

March 4, 2024

Keenan Ordon-Bakalian
Admitted in Oregon and
Washington
D: 503-796-2470
kordon-bakalian@schwabe.com

VIA EMAIL

Development Review Board Panel B
City of Wilsonville
c/o Cindy Luxhoj, Associate Planner
luxhoj@ci.wilsonville.or.us
29799 Town Center Loop E
Wilsonville, OR 97070

Kenneth Katzaroff
Admitted in Washington and
Oregon
D: 206-405-1985
C: 206-755-2011
KKatzaroff@schwabe.com

RE: ***In the Matter of an appeal of Planning Director Determination ADMN23-0029 (DB24-0002/APPL24-0001)***

Dear Members of the Development Review Board:

This firm represents The Home Depot, Inc. (“**Home Depot**”) in the above-referenced casefiles (the “**Appeal**”). On February 26, 2024, the Development Review Board (the “**DRB**”) held a public hearing on the Appeal. Home Depot testified orally during the hearing. At the conclusion of the hearing, the DRB closed the record to further oral testimony but allowed the written record to remain open until 5:00 PM on March 4th for any party to submit any evidence or testimony. Home Depot is also entitled to at least seven days after the record is closed to all other parties (March 11, 2024) to submit final written argument, pursuant to ORS 197.797(6)(e).

This letter addresses several themes and questions that were raised during the February 26 public hearing. It is timely submitted prior to the close of the open record period. This letter does not contain significant legal argument, but rather summarizes Home Depot’s responsive evidence and testimony, which is enclosed.

I. Summary of Enclosures and Testimony

A. Home Depot’s Operations at the Subject Property will be Less Significant than Fry’s Electronics Prior Impacts

During the February 27 public hearing, members of the DRB raised questions regarding the scope of Home Depot’s impact on the subject property and surrounding area – in relation to that of Fry’s Electronics. City Staff has also suggested that operating a Home Depot at the subject property may constitute an expansion of a lawfully established nonconforming use. In response,



Home Depot provides analysis from Lars Anderson & Associates that details the potential development impacts of Home Depot, in relation to Fry's Electronics. **Exhibit A.**

This letter also encloses a Trip Generation Memorandum for Home Depot's use of the subject property, prepared by Transportation Engineering Northwest ("TENW"). **Exhibit B.** TENW's memo demonstrates that Home Depot's use of the subject property will result in less average daily trips than the trips previously generated by Fry's Electronics.

B. The Decision Effects a Taking on Home Depot

It is clear from the facts of this Appeal that the City's desire to prevent any development of the subject property that is inconsistent with the City's adopted Town Center Plan¹ led the Planning Director to intentionally make a nonconforming use determination of such limited scope so as to prevent any valid nonconforming use of the subject property.

The Decision has effected a compensable regulatory "taking" under Article I, section 18, of the Oregon Constitution,² and the Fifth and Fourteenth Amendments to the United States Constitution.³ Here, the City's arbitrarily narrow determination that the nonconforming use at the subject property is a "Fry's Electronics" denies Home Depot (or any other party) any economic use of the lawfully established nonconforming use at the property. Looking past the impracticality of the forthcoming hypothetical, we note that Fry's Electronics is no longer in business,⁴ therefore, it would be impossible for Home Depot to operate a Fry's Electronics at the property even if Home Depot had such an interest – which it does not. Moreover, the restriction

¹ Wilsonville Town Center Plan (May 6, 2019). Adopted Ord. No. 835; Amended October 18, 2021 per Ord. No. 850.

² Article I, section 18, of the Oregon Constitution provides, in part: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]"

³ The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), provides that "private property" shall not "be taken for public use, without just compensation."

