondence and reached out to City Attorney Guile-Hinman that morning. There would need to be an agreement between the City and Home Depot that the DRB would adopt a new resolution, effectively cleaning the slate from the Planning Director's Determination before the Appellant dismissed their appeal. If the appeal was dismissed prior to that, the decision would be inconsistent with what the Appellant agreed with, so some certainty was needed. The open record period would be beneficial at this point to allow continued discussions. He was not sure if the DRB was interested in exploring options, but he understood the DRB's concerns.

Ms. Davidson confirmed the request to keep the record open was granted.

Mr. Mesbah confirmed another DRB meeting was required if the record was left open and for the DRB to adopt some resolution.

Daniel Pauly, Planning Manager noted the DRB might need to hold a special meeting for that.

Ms. Davidson stated that given the timelines at play, the Board members' availability on March 5th and March 21st needed to be discussed.

Miranda Bateschell, Planning Director, did a raise of hands inventory for potential meeting dates: three Board members were available March 5th, four on March 18th, 19th, and 20th, and three on March 21st.

Chair Barrett asked what the difference was between a Class 1 and Class 2 Review.

Mr. Pauly explained Class 1 was a ministerial or administrative decision where there was no discretion. The only person noticed of the application was the Applicant. Class 2 was also administrative, but the surrounding properties, the DRB, and the Planning Director received notice. So, more notice was given and more was involved with a Class 2 than in Class 1, which were essentially issued over the counter. The Planning Director could also refer a Class 2 Review to the DRB. More discretion was allowed under a Class 2 Review.

Chair Barrett asked if the questions the applicant posed would be different for a Class 1 versus a Class 2 Review?

Ms. Rybold replied yes. While the submitted Class 1 application was the determination of non-conforming status related to the Location: the use, site conditions, and structure, the Class 2 was a Planning Director's interpretation of the question posed regarding the Fry's Electronics and the Home Depot and whether that was a continuation of use according to City Code, which required an interpretation of the standards within the Development Code.

Chair Barrett asked who did the interpretation.

Ms. Rybold responded both decisions were issued by the Planning Director. One was a determination of status, and the other was an interpretation as to whether the two retail users would constitute a continuation of use. So, as highlighted in Ms. Luxhoj's presentation, any testimony or conversation related to the proposed user in the case is tied more to Class 2 than the current Class 1 Review.

Mr. Ordon-Bakalian added that although the Appellant agreed in premise with Ms. Rybold, ORS 197.797 said that for a quasi-judicial hearing, to the extent there was argument or evidence that the Appellant believed was relevant, they were allowed to offer that. Because these two proceedings had gotten so intertwined, there were things the Appellant felt obligated to raise during this hearing to preserve them. Whether or not they were deemed relevant was effectively up to the Board, and not the City or the Appellant.

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. Seeing none, she called for rebuttal or responsive testimony from the Applicant.

Mr. Ordon-Bakalian asked if the Appellant would have opportunity to rebut any Staff testimony that came after his comments or was this their final time to speak.

Chair Barrett replied the Board would be asking questions, so Mr. Ordon-Bakalian could stay and respond.

Mr. Ordon-Bakalian responded to Commissioner Mesbah's earlier question about non-conforming use standards for whether a use is continued, noting that was detailed in the Appellant's application, Exhibit 429 of the City's Staff report and packet, because it was application criteria. Wilsonville Development Code (WDC) 4.189(.01) stated, "A non-conforming use may be continued subject to the requirements of this section". One requirement of this section was to determine whether the use has

been abandoned, which was WDC 4.189(.03), which said, "If a non-conforming use is abandoned for a period of 18 consecutive months, the use shall not be reestablished without fully complying with the use requirements of the zone" which would be the Town Center 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 for it to be considered abandoned, a site must not be receiving City utilities, must not be actively marketed for rent, lease, or sale. These standards concerning abandonment do not affect the City's process for abating nuisances" which in his opinion, was likely not relevant to this proceeding. What was relevant was whether the property was receiving City utilities, whether it was marketed for rent, lease, or sale—both were true. There was evidence in the record demonstrating as much and that was the City's standard for abandonment. The Appellant believed the use had not been abandoned because the site is receiving utilities, and is currently being marketed for rent, sale, or lease. So again, the Appellant believed the use, the commercial retail use approved in 1991 had not been abandoned and has continued. To the Appellant's knowledge, based on the Planning Director's Determination, and the Staff report for this appeal, the City did not appear to dispute that; however, he did not want to speak for the City.

Mr. Mesbah clarified he was not confused about the Appellant's position. Staff did not necessarily agree with all the Appellant's positions, and because the scope of analysis was being expanded, that disagreement might become clearer to the Board later, so there was no reason to rush a decision now if some understanding could be engineered.

