Legal Memorandum

TO: City Council

FROM: Stephanie Davidson, Assistant City Attorney

DATE: April 2, 2024

RE: Appeal of DRB decision in DB24-0002 (ADMN23-0029)

I. OVERVIEW

The City Council should deny Appellant's appeal of the Development Review Board ("*DRB*") decision in DB24-0002. Appellant has failed to meet its burden of proof, and has not supplied any relevant evidence to support its request that the City recognize a relatively broad non-conforming use. Appellant also ignores and misconstrues applicable law regarding the record in this matter in an attempt to undermine the authority of the hearings body (the DRB). On close inspection, Appellant's appeal has no basis in law or fact. Thus, the City Council's denial of Appellant's appeal is appropriate.

II. STATEMENT OF FACTS

A. Description of the Property that Is the Subject of this Appeal

The property that is the subject of this Appeal is located at 29400 SW Town Center Loop West (the "*Location*"). The property is specifically known as Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon. The Location is developed with a 159,400 square-foot electronics-related retail store in a single story with a partial mezzanine.[1]

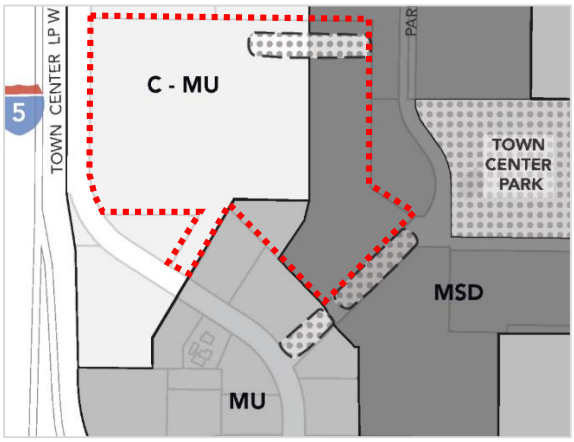
B. Change of Zoning in Town Center in 2019

In 2019 the City adopted the Town Center Plan (Ordinance No. 835), a long-term, community-driven vision to transform Wilsonville's Town Center into a vibrant, walkable destination that inspires people to come together and socialize, shop, live, and work. As part of this work, a new zoning designation, the Town Center ("*TC*") zone, and associated Wilsonville Development Code ("*WC*") Section 4.132 were adopted for the entire Town Center Area to implement the Town Center Plan's recommendations. These standards support the creation of a walkable Town Center and main street, with design standards regulating building placement,

[1] *See* Attachment 3 to Staff Report, p. 98 of 660 (first page of Planning Department Staff Report dated December 9, 1991).

building height, parking location, and drive through facilities. The plan and associated Zone Map and Development Code amendments went into effect on June 5, 2019.

The Location is currently in the TC Zone, and more specifically, the following three (3) TC sub-districts, as shown in the map below: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU).



The C-MU sub-district applies to roughly half of the Location. Permitted uses within this sub-district include retail sales and service of retail products, under a footprint of 30,000 square feet per use; office; personal and professional services; and single-user commercial or retail, such as a grocery store or retail establishment, that may exceed 30,000 square feet if located on more than one (1) story of a multi-story building, provided the footprint of the building does not exceed 30,000 square feet.[2]

The existing structure at the Location has a total square-footage of 159,400 square feet in a single story with a partial mezzanine, which exceeds the footprint of 30,000 square feet per user and footprint limitation that is allowed in the TC Zone.[3]

Appellant agrees that use of the Location is non-conforming under the City's current Code provisions, and that the Location was rendered non-conforming on June 5, 2019.[4]

C. Summary of DRB Decision

The Development Review Board approved Resolution No. 429 affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029) dated December 28, 2023, (the "*Planning Director's Determination*"), and determined that:

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[2] *See* WC 4.132 (.02) F. and (.03) A. 1.
[3] *See* Attachment 3 to Staff Report, p. 98 of 660 (first page of Planning Department Staff Report dated December 9, 1991).
[4] *See* Applicant's Notice of Appeal submitted on March 27, 2024 (hereinafter, the "*Notice of Appeal*"), p. 4. Appellant took the same position before DRB. *See* Attachment 3 to Staff Report, pp. 24-25 (Appellant stated in its March 11 submission to DRB, providing legal argument, that the Location became non-conforming on June 5, 2019).

1. There is a legally established non-conforming use at the Location; specifically, the protected use is "a 159,400 square-foot electronics-related retail store."
2. There is a legally established non-conforming structure at the Location.
3. There are legally established non-conforming site conditions at the Location.