⁴ *Fry's Electronics suddenly went out of business*, CNN, <https://www.cnn.com/2021/02/24/business/frys-electronics-closure/index.html> (last accessed Oct. 9, 2023); *Fry's Electronics closes, leaving Wilsonville store barren*, Portland Tribune, https://www.portlandtribune.com/news/frys-electronics-closes-leaving-wilsonville-store-barren/article_cde50d46-de09-5ce3-a647-9f54ce7d4bb1.html (last accessed Oct. 9, 2023).

essentially precludes use of the structure as the current zoning limits retail uses to less than 30,000 square feet. As such, the City's decision has deprived Home Depot of all economically productive use of the subject property or the existing structure.

As will be discussed further in Home Depot's final written argument, the Appellant respectfully requests that the DRB modify the Decision to find that the lawfully established nonconforming use at the subject property is a commercial retail use, not a "Fry's Electronics" or "single-user electronics retail store." Alternatively, the DRB may reverse the Decision, or remand the Decision back to the Planning Director to make a decision consistent with Oregon's nonconforming use caselaw. Otherwise, the City risks effecting a regulatory taking on Home Depot.

C. *Gould* Citation Correction

Home Depot would like to correct the record regarding the citation to *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff'd without opinion*, 310 Or App 868, 484 P.3d 1073 (2021) that was contained on slide 7 of the Appellant's PowerPoint presentation. Home Depot cited *Gould VIII* for the proposition that the City is not entitled to deference in interpreting the 1991 Decision, pursuant to ORS 197.829(1). Home Depot intended to cite *Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No. 2020-095).

As stated on the record during the hearing for this matter, ORS 197.829(1) generally⁵ does not require LUBA to affirm a local government's interpretation of a prior land use decision or conditions of approval attached to a prior land use decision. *Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No. 2020-095, at 17, Jun. 11, 2021); *see also M & T Partners, Inc. v. City of Salem*, ___ Or LUBA ___, ___ (LUBA No 2018-143, Aug .14, 2019) (slip op at 14), *aff'd sub nom M & T Partners, Inc. v. Miller*, 302 Or App 159, 170, 460 P3d 117 (2020). In the event this appeal proceeds to LUBA, the City's interpretation of the 1991 Decision will not be entitled to deference. Therefore, the City's interpretation that the 1991 Decision approved a "Fry's Electronics" will be reviewed by LUBA for legal error. ORS 197.835(9)(a)(D); *Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No. 2020-095, at 17).

⁵ To a "limited extent," LUBA will defer to plausible interpretations of county land use regulations that the governing body made in the course of interpreting a condition of approval. *Kuhn v. Deschutes County*, 74 Or LUBA 190, 194 (2016). It is Home Depot's position that this exception to the general rule that LUBA does not defer to local government interpretations of prior land use decisions is *not relevant* to the subject appeal.

Seeing as the words “Fry’s Electronics” are not contained anywhere within the 1991 Decision, the City’s nonconforming use Decision is likely to be reversed or remanded by LUBA. As such, Home Depot requests that the DRB to find that the 1991 Decision approved a commercial retail use, which is consistent with Oregon nonconforming use caselaw. Such a finding will prevent the unnecessary expenditure of time and resources on the part of both Home Depot and the City that will inevitably result from a LUBA appeal.

D. Objection to City’s Attempted Exclusion of Home Depot’s Documents and Testimony

Home Depot formally objects to the City’s attempt to exclude from the record certain documents and testimony submitted by Home Depot as part of its Class I application. *See* Staff Report for APPL24-0001, Exhibit A1, at 13. The documents and testimony submitted by Home Depot as part of its application are within the record before the DRB on appeal. The documents and testimony that the City seeks to exclude constitute “argument” and “evidence” as defined in ORS 197.797(9):

- (a) “Argument” means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. “Argument” does not include facts.
- (b) “Evidence” means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. [Formerly 197.763]

The City cannot exclude certain documents and testimony within Home Depot’s Class I application because the documents and testimony that the City seeks to exclude are “argument” and “evidence” that the Appellant believes to be relevant to the satisfaction of the applicable approval criteria for the subject application, as well as Home Depot’s appeal of the Decision. ORS 197.797(9). In addition, the City’s attempt to omit certain documents and testimony that were submitted by Home Depot as part of its Class I application runs afoul ORS 197.797(4)(a)’s requirement that “[a]documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.” ORS 197.797 prohibits the City from excluding portions of Home Depot’s Class I application materials from the record.

