



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

April 8, 2024 at 6:30 PM

City Hall Council Chambers & Remote Video Conferencing

CALL TO ORDER

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

CHAIR'S REMARKS

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

ROLL CALL

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

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

CITIZEN INPUT

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

CONSENT AGENDA

PUBLIC HEARINGS

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

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

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

The following exhibits were entered into the record:

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

[Verbatim Transcript Begins @ 7:56]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Katzaroff: Willamette Valley.

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

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

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

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

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

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

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

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

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

Mr. Katzaroff: It's a big budget.

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

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

Chair Barrett: Any other questions?

Kamran Mesbah: Not for me.

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

Mr. Katzaroff: Thank you.

Chair Barrett: Thank you.

[62:00]

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

[64:30]

Chair Barrett: Sean O’Neil

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

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

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

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

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

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

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

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

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

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

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

Chair Barrett: So, you work for Ace Hardware?

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

Chair Barrett: Is it an electronics store?

Mr. Lemka: No, ma'am.

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

Shelley White: There's nobody online.

Chair Barrett: All right.

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

Chair Barrett: Okay.

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

Chair Barrett: Are you ready?

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

[01:09:28]

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

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

Transcriptionist: That was received during the meeting?

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

Transcriptionist: Thank you.

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

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

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

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

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

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

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

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

Mr. Katzaroff: Sure.

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

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

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

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

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

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

Chair Barrett: Okay, what else?

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

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

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

Chair Barrett: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Mesbah: Not for the Applicant.

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

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

Mr. Katzaroff: Thank you.

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

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

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

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

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

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

Chair Barrett: More questions?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Andrews: Okay.

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

Mr. Andrews: Okay, thank you.

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

Mr. Andrews: Thank you. Thank you all.

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

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

Chair Barrett: Is that acceptable to the Applicants?

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

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

Ms. Davidson: Yeah, that's under—

Mr. Katzaroff: —977.97. [1:35:27]

Ms. Davidson: Okay, yeah.

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

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

Mr. Andrews: Thank you.

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

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

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

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

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

Mr. Pauly: April 15th.

Mr. Katzaroff: Tax day.

Chair Barrett: April 15th.

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

Mr. Mesbah: Can we have a short break?

Chair Barrett: What?

Mr. Mesbah: Can we have a short break?

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

Mr. Mesbah: Are we?

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

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

Chair Barrett: Sorry. Hearing.

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

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

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

Ms. White: Okay. Thank you.

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

Mr. Pauly: Correct.

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

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

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

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

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

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

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

Mr. Andrews: Second.

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

Mr. Andrews: Aye.

Mr. Mesbah: Aye.

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

BOARD MEMBER COMMUNICATIONS

1. Recent City Council Action Minutes

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

Kamran Mesbah: Not me.

STAFF COMMUNICATIONS

Chair Barrett: All right. So that Staff Communications.

Daniel Pauly, Planning Director: None.

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

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

Chair Barrett: Okay.

Mr. Pauly: We will coordinate with you.

ADJOURNMENT

The meeting adjourned at 8:09 pm