The DRB issued its Notice of Decision for Case File No. DB24-0002 on March 15, 2024 (the "*DRB Decision*").[5]

D. Separate Class II Proceeding

The City is currently processing a separate, but related, Class II Review application, which was filed by Appellant on December 15, 2023 (AR23-0031) (the "*Class II Review Application*"). The central issue in the Class II Review Application proceeding is whether the Appellant's proposed use of the Location constitutes a continuation of the non-conforming use that has been recognized by the DRB. The Class II Review Application has been referred by the Planning Director to the Development Review Board for review as Case File No. DB24-0003. The Development Review Board public hearing is scheduled for April 8, 2024.

III. ISSUES PRESENTED

A. Issue Before City Council

Appellant challenges the following DRB actions in this appeal:

1. Finding that the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store;"
2. Rejection of certain materials and information from the record on March 14, 2024; and
3. Adoption of the staff report presented to it in preparation for the February 26, 2024 meeting.[6]

Because City Council has decided to review an unredacted record, which includes all evidence submitted by any party, including Appellant, to the DRB, this memorandum addresses only City Council's ability to reject certain materials and information from the record in this appeal.

City Council's decision in this matter must be supported by substantial evidence in the whole record.[7] The "substantial evidence" standard means the governing body (City Council) decision must be a conclusion a reasonable person could make. This standard disallows LUBA from overturning a local government decision even if a reasonable person could draw a different conclusion from the same evidence so long as another reasonable person could draw the same conclusion as the local government.[8]

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[5] *See* Attachment 2 to Staff Report, pp. 3-4 of 20 (Resolution no. 429).
[6] Notice of Appeal, p. 2.
[7] *See* ORS 197.835(9)(a)(C).
[8] *See Adler v. City of Portland*, 25 Or LUBA 546, 1993 WL 1473299 at *6 (1993); *Fraley*, 32 Or LUBA 27, 31-32 (1996), *aff'd*, 145 Or App 484 (1996).

B. Issues Not Appealed

The following DRB decisions are not being challenged by Appellant (i.e., they are not being appealed and are not referenced in the Notice of Appeal):

1. There is a legally established non-conforming use at the Location
2. There is a legally established non-conforming structure at the Location.
3. There are legally established non-conforming site conditions at the Location.

City Council has decided that these issues are not necessary for a proper resolution of this matter.

C. Issues Beyond the Scope of this Appeal

The issues being addressed in the Class II Review Application are beyond the scope of this proceeding. In particular, City Council should not address the Appellant's proposed use of the Location or whether such proposed use constitutes a continuation of the non-conforming use that has been recognized by the DRB. The City Council should disregard any argument about proposed use(s) of the Location and reject any evidence outside the scope of this Appeal that may be more appropriate in the Class II Review.

ISSUE NO. 1
DRB'S RECOGNITION OF A NON-CONFORMING USE FOR "A 159,400 SQUARE-FOOT ELECTRONICS-RELATED RETAIL STORE"

The DRB recognized a non-conforming use for "a 159,400 square-foot electronics-related retail store."[9] Appellant requests recognition of a non-conforming use for "a 159,400 square foot ("SF") retail, office, warehouse, manufacturing, and service store (a commercial retail use)."[10]

IV. BURDEN OF PROOF

Appellant has the burden to prove the existence of a non-conforming use to the City in these proceedings.[11] Appellant's burden to establish the existence of a non-conforming use is not affected by the fact that the inquiry calls for production of evidence of what occurred at the Location almost five years ago. In *Fraley v. Deschutes Cnty*., the Land Use Board of Appeals ("*LUBA*") reiterated the applicant's requirement to establish the existing use, even from 20 years prior, stating, "[a]lthough it may be more difficult in most cases to establish the nature and extent

[9] *See* Attachment 2 to Staff Report, p. 4 of 20 (Resolution no. 429).
[10] *See* Notice of Appeal, p. 7; *see also* Attachment 3 to Staff Report, p. 28 (Appellant's March 11, 2024 submission of evidence to DRB).
[11] *See* Subsection 4.014 of the Development Code ("The burden of proving that the necessary findings of fact can be made for approval of any land use or development application rests with the applicant in the case. In the case of an appeal, the burden of proof rests with the appellant."); *ODOT v. City of Mosier*, 36 Or LUBA 666, 671 (1999) (explaining that in ODOT, which was arguing for its right to continue a use, had the burden of showing the nature and extent of its use (citing *Lane Cnty. v. Bessett*, 46 Or App 319 (1980))); *Sabin*, 20 Or LUBA at 30 (1990) ("The proponent of a nonconforming use bears the burden of establishing whether a nonconforming use has been lawfully established." (citing *Webber v. Clackamas Cnty.*, 42 Or App 151, *rev den*, 288 Or 81 (1979))).