Furthermore, Home Depot must respectfully object to the DRB’s premature motion to exclude certain documents and testimony from the record that were offered by the Appellant during the February 26 public hearing. Home Depot believes that all of the argument and evidence that

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Home Depot offered during the February 26 hearing was relevant to the DRB's decision on the appeal, and must be held within the record pursuant to ORS 197.797(9).

II. Conclusion

As noted above and will be discussed further in Home Depot's final written argument, Home Depot's operations at the subject property will not be an expansion of the lawfully established commercial retail nonconforming use at the subject property. Moreover, the Decision's conclusion that the nonconforming use at the property is a "Fry's Electronics" effects a regulatory taking on Home Depot.

Thank you for your consideration of this letter. We look forward to providing additional testimony in Home Depot's final written argument.

Sincerely,



KOB:jmhi
Enclosures

cc: Client
Miranda Bateschell, bateschell@ci.wilsonville.or.us
Amanda Guile-Hinman, guile@ci.wilsonville.or.us
Shelley White, swhite@ci.wilsonville.or.us



LARS ANDERSEN & ASSOCIATES, INC.

CIVIL ENGINEERS • LAND SURVEYORS • PLANNERS
ADA COMPLIANCE • LEED ACCREDITED • STORM WATER QUALITY
4694 W JACQUELYN AVENUE
FRESNO, CA 93722
PH (559) 276-2790 FX (559) 276-0850
TEXAS REGISTERED ENGINEERING FIRM F-18450

SCOTT A. MOMMER, PE, QSD
PRESIDENT

DANIEL J. ZOLDAK, PE, PLS
CASp, LEED AP, QSD/P
VICE PRESIDENT

March 4, 2024

Development Review Board Panel B

City of Wilsonville

c/o Cindy Luxhoj, Associate Planner

luxhoj@ci.wilsonville.or.us

29799 Town Center Loop E

Wilsonville, OR 97070

Re: Home Depot, Wilsonville, OR – ADMN23-0029 (DB24-0002/APPL24-0001)

The purpose of this letter is to provide an overview of the reduced scale of development impacts that will be associated with Home Depot's proposed operations at 29400 Town Center Loop W. Wilsonville, OR 97070 (the "subject property").

Consistent with Planning Commission Resolution No. 91PC43 (the "1991 Decision"), Home Depot intends to operate at the subject property. Operations will include reoccupying the existing commercial retail building on the property. The structure currently has an existing 166,494 SF associated with it. Of this existing square footage, Home Depot intends to demolish portions of the existing mezzanine which will result in a reduced commercial square foot for a total proposed square footage of 129,069 square foot.

Home Depot operates stores across the United States, and typical operations require approximately 400 parking stalls. There are currently 838 parking stalls at the subject property. In the future, should other development be interested in developing on the property, Home Depot will be able to reduce the current count by over 400 stalls allowing for this future development while still retaining sufficient parking capacity for Home Depot operations.

Finally, as detailed in the Transportation Northwest ("TENW") Trip Generation Memorandum that is submitted under separate cover, Home Depot's operations at the subject property will result in a reduction of average daily trips to and from the property, as well as a potential reduction in peak hour trips.

Should you have any questions or comments, please feel free to contact me at (559) 276-2790 Ext. 117

Sincerely,
LARS ANDERSEN & ASSOCIATES, INC.

Daniel J. Zoldak PE, PLS, CASp, LEED AP, QSD/P
Vice President

MEMORANDUM

DATE: March 4, 2024

TO: City of Wilsonville

FROM: Amy Wasserman / Chris Forster, P.E.
TENW

SUBJECT: Trip Generation Memorandum
Home Depot Wilsonville
TENW Project No. 2023-264

This memorandum summarizes the preliminary traffic information for the proposed Home Depot Wilsonville project located at 29400 Town Center Loop West in Wilsonville, Oregon. This memo includes a project description and project trip generation estimate. Upon your review of this information, we would like to confirm if any additional traffic analysis is required for this project.

