CITY COUNCIL MEETING
STAFF REPORT

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Staff Member: Miranda Bateschell, Planning Director; Stephanie Davidson, Assistant City Attorney

Department: Community Development, Legal</td></tr>
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ISSUE BEFORE COUNCIL:

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

EXECUTIVE SUMMARY:

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

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

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

Therefore, the primary question before Council is:

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

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

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

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

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

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

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

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

I. <u>The Location</u>

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

II. Non-conforming Status

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

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

PROCEDURAL BACKGROUND:

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

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

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

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

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

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

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

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

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

LEGAL STANDARD:

I. Evidentiary Standard

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

II. Burden of Proof

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

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

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

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

III. Legal Standard Regarding Continuation of Non-conforming Uses

1. WC 4.189 (.01)

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

2. Case law Regarding Continuation of Non-Conforming Uses

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

a. Non-Conforming Use Defined

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

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

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

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

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

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

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

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

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

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

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

Further, a local government may specifically allow certain uses as non-conforming, but deny others, even when all such activities are related to the same business venture. In the Clackamas County Hearings Officer's Findings and Decision, docket no. Z1155-91-E/A[1], the hearings officer determined that there was a protected non-conforming use for "the storage commercial goods in the two structures in question, including the storage of cedar wood fencing materials." Findings and Decision of the Hearings Officer at 6, Z1155-91-E/A (Feb. 11, 1994). (Attachment 3b, pages 47-53). The applicant in this case had also applied for a "change" (i.e., expansion) of this recognized use for an on-site office facility for this warehousing and repackaging business. *Id.* The reasoning and legal standard used by the hearings officer relates to only counties – and not cities, but the important point is that he declined to expand the recognized non-conforming use. *Id.* The Clackamas County Hearings Officer's decision in docket no. Z1155-91-E/A is an example of a local government deliberately and selectively recognizing some activity to be within the scope of a recognized non-conforming use – and other activity to be beyond this scope of the recognized non-conforming use – even when both activities relate to the same business venture.

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

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

I. What Is the Current Non-conforming Use?

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

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

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

II. What Is the Proposed Use?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. Appellant's Position Ignores a Valid Council Order

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The 1991 Decision Is Irrelevant to this Appeal

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

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

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

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

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

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

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

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

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

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

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

III. Appellant Misunderstands and Misrepresents Applicable Case law

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

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

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

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

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

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

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

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

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

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

2. There Is No Violation of the Codification Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Staff recommendation is based on the following considerations:

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

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

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

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

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

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

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

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

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