of a use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it."[12]

In this matter, Appellant has the burden of proof, and City Council's decision is subject to the "substantial evidence" standard.[13] *River City Disposal and Recycling v. City of Portland*, also a case regarding non-conforming uses, illustrates how these concepts should be applied together.[14] In *River City Disposal and Recycling*, LUBA found that the City hearings officer's decision satisfied the "substantial evidence" standard.[15] It was enough that the hearings officer found that evidence presented in an affidavit (aerial photographs) was not persuasive.[16] 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.[17]

City Council must be sure that its decision – whether in favor of or against the Appellant's position – makes sense in light of all evidence in the record. Because Applicant has the burden of proof, City Council may decide that not enough evidence has been provided by Appellant to satisfy its burden of proof. The City is not obligated to produce evidence to counter Appellant's evidence in order for City Council to affirm the DRB's decision, or to otherwise recognize a more narrow scope of use than the Applicant would like. Further, City Council may determine the credibility of evidence in the record; in particular, when conflicting evidence exists, City Council may decide that some evidence is credible and persuasive, and other evidence is not.

V. LEGAL AUTHORITIES

This section outlines the legal authorities relevant to City Council's determination on this first issue.

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."[18] Wilsonville's own City Code defines "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."[19]

[12] 32 Or LUBA at 31-32.
[13] *See* Section III.A.
[14] *See* 35 Or LUBA 360 (1998).
[15] *Id.*
[16] *Id.* at 367-71.
[17] *Id.*
[18] *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)).
[19] S*ee* WC 4.001 (196.).

Appellant and the City agree that the use of the Location became non-conforming on June 5, 2019 (we will refer to the use of the Location on this date as the "Current Use").[20] This is the effective date of the Town Center Plan and related adopted zoning regulations. As of this date, the Current Use would not have been permitted under then-current applicable zoning regulations for a multitude of reasons. For purposes of this appeal, the Current Use would not be permitted due to the limitations of either: (1) 30,000 square feet per user for single-story buildings; or (2) for uses in multi-story buildings, a building footprint limitation of 30,000 square feet, as stated in WC 4.132 (.02) F. and (.03) A. 1.

B. City Council Must Examine the Actual Use of the Location as of June 5, 2019 to Define the Scope of that Non-Conforming Use

The DRB has recognized that a non-conforming use exists at the Location, and Appellant agrees. The only controversy of the non-conforming use raised by Appellant regards the scope of that non-conforming use. City Council must determine the nature and extent of this non-conforming use as of June 5, 2019.[21] City Council's decision in this matter should be based on a determination of how the Location was actually used as of June 5, 2019.[22] Doing so is required under applicable law[23] and critical to establishing a standard for what non-conforming use(s) may continue at the Location. Contrary to Appellant's argument in its appeal (which finds no support under Oregon law), the City Council must determine the non-conforming use as of June 5, 2019, not what use(s) may have been approved in 1991, over 30 years ago.

C. Evidence Relevant to Establishing Nature and Extent of Non-Conforming Use

Prior Oregon cases that address non-conforming uses provide some examples of the evidence that is considered by local governments in this type of matter: testimony and affidavits regarding what activities occurred on the subject property, contemporaneous records such as advertisements and tax returns, and photographic evidence.[24] None of the many cases reviewed by

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[20] *See* Section II.B; Notice of Appeal, p. 4. Appellant took the same position before DRB. *See* Attachment 3 to Staff Report, pp. 24-25 (Appellant stated in its March 11 submission to DRB, providing legal argument, that the Location became non-conforming on June 5, 2019).

[21] *See Sabin v. Clackamas Cnty.*, 20 Or LUBA 23 (1990) (citing *Polk County v. Martin*, 292 Or 69 (1981)) ("It is the nature and extent of the lawful use in existence at the time the use became nonconforming, which is the reference point for determining the scope of permissible continued use."); *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.").

[22] *See 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."). Appellant agrees that June 5, 2019 is the relevant point in time. *See* Notice of Appeal, p. 4; Attachment 3 to Staff Report, pp. 24-25 (Appellant stated in its March 11 submission to DRB, providing legal argument, that the Location became non-conforming on June 5, 2019).