Project Description

The proposed Home Depot Wilsonville project is located at 29400 Town Center Loop West in Wilsonville, Oregon as illustrated in the **Attachment A** site vicinity map. The proposed project would consist of up to 129,100 square feet (SF) of building area for a home improvement superstore. The Home Depot will replace an existing building consisting of 166,495 SF that was previously occupied by an electronics superstore (Fry's). Buildout and occupancy of the Home Depot project is expected in 2025.

Vehicular access to the site is proposed to remain the same as existing with one (1) full access driveway on Park Place, and three (3) access driveways on Town Center Loop West; two (2) of which are full access and one of which is right-in right-out only. A preliminary site plan is shown in **Attachment B**.

Trip Generation

Trip generation estimates for the proposed project were based on methodology documented in the Institute of Transportation Engineers (ITE) *Trip Generation Manual*, 11th Edition for Code 862 (Home Improvement Superstore) and Code 863 (Electronic Superstore). Adjustments to the trip generation estimates were made to account for pass-by trips.

Pass-by trips are trips that are made by vehicles that are already on the adjacent streets and make intermediate stops at commercial uses on route to a primary destination (i.e., on the way from work to home). Pass-by trips were based on studies included in the appendices of the ITE *Trip Generation Manual*, 11th Edition, 2021.

The resulting net new weekday daily, AM peak hour, and PM peak hour trip generation for the proposed Home Depot project is summarized in **Table 1**. The detailed trip generation estimates are included in **Attachment C**.

Table 1
Project Trip Generation Summary

Weekday Time Period	Net New Trips Generated		
	In	Out	Total
Daily	-900	-800	-1,799
AM Peak Hour	22	34	56
PM Peak Hour	-129	-124	-253

Next Steps

Upon your review of this information, we would like to confirm if any additional traffic analysis is required for this project.

