



# **Appeal of Development Review Board Resolution No. 429 (DB24-0002)**

City Council Special Meeting

April 15, 2024

Presented by:

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# Existing Development



see Attachment 3 to staff report, pp. 46-47 of 660



# Procedural Background

**October 30, 2023**

**Class I Review  
Application  
Submitted**

**December 28, 2023**

**Planning Director  
Determination  
Issued**

**January 10, 2024**

**Notice of Appeal  
Filed**



# Procedural Background



see Attachment 2 to staff report, pp. 3-4 of 20;  
Attachment 4 to staff report, all pages; Attachment 5  
to staff report, all pages; Appellant's Notice of Appeal  
dated March 27, 2024, pp. 1-7



# Procedural Background

**April 1, 2024**  
**City Council Order on  
Appeal Issued**

**April 3, 2024**  
**City Council Special  
Meeting**  
*Scheduled and  
Continued*

**April 15, 2024**  
**City Council Meeting**

see Appellant's Notice of Appeal dated March 27,  
2024, pp. 1-7



# Concurrent Class II Review

- Referred by Planning Director to Development Review Board
- Public Hearing held on April 8, 2024
  - Closed public hearing
  - Record kept open for 7 days until April 15, 2024
  - Special Meeting not yet scheduled



# Class I Decision

- Town Center Development Regulations
  - Ordinance No. 835
  - Effective Date June 5, 2019

*see Applicant's Notice of Appeal, pg. 4; Attachment 3  
to staff report, pp. 24-25*



# Issue on Appeal

- Is the Development Review Board's definition of the scope of the recognized legally established non-conforming use at the Location – “a 159,400 square-foot electronics-related retail store” – correct?





# Burden of Proof

- Appellant has the burden of proof
- Impact of “Substantial Evidence” standard
  - City may decide evidence is not persuasive or not credible
  - City is not obligated to present its own evidence
  - City may find that Appellant has failed to satisfy its burden of proof
  - City’s decision must be one that a reasonable person could make when viewing the same evidence



# What is a Non-Conforming Use?

- 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.”

*Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (full citation included in legal memorandum).



# Key Questions before City Council

- What was the actual use of the Location as of June 5, 2019?
  - Nature, and
  - Extent.



# Types of Evidence

- Relevant evidence
  - Testimony/affidavits
  - Contemporaneous records
    - Advertisements
    - Tax returns
    - Photographs
- Irrelevant evidence
  - What would have been allowed under original zoning
  - Content of original land use approvals



# NCUs are Not Favored

- NCUs are no favored – they detract from local government’s ability to engage in land use planning and undermine zoning regulations.
- Liberally construe provisions to limit NCUs to prevent expansion of NCUs as much as possible
- Only allow least intensive variation of NCU to continue

# Examples

	Recognized use	NOT
<i>Smith v. Lane Cnty.</i>	“The use of horses and cattle to practice equine/bovine eventing is verified <u>as to the participation of up to ten individuals during any one session.</u> ”	Agricultural use
<i>Larson v. City of Warrenton</i>	“ . . . storing and repairing marine construction equipment and as a base of operations for his construction company. <u>Equipment typically seen at the site included trucks, cranes and other earth moving equipment used in marine and land construction.</u> ”	Industrial use



# Examples

	Recognized use	NOT
<i>Senkovich v. Lane Cnty.</i>	“agricultural and forestry uses, counseling, educational uses, seminars, conferences, retreats, religious uses, and residential uses,” but limited the nonconforming use to <u>“150 resident students, 35 staff members and families, and 3,000 annual guests.”</u>	Recreational, educational, agricultural and forestry uses



# Takings Issue

- Appellant had no actionable property interest in the Location on June 5, 2019





# Establishing a Record

- OAR 661-010-0025(1)(b): 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.”
- ORS 197.797 does not prohibit rejection of evidence



# Recommendation

- **Affirm** the Development Review Board decision in Resolution No. 429, affirming the Planning Director's Determination of Non-Conformance in Case File No. ADMN23-0029 determining that the scope of the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store."