[23] *See, e.g., Marquam Farms Corp. v. Multnomah Cnty.*, 35 Or LUBA 392, 396 (1999) (explaining that a local government that recognizes a non-conforming use must define the nature and extent of that use).

[24] *See Larson v. City of Warrenton*, 29 Or LUBA 86 (1995) (considered evidence included testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs); *Fraley v. Deschutes Cnty*., 32 Or LUBA 27 (1996), *aff'd*, 145 Or App 484 (1996) (considered evidence included tax records, affidavits and interviews of previous site occupants, and photographic evidence); *Crook v. Curry County*, 38 Or LUBA 677 (2000) (considered

staff in this matter provide even one example of a local government that considered either (1) what would have been allowed under a property's original zoning, or even (2) what was written in the subject property's original land use approvals. Further, LUBA does not consider these factors when reviewing local jurisdictions' decisions regarding non-conforming uses.

Appellant's position is that the City should recognize a non-conforming use based on the Location's original land use approvals, secured by Capital Realty Corporation, the property owner, in 1991 (Appellant refers to this as the "1991 Decision").[25] Appellant makes a few related arguments:

1. "The 1991 Decision is the controlling authority for determining the nature and extent of the non-conforming [use] at the [Location] because the 1991 Decision lawfully established the non-conforming use in the first instance."[26]
2. "[B]oth the Planning Director and DRB have abjectly failed to so much as even *address* the 1991 Decision."[27]

Based on an extensive review of applicable case law (and without any contradictory case law presented by Appellant), the original land use approvals (and the zoning regulations that applied prior to 2019) are irrelevant to a determination of what use existed at the Location as of June 5, 2019. This is the analysis that the case law cited in this memorandum requires. Appellant has not cited any legal authorities to support its assertion that the original land use approvals are the "controlling authority" in this matter, nor has it provided any relevant evidence that local governments typically review in these types of matters.

Appellant interprets the definition of "non-conforming use" provided in *Morgan* and WC 4.001 (196.) to compel the City to recognize its desired scope of non-conforming use. These are mere definitions, and do not address how a local government determines the scope of a non-conforming use, which is the central issue in this matter. Appellant's reading of these definitions focuses on the part that requires a non-conforming use to be legally established – but completely ignores the part that recognizes a use may change over time or may be rendered non-conforming by subsequent zoning regulations. Appellant's focus on these definitions also completely ignores the legal authorities outlined in the next section, Section V.D. These legal authorities are the law in Oregon, and control the discretion a local government has to determine the scope of a non-conforming use.

D. Non-Conforming Uses Are Disfavored and Local Government Has Discretion to Establish Extremely Narrow Scope of Use

If the City recognizes a non-conforming use in this matter, it has significant discretion to define a narrow scope. "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,

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evidence included photogrammetric evidence, testimony from site visitors, the age of certain building materials, and the fact that the county's assessor's office had no record of a structure on the subject site).

[25] *See* Attachment 3 to Staff Report, pp. 20-28 of 660 (Appellant's March 11 legal argument to DRB).

[26] *See* Notice of Appeal, p. 3.

[27] *See* source cited *supra* note 26.

conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible."[28] Further, "the 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."[29]

There are many examples in the case law of local governments defining a non-conforming use in extremely narrow terms:

- In *Smith v. Lane County*, a county hearings officer recognized a limited non-conforming use: "The use of horses and cattle to practice equine/bovine eventing is verified as to the participation of up to ten individuals during any one session."[30] On appeal to LUBA, LUBA applied the substantial evidence standard and declined to "disturb the county's choice" (i.e., LUBA allowed the county's recognized scope of non-conforming use).[31] Not only did the hearings officer recognize a specific use (using horses and cattle to practice equine/bovine eventing), the hearings officer also recognized a narrow scope of the specific use – participation of up to only ten individuals during one session.
- In *Larson v. City of Warrenton*, the City of Warrenton determined the following scope of non-conforming use: " . . . storing and repairing marine construction equipment and as a base of operations for his construction company. Equipment typically seen at the site included trucks, cranes and other earth moving equipment used in marine and land construction."[32]
- In *Senkovich v. Lane County*, the county recognized as nonconforming uses "agricultural and forestry uses, counseling, educational uses, seminars, conferences, retreats, religious uses, and residential uses," but limited the nonconforming use to "150 resident students, 35 staff members and families, and 3,000 annual guests."[33]

As is clear from these examples, local governments may define non-conforming uses in extremely narrow terms. Under Appellant's theory of non-conforming use, the above-described cases would have uses described as "agricultural use" in *Smith*, "industrial use" in *Larson*, and "recreational, educational, agricultural and forestry uses" in *Senkovich*. Not only is such an interpretation contrary to Oregon law, the purpose of non-conforming uses is to ensure only the particular, current use is continued, rather than allowing a broad category of non-conforming uses to occur on a property.