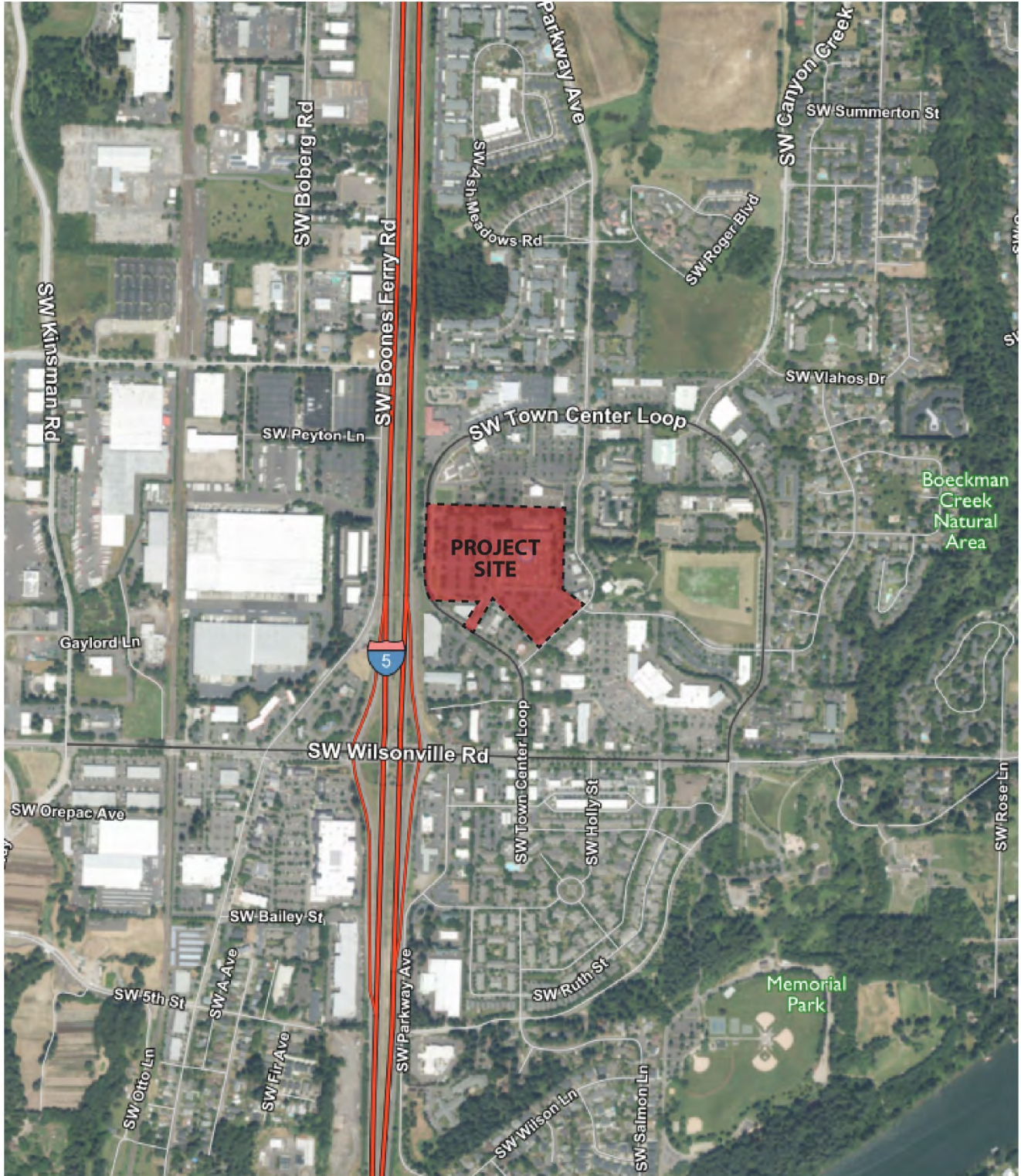
If you have any questions regarding the information presented in this memo, please contact me at (425) 466-7072 or amy@tenw.com.

cc: Dan Zoldak, Lars Andersen & Associates

Attachments: A. Project Site Vicinity
B. Preliminary Site Plan
C. Trip Generation Calculations

