



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.

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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 **bold italics underline**
Removed language ~~struck through~~

Date of Hearing: April 8, 2024
Special Meeting Date: April 24, 2024
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)

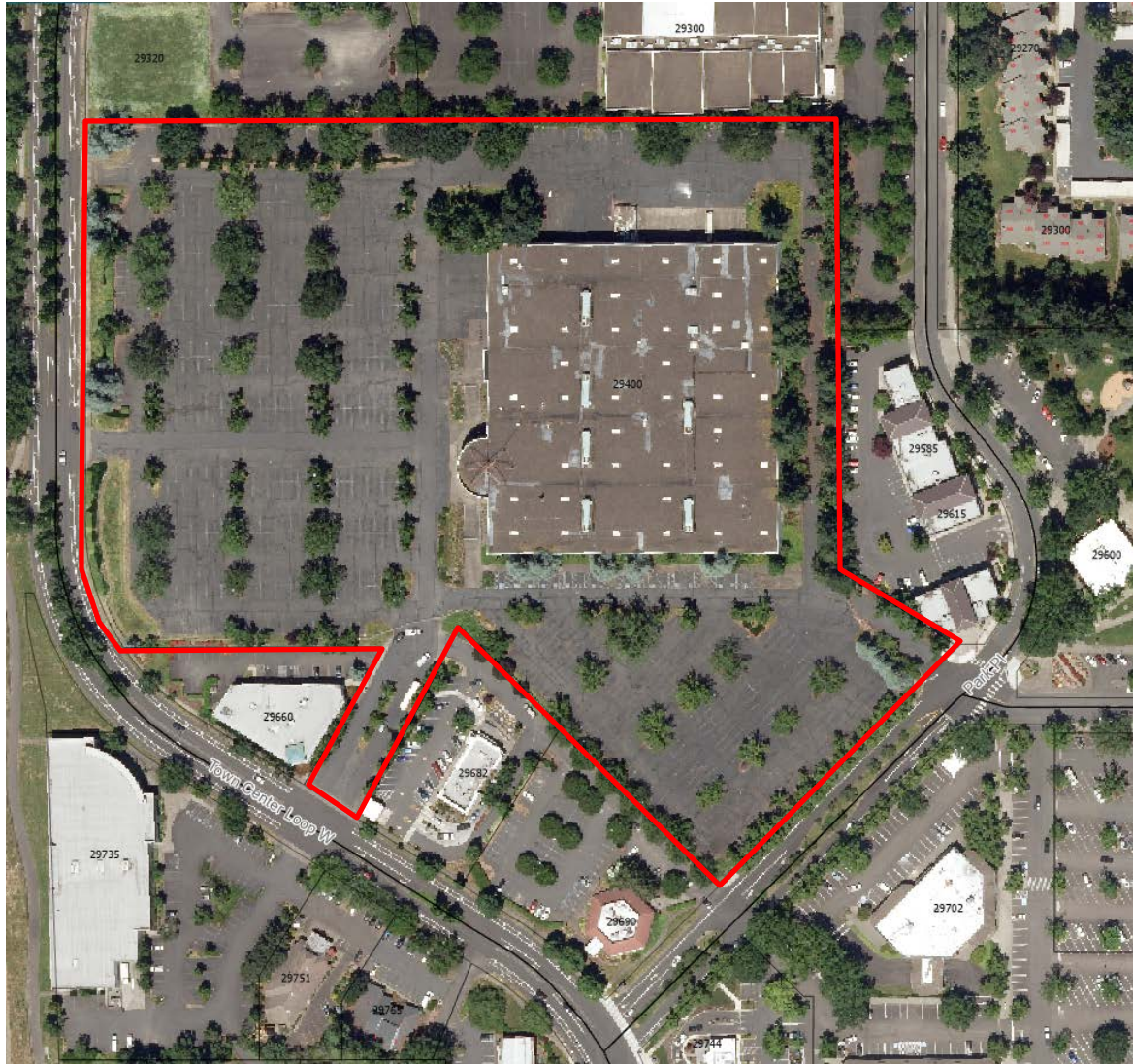
Staff Reviewers: Cindy Luxhoj AICP, Associate Planner
Miranda Bateschell, Planning Director

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:

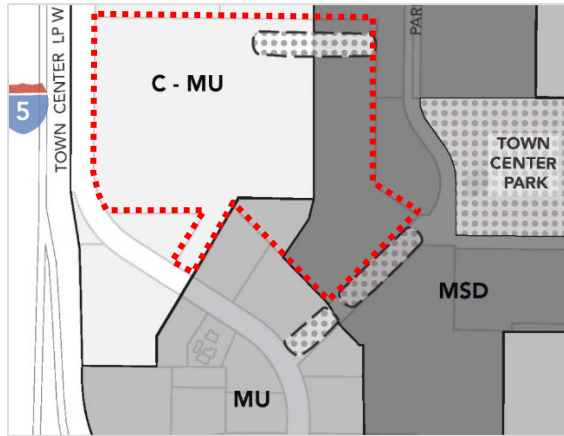
I. Town Center Zone

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).

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

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

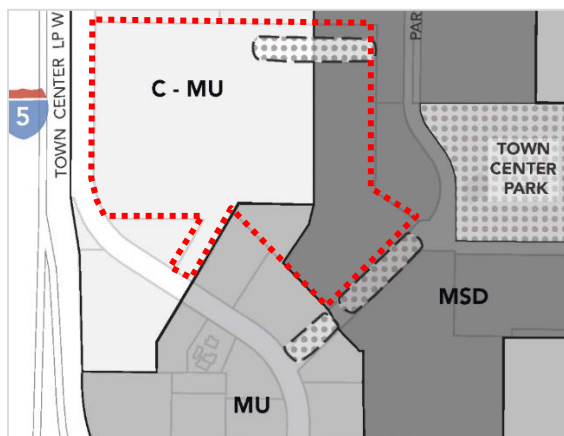
Adherence to Approved Plan and Modification Thereof
Subsections 4.140 (.10) C. and 4.030 (.01) B. 3.

- 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.