As of June 5, 2019, it is undisputed that the actual use of the Location was a Fry's Electronics store: an electronics retail store with a total interior square-footage of 159,400 square feet.[34] Appellant offers no evidence that the use as of June 5, 2019 is anything more than or

[28] *Parks v. Bd. of Cnty. Comm'rs of Tillamook Cnty.*, 11 Or App 177, 196–97 (1972) (internal citation omitted).
[29] *Clackamas Cnty. v. Gay*, 133 Or App 131, 135 (1995), *rev den*, 321 Or 137 (1995), *aff'd*, 146 Or App 706 (1997).
[30] 25 Or LUBA 1, 2 (1993) (emphasis added).
[31] *Id.*
[32] 29 Or LUBA 86, 1995 WL 1773182 at *1 (emphasis added).
[33] LUBA No. 2017-064, 2023 WL 6955255 at *1 (Sept. 18, 2023) (emphasis added).
[34] *See* Attachment 3 to Staff Report, p. 98 of 660 (first page of Planning Department Staff Report dated December 9, 1991, which characterized the use as "a retail business with the anonymous name 'Project Thunder' . . . a 159,400 square foot electronics-related retail store").

different from this use. The DRB Decision recognized a non-conforming use for "a 159,400 square-foot electronics-related retail store."[35] This scope is appropriate and comports with applicable case law such as *Parks* and *Gay*, which allow local governments to narrowly limit and resist expansion of the scope of non-conforming uses in order to resist the erosion of zoning regulations.

In fact, the term "electronics-related retail store" is broader than what is strictly necessary under applicable case-law – especially when this term is compared to the extremely narrow uses that were approved in *Smith*, *Larson*, and *Senkovich*. And, although not relevant to this inquiry, "electronics-related retail store" is language found in the 1991 land use approval that Appellant inaccurately states should be the sole basis for determining the non-conforming use.[36]

As stated in Section IV, Appellant has the burden of proof to establish the existence of a non-conforming use. In other words, Appellant must prove that uses beyond those described above were occurring at the Location on June 5, 2019. Furthermore, the City is not obligated to present evidence if it desires to define a more narrow non-conforming use than Appellant would like – Appellant must provide sufficient evidence to compel the City to recognize the broader "retail, office, warehouse, manufacturing, and service store" use that it argues for in its briefing.[37]

If the City elects to recognize this scope of non-conforming use, virtually *any* business could operate at the Location under this non-conforming use; this is an absurd result that totally undermines City's land use planning. Exceptions to broad regulations, such as regulating non-conforming uses, should not be interpreted to "swallow the rule."[38] Appellant's unsupported and overly broad classification of non-conforming use would do just that. To reiterate, Appellant has not provided or referred to any relevant evidence to establish the scope of the non-conforming use of the Location as of June 5, 2019.

VI. APPELLANT HAS NO TAKINGS CLAIM

Appellant advances an argument that the DRB Decision represents an unconstitutional regulatory taking that is prohibited under Article I, section 18 of the Oregon Constitution and the Fifth Amendment (made applicable through the Fourteenth Amendment) of the United States Constitution.[39] These state and federal "takings" principles provide that private property cannot be taken for a public purpose without just compensation to the property owner. A typical example of this requirement is when a city needs to build a new road and acquire property from a private property owner for the road, the city must pay the property owner "just compensation" for the property being acquired.

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[35] *See* Attachment 2 to Staff Report, pp. 3-4 of 20 (Resolution no. 429).
[36] *See* Attachment 3 to Staff Report, p. 98 of 660 (first page of Planning Department Staff Report dated December 9, 1991, which characterized the use as "a retail business with the anonymous name 'Project Thunder' . . . a 159,400 square foot electronics-related retail store").
[37] *See* Notice of Appeal, p. 7; *see also* Attachment 3 to Staff Report, p. 28 of 660 (Appellant's March 11, 2024 legal argument to DRB).
[38] *See, e.g., 1000 Friends of Oregon v. LCDC (Tillamook Co.)*, 303 Or 430, 441 (1987).
[39] *See* Notice of Appeal, p. 5; *see also* Attachment 3 to Staff Report, pp. 5-6 (Appellant's March 4, 2024 submission of evidence to DRB), p. 27 (Appellant's March 11, 2024 legal argument to DRB).