ATTACHMENT A

Project Site Vicinity

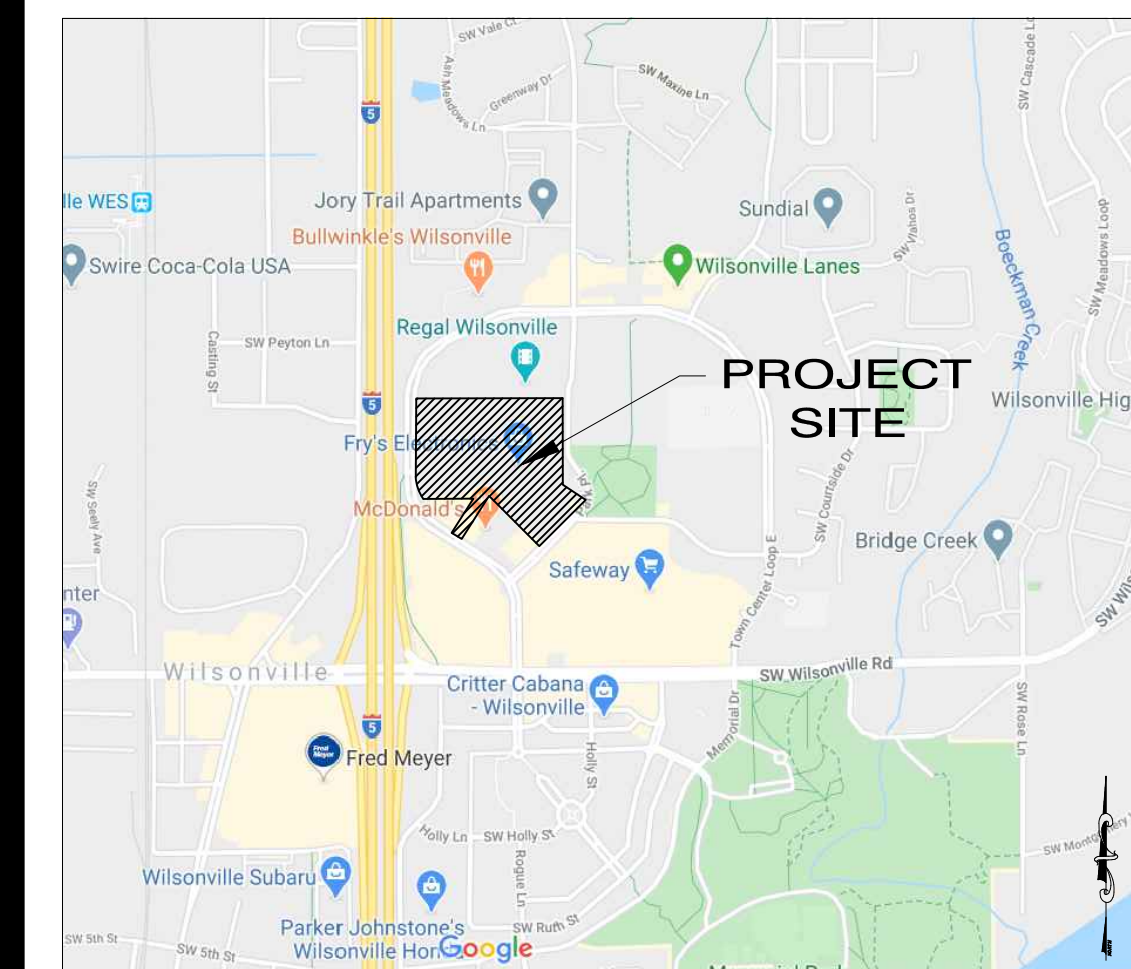


Attachment A: Project Site Vicinity



ATTACHMENT B

Site Plan



LOCATION MAP (NTS)