Mr. Ordon-Bakalian agreed.

Mr. Andrews asked if the 2019 date was the effective date for when the use of the property became defined.

Ms. Davidson responded June 5, 2019 was the date the Town Center Plan became effective. Based on the content of the Town Center Plan, the proposed use would not be allowed, so that was the date of the more restrictive land use regulation.

Mr. Pauly added that even though it was a planned unit development, the zoning changed so now it was a non-conforming planned unit development.

Ms. Galloway understood the Board was to affirm or reject a Planning Director's decision and said she would move to reject from the record certain information from the Applicant.

Ms. Davidson clarified nothing could be done with the record tonight because the Applicant had requested to keep the record open for seven days. Staff would discuss a date for the Board to reconvene to make a decision on this application.

Mr. Ordon-Bakalian stated based on ORS 197.797 and the standards that allowed them to make argument in evidence in a quasi-judicial setting, the Appellant formally objected for the record the future exclusion of testimony and evidence in the record

Ms. Davidson added that City Staff reviewed the cited 2019 case, *Gould v. Deschutes County* 79 Or LUBA 561, and observed that case did not cite ORS 197.829 as noted on Slide 7. (Exhibit B2) The legal standard was outlined in the Staff report, which the Board reviewed.

Chair Barrett the ORS Standard cited as.

Mr. Ordon-Bakalian confirmed the ORS standard he cited was ORS 197.797 Sub 9, which was the procedure for local quasi-judicial land use proceedings or hearings and detailed both hearing process and notice requirements. Subsection 9 of that statute stated, "Argument means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed to be relevant by a proponent to a decision. Evidence means facts, documents, data, or other information offered to demonstrate compliance or non-compliance with the standards believed to be relevant by the proponent." The Appellant believed all the information they had entered into the record was relevant for the decision before the DRB.

- He clarified it was not in *Gould*, but another standard he had referenced. He added more could be followed up on in writing, but the Appellant believed the *Gould's* decision found that a local government's interpretation of a prior land use decision was not afforded the same level of deference before the Land Use Board of Appeals that a City would be afforded if interpreting its Development Code. In this case, the DRB was interpreting the 1991 Decision, so the nature of the use allowed to continue at the property would not be afforded any special deference. The *Gould* case was referenced to provide context for the decision before the Board.

Amanda Guile-Hinman, City Attorney, clarified the definition for the record, noting it ended with "...argument does not include facts." And then "Evidence means facts, documents, data or other information offered to demonstrate compliance or non-compliance with the standards believed by the proponent to be relevant to the decision." She wanted to be clear that argument and evidence were different and discussed differently in ORS 197.797.

Mr. Ordon-Bakalian agreed with that clarification, adding Sub A and Sub B.

Ms. Rybold added a clarification pertaining to uses, the new zoning, and what applied. When the Planning Director made determinations or interpretations, Staff's standards for the uses that are allowed were agnostic of a specific business or user. No preferences were being expressed in terms of a specific business being preferred or not preferred by Staff. Staff was making the determinations based on uses and interpretations of uses, considering prior decisions or legal case law to determine how to define those uses.

Chair Barrett asked if a business name had to go into a use.

Ms. Davidson replied the DRB has discretion to decide the nature and the extent of the use in the Class 2 proceedings.

Chair Barrett confirmed there were no additional questions or discussion and closed the public hearing at 9:17 p.m.

Ms. Bateschell clarified Staff would contact the Board about specific dates to hold the special DRB meeting, requesting that the Board members hold open March 5th and March 19th. She noted Staff had to work internally to determine other City meeting schedules and to potentially accommodate additional time beyond the seven days should anyone on the record submit testimony because the Appellant would have additional time to submit a response, which would mean meeting March 19th. Most meetings of this nature were held in the evening, so she asked Board members to hold those evenings open and to contact Mr. Pauly if they were only available after a certain time.

Ms. Davidson advised making a motion to keep the written record open for seven days until March 4, 2024 at 5:00 p.m., the date the record would close. Staff would have to separately determine the date of the Board would reconvene. So that's a motion to keep the written record open for seven days until March 4th, 2024

Alice Galloway moved to keep the written record open until March 4, 2024, at 5:00 p.m. Karman Mesbah seconded the motion, which passed unanimously.

BOARD MEMBER COMMUNICATIONS

1. Results of the February 12, 2024 DRB Panel A meeting
2. Recent City Council Action Minutes

There were no comments.

STAFF COMMUNICATION

There were no comments.

ADJOURNMENT

The meeting adjourned at 8:23 p.m.