A. Regulatory Taking Defined

The United States Supreme Court and the Oregon Supreme Court have also recognized that regulations can also constitute a taking of private property, generally when the property owner is deprived of all economically feasible use of the property.[40]

Prior to determining whether a regulatory taking has occurred, a precursor to these tests is establishing who is entitled to allege that a regulatory taking has occurred. Only persons or entities that hold a current, not prospective, interest in the real property at the time the alleged taking occurred, and who can allege a loss of economically feasible use of the property, may assert a takings claim. Possessing a current, not prospective, property interest is necessary because the person or entity that is allegedly being deprived their interest in the property without just compensation must actually have been deprived.

B. Appellant Cannot Claim a Regulatory Taking Occurred

Here, Appellant, the party advancing the takings argument, did not own the subject real property when the City adopted the Town Center zone, nor does Appellant now own the subject real property. Appellant may have a prospective, future right to purchase the real property (though such evidence is not in the record), but it is not the current property owner, a tenant, or lender with a security interest in the real property. Appellant has no standing to assert a takings claim nor to allege it is being denied a property right because Appellant does not own the subject real property.

The United States Supreme Court has held that a property owner who purchases property from another may assert a regulatory takings claim after transfer of ownership, but only in the case where the prior owner could not have made such a claim because the claim was not ripe at the time.[41] Again, Appellant does not currently own the subject property, and, as such, does not have standing to make a takings claim against the City.

ISSUE NO. 2
REJECTION OF CERTAIN MATERIALS AND INFORMATION FROM THE RECORD

The DRB rejected certain materials and information from the record during its March 14, 2024 meeting.[42] Appellant objects to this.[43] City Council has decided to review an unredacted record, which includes all evidence submitted by any party, including Appellant, to the DRB, this section addresses only City Council's ability to reject certain materials and information from the record in this appeal.

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[40] *See Lucas v. S.C. Coastal Council*, 505 US 1003 (1992); *Fifth Ave. Corp. v. Washington County*, 282 Or 591 (1978); *but see Penn Central Transp. Co. v. New York City*, 438 US 104 (1978) (under federal takings analysis, when not all economically feasible use has been deprived, courts will engage in a three-factor test to determine whether a regulatory taking has occurred).
[41] *See Palazzo v. Rhode Island*, 533 US 606, 626-28 (2001).
[42] *See* Attachment 5 to Staff Report, p. 2 of 5 (verbatim transcription of motion made during March 14, 2024 DRB meeting); *also see* Attachment 3 to Staff Report (the unredacted record).
[43] *See* Notice of Appeal, pp. 5-7.

VII. CITY COUNCIL IS ENTITLED TO REJECT EVIDENCE FROM THE RECORD

City Council is entitled to reject evidence from the record pursuant to OAR 661-010-0025(1)(b).[44] This administrative rule states that in an appeal to LUBA, LUBA may review, "[a]ll written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." It is a well-established rule of statutory interpretation that one must not insert language that has been omitted – or omit language that has been inserted.[45] This administrative rule expressly states that LUBA reviews evidence "not rejected by" the decision maker, thus indicating a local government may reject evidence from the record. Appellant cites no accurate authority to support its position that the City must accept any evidence submitted by Appellant.

If City Council decides that evidence is not relevant to this appeal proceeding, City Council should reject such evidence from the record in this Appeal, as DRB did.

VIII. ORS 197.797 DOES NOT PROHIBIT A LOCAL GOVERNMENT FROM REJECTING EVIDENCE FROM THE RECORD

Appellant cites portions of ORS 197.797 to argue that a local government may not reject certain materials and evidence from the record.[46] Appellant misrepresents and misunderstands this statute.

ORS 197.797(4)(a) requires only that documents or evidence that is supplied to the local government by Appellant "be made available to the public." A local government's obligation to create a record for its ultimate decision (and possible appeal) is entirely distinct from its obligation to make materials and information available to the public.

With respect to DRB's proceedings in this matter, all of Appellant's documents and evidence were included in the packet of materials that was published and made available to the public. Appellant was not restricted from discussing certain topics or issues during oral testimony at the DRB hearing, nor was Appellant denied the ability to provide a PowerPoint presentation during the DRB hearing. Thus, all of Appellant's documents, evidence, and argument were made available to the public.