SITE AREA		
THE HOME DEPOT PARCEL	15.01 AC	653,836 SF

BUILDING AREA		
THE HOME DEPOT		125,176 SF
MEZZANINE		3,893 SF
SUBTOTAL		129,069 SF
TOTAL BUILDING AREA		129,069 SF

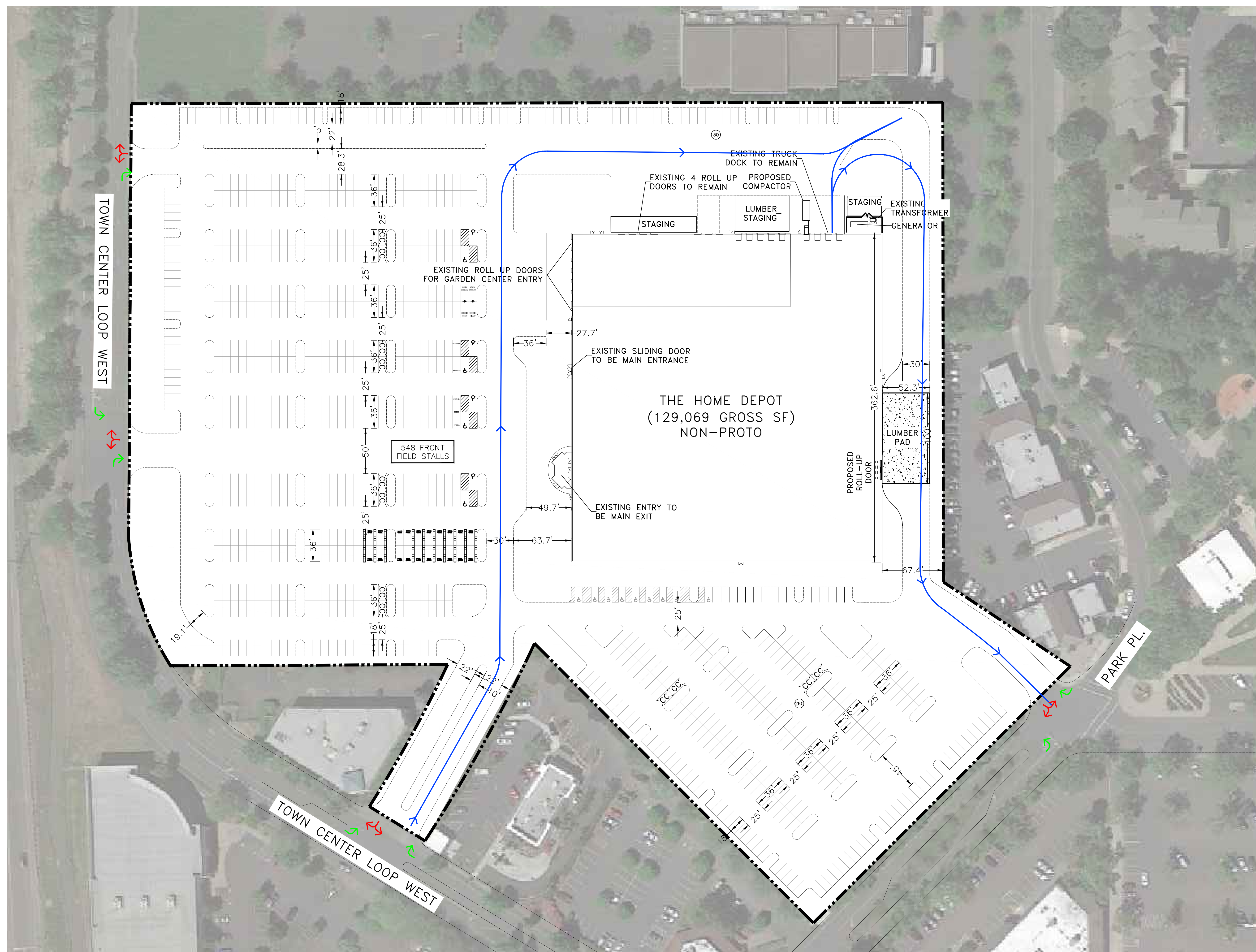
PARKING REQUIRED		
THE HOME DEPOT	4.1 / 1,000 SF	529 STALLS
TOTAL PARKING REQUIRED		529 STALLS

PARKING PROVIDED		
FRONT FIELD		548 STALLS
SIDE FIELD / REAR		290 STALLS
TOTAL PARKING PROVIDED		838 STALLS

INCLUDED IN PARKING PROVIDED		
ACCESSIBLE STALLS (17 REQ. @ 2%)		17 STALLS

NOT INCLUDED IN PARKING PROVIDED		
CART CORRALS		12 STALLS
ACCESSORY PARKING NOT INCLUDED		12 STALLS
TOTAL THD PARKING PROVIDED		838 STALLS

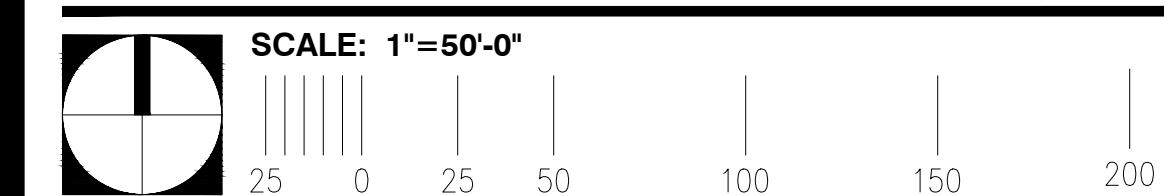
ZONING CLASSIFICATION		
JURISDICTION		CITY OF WILSONVILLE
ZONING CLASSIFICATION		PLANNED DEVELOPMENT
		COMMERCIAL TOWN CENTER (PDC-TC)
THD USE PERMITTED BY RIGHT		YES



NOTES
 1. PLAN BOUNDARY IS BASED OFF AVAILABLE APN MAPS; AN ALTA SHOULD BE COMPLETED FOR ACCURACY.