However, ORS 197.797(4)(a) is not the relevant part of ORS 197.797 regarding the record created by a local government in a quasi-judicial land use hearing. ORS 197.797(9) provides definitions of the terms "evidence" and "argument" because other parts of this statute differentiate between these categories of information. ORS 197.797(9)(a), defining "Argument," expressly states that it does not include facts; rather, argument includes assertions and analysis of the applicable legal standards or policy that Appellant believes is relevant to the decision to be made. The only place in ORS 197.797 that explicitly states something must be made part of the record is

[44] *See* OAR 661-010-0025(1)(b) (emphasis added).
[45] *See* ORS 174.010.
[46] *See* source cited *supra* note **Error! Bookmark not defined.**.

found in ORS 197.797(6)(e), which allows an applicant to submit final written argument. However, that subsection also states that the applicant cannot submit new evidence in the final argument. In other words, the only document that the local government may not reject is Appellant's final written argument, which could not contain new evidence.

With respect to DRB's proceedings in this matter, DRB did not reject Appellant's argument. DRB only rejected certain evidence that was not relevant to the Class I Review.[47] No part of ORS 197.797 even addresses – let alone prohibits – a local government from rejecting "written testimony and all exhibits, maps, documents or other materials" from the record.

If City Council decides that evidence is not relevant to this appeal proceeding, City Council should reject such evidence from the record in this Appeal, as DRB did.

IX. THE PROPER FORUM FOR AN OBJECTION TO REJECTION OF EVIDENCE FROM THE RECORD IS LUBA

If Appellant disagrees with the DRB's (or City Council's) determination of what should be rejected from the record, that argument is properly addressed through a procedural assignment of error at LUBA.[48]

X. A MOTION TO REJECT EVIDENCE FROM THE RECORD IS NOT REQUIRED TO BE INCLUDED IN THE DRB DECISION

Appellant argues that the DRB's motion to reject certain materials and evidence from the record was deficient because it was not included in the DRB Decision.[49] Appellant does not cite any legal authority for this proposition.

ISSUE NO. 3
DRB'S ADOPTION OF THE STAFF REPORT

The DRB adopted the staff report dated February 15, 2024.[50] Appellant objects to this.[51]

XI. THE DRB WAS ENTITLED TO ADOPT THE STAFF REPORT

Appellant does not cite any legal authority for this proposition, and does not provide any substantive argument on this point in the Notice of Appeal.

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[47] In fact, the vast majority of the evidence excluded would be more appropriate in the Class II Review since it largely involved a discussion of the proposed use of the Location, rather than the existing use.
[48] *See Port of Umatilla v. City of Umatilla*, LUBA No. 2014-062 (2014).
[49] *See* Notice of Appeal, p. 6.
[50] *See* Attachment 5 to Staff Report, p. 3 of 5 (verbatim transcription of motion made during March 14, 2024 DRB meeting); *see also* Attachment 2 to Staff Report, pp. 5-20 of 20 (the staff report, as attached to Resolution no. 429).
[51] *See* Notice of Appeal, p. 2.

CONCLUSION TO ISSUES APPEALED

Appellant has not presented any case law or other legal authority that contradicts City staff's summary of relevant authorities in this memorandum. Further, Appellant has not satisfied its burden of proof: it has presented no relevant evidence to support its position regarding the proper scope of non-conforming use.

City staff recommend that City Council find, pursuant to WC 4.022(.07):

1. DRB followed correct procedures, and in particular, the DRB did not err when it adopted the staff report dated February 15, 2024, and rejected certain materials and evidence from the record; and,
2. Affirm the Development Review Board decision in Resolution No. 429, determining that 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 the correct and appropriate decision made based on applicable laws, policies, and standards.

Further, City staff recommend that City Council reject any irrelevant evidence from the record pursuant to OAR 661-010-0025(1)(b) because in an appeal of this matter to LUBA, LUBA will review any evidence not rejected by City Council.

OTHER ARGUMENTS PRESENTED IN THE APPEAL

XII. BIFURCATION OF CLASS I AND CLASS II PROCEEDINGS

Appellant mentions in its Notice of Appeal, and in its briefing to DRB, that the City required Applicant to file separate Class I and Class II applications; it implies procedural deficiencies.[52]

City staff did determine that a Class II application was necessary to address at least one of the questions that were posed in Appellant's Class I application. The City invited Appellant to submit a Class II application and withdraw its Class I application, both in writing on November 28, 2023,[53] at the DRB hearing on February 26, 2024,[54] and in the days following the DRB hearing on February 26, 2024. The City offered to withdraw the Planning Director's Determination if Appellant wanted to withdraw the Class I application. The City's goal in making this offer was to allow the City to address all issues pertinent to both the Class I and Class II proceedings in one combined proceeding. Appellant declined this offer.

Appellant misunderstands the City's reason for requiring a separate Class II application. Appellant's briefing seems to suggest that the City required a Class II process in order to determine the scope of the recognized non-conforming use.[55] That is not accurate. The City required a Class II application to address Appellant's request for confirmation that the Home Depot may continue to operate at the Location (i.e., a determination of continuation of non-conforming use by a new proposed user); this question requires a Class II process under the City's policies and procedures.[56] When Appellant failed to respond to the City in November 2023 and rejected the City's offer in February 2024, the City was forced to process the question that is subject to a Class I review (the determination whether the current use is legally non-conforming) since Appellant requested a Class I review. The DRB determined the nature and extent of the recognized non-conforming use because that is what case law requires; a local government may not recognize a non-conforming use but neglect to determine its nature and extent (i.e., scope).[57] Therefore, the DRB Decision did not "prejudge" the issues subject to the Class II Review as Appellant asserts in its Notice of Appeal.

XIII. APPELLANT'S READING OF CITY ZONING REGULATIONS

Appellant states in its Notice of Appeal that it "has reviewed the zoning code in place at the time of the 1991 Decision, and nothing within the zoning code further classified uses or limited commercial retail uses to specific subsets, such as an electronic store or commercial hardware store. The Applicant is also not aware of any state law that makes such a distinction; nor has the

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[52] *See* Notice of Appeal, p. 3; Attachment 3 to Staff Report, p. 21 of 660 (portion of Appellant's March 11, 2024 legal argument regarding this point) and p. 463 of 660 (portion of Appellant's Notice of Appeal to DRB regarding this point).
[53] *See* Attachment 3 to Staff Report, p. 469 of 660 (email from Cindy Luxhoj to Appellant stating that Class II application is necessary and offering an option to withdraw the Class I application).
[54] *See* Attachment 4 to Staff Report, pp. 14-15 of 24 (discussion before DRB regarding this point).
[55] *See* sources cited *supra* note 52.
[56] *See* source cited *supra* note 53.
[57] *See, e.g., Marquam Farms Corp. v. Multnomah Cnty.*, 35 Or LUBA 392, 396 (1999) (explaining that a local government that recognizes a non-conforming use must define the nature and extent of that use).

City pointed to any state law or code provision applicable at the time."[58] This statement reflects an incomplete understanding of Wilsonville's zoning code, as it existed in 1991.

Included within the 1991 Decision record submitted by the Appellant is a memorandum from City staff to the Design Review Board regarding a land use application for the Les Schwab Tire Center. This memorandum provides background on Wilsonville's zoning code as it applied to the Town Center at that time, noting that "The Town Center was zoned and master planned. The Wilsonville Town Center Plan drawing was placed into the Zoning Code at 4.136 (1) (c) (12). The Town Center Plan drawing conceptually locates functional use areas of central commercial, service commercial (includes tire sales and service), food and sundries, fast foods service, office professional, offices for general use, and high density apartments. The zoning text provides for permitted and accessory uses within each of the designated functional use areas." [59]

The Stage I Master Plan implemented the Wilsonville Town Center Plan (Ordinance No. 55) under the Planned Development Commercial zoning designation. The Stage I Master Plan modification in 91PC43 reclassified the overlay designation of the Location to Central Commercial to allow an electronics-related retail store consistent with this overlay designation.[60] Finding 40 of the 1991 Decision states "Ordinance No. 55 is a conceptual plan intended to list recommended uses prescribed by commercial overlay zones. The Ordinance further allows the Planning Commission flexibility to change the plan to reflect changes of community needs, shopping habits, transportation and in social economic needs. Such is the case in this application with proposed changes in building orientation, driveway location, reclassified uses and reconfigured open space."[61] Therefore, it is inaccurate to state that the Wilsonville Development Code in effect in 1991 did not further classify uses within the Planned Development Commercial zone.

[58] *See* Notice of Appeal, pp. 4.
[59] *See* Attachment 3 to Staff Report, pp. 161-162 of 660 (memorandum from Michael E. Kohlhoff, City Attorney to the Design Review Board dated October 9, 1990 explaining background and purpose of Planned Development Commercial Zoning as it applied to Town Center).
[60] *See* Attachment 3 to Staff Report, pp. 238-239 of 660 (revised Stage I Master Plan)
[61] *See* Attachment 3 to Staff Report, p. 113 of 660 (Case File 91PC43 Staff Report explaining process for modifying overlay zones)