THE HOME DEPOT
THE HOME DEPOT
 WILSONVILLE, OR
 29400 TOWN CENTER LOOP W
 WILSONVILLE, OR 97070

DRAWING ISSUE DATE 03.04.2024
 HD SITE SELECTION NUMBER SS-02804.2001



OR - SITE PLAN 10

ATTACHMENT C

Trip Generation Calculations

**Home Depot Wilsonville
Weekday Daily Trip Generation Summary**

	Units ¹	ITE LUC ²	Directional Distribution ²		Trip Rate or Equation ²	Trips Generated		
			In	Out		In	Out	Total
WEEKDAY DAILY								
Proposed:								
Home Improvement Superstore	129,100 SF	862	50%	50%	30.74	1,985	1,984	3,969
<i>Passby Trips</i> ³	42%					-834	-833	-1,667
					Subtotal (less passby) =	1,151	1,151	2,302
Less Existing:								
Electronics Superstore	166,495 SF	863	50%	50%	41.05	3,418	3,417	6,835
<i>Passby Trips</i> ³	40%					-1,367	-1,367	-2,734
					Subtotal (less passby) =	2,051	2,050	4,101
Net New Daily Trips =						-900	-899	-1,799

Notes:

¹ SF = Square Feet.

² Institute of Transportation Engineers, Trip Generation Manual, 11th Edition.

³ Passby percent based on Institute of Transportation Engineers, Trip Generation Manual, 11th Edition. The pass-by rate was assumed to be equal to the PM peak hour rate for LUC 862 and 863.

**Home Depot Wilsonville
Weekday AM Peak Hour Trip Generation Summary**

	Units ¹	ITE LUC ²	Directional Distribution ²		Trip Rate or Equation ²	Trips Generated		
			In	Out		In	Out	Total
WEEKDAY AM PEAK HOUR								
<u>Proposed:</u>								
Home Improvement Superstore	129,100 SF	862	57%	43%	1.51	111	84	195
<i>Passby Trips</i> ³	42%					-47	-35	-82
					Subtotal (less passby) =	64	49	113
<u>Less Existing:</u>								
Electronics Superstore	166,495 SF	863	73%	27%	0.34	42	15	57
<i>Passby Trips</i> ³	0%					0	0	0
					Subtotal (less passby) =	42	15	57
Net New AM Peak Hour Trips =						22	34	56

Notes:

¹ SF = Square Feet.

² Institute of Transportation Engineers, Trip Generation Manual, 11th Edition.

³ Passby percent based on Institute of Transportation Engineers, Trip Generation Manual, 11th Edition. The pass-by rate was assumed to be equal to the PM peak hour rate for LUC 862 and was assumed to be 0% for LUC 863.

**Home Depot Wilsonville
Weekday PM Peak Hour Trip Generation Summary**

	Units ¹	ITE LUC ²	Directional Distribution ²		Trip Rate or Equation ²	Trips Generated		
			In	Out		In	Out	Total
WEEKDAY PM PEAK HOUR								
<u>Proposed:</u>								
Home Improvement Superstore	129,100 SF	862	49%	51%	2.29	145	151	296
<i>Passby Trips</i> ³	42%					-61	-63	-124
					Subtotal (less passby) =	84	88	172
<u>Less Existing:</u>								
Electronics Superstore	166,495 SF	863	50%	50%	4.25	354	354	708
<i>Passby Trips</i> ³	40%					-141	-142	-283
					Subtotal (less passby) =	213	212	425
Net New PM Peak Hour Trips =						-129	-124	-253

Notes:

¹ SF = Square Feet.

² Institute of Transportation Engineers, Trip Generation Manual, 11th Edition.

³ Passby percent based on Institute of Transportation Engineers, Trip Generation Manual, 11th Edition.