

DEVELOPMENT REVIEW BOARD MEETING

MONDAY, MARCH 25, 2024

6:30 PM

Consent Agenda:

1. Approval of minutes from the February 26, 2024
DRB Panel B meeting



DEVELOPMENT REVIEW BOARD PANEL B

MEETING MINUTES

February 26, 2024 at 6:30 PM

City Hall Council Chambers & Remote Video Conferencing

CALL TO ORDER

A regular meeting of the Development Review Board Panel B was held at City Hall beginning at 6:30 p.m. on Monday, February 26, 2024. Chair Rachele Barrett called the meeting to order at 6:32 p.m., followed by roll call.

CHAIR'S REMARKS

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

ROLL CALL

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

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

CITIZEN INPUT

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

CONSENT AGENDA

1. Approval of minutes of January 22, 2024 DRB Panel B meeting

Alice Galloway made a motion to approve the January 22, 2024 DRB Panel B meeting minutes as presented. John Andrews seconded the motion, which passed unanimously.

PUBLIC HEARINGS

2. **Resolution No. 428. PGE Memorial Substation.** The applicant is requesting approval of a Conditional Use Permit and Site Design Review for development of the PGE Memorial Substation adjacent to SW Parkway Avenue and the I-5 Freeway.

Case Files:

DB23-0012 PGE Memorial Substation

- Site Design Review (SDR23-0005)
- Conditional Use Permit (CUP23-0001)

Chair Barrett called the public hearing to order at 6:37 p.m. and read the conduct of hearing format into the record. All Board members declared for the record that they had visited the site. No board member, however, declared a conflict of interest, bias, or conclusion from a site visit. No board member participation was challenged by any member of the audience.

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

Ms. McAlister presented the Staff report on the PGE Memorial Substation via PowerPoint, briefly noting the site's location and surrounding features, and reviewing the requested applications with these key comments:

- Currently a green field with a public sidewalk, the site also contained the Failmezger Heritage Tree, located along the east property line. The site was designated Industrial in the Comprehensive Plan and the proposed use was compatible with the PDI Zone and Comprehensive Plan designation. (Slide 2)
- Proper noticing was followed for this application. On February 6, 2024, notice was mailed to all property owners within 250ft of the subject property, published in the newspaper, and placed on the site and on the City's website.
 - No public comments were received during the comment period for the project.
- There were two requests before the DRB tonight for the PGE Memorial Substation application. The first request was objective in nature as it involved verification of compliance with Code standards. The other request for a Conditional Use Permit involved discretionary review.
- For the Site Design, the Applicant had used appropriate professional services to design the proposed substation and associated landscaping. The proposed structure would be screened from surrounding uses with landscaping and fencing. Plants selected for screening included a combination of cascara trees, large and small evergreen shrubs, and ground cover. The chosen species were selected to provide a variety of heights and sizes that would not be bare in winter. Landscape screening was proposed along the north, east, and south perimeter of the fence. Landscaping was also incorporated on the boundaries of the site and would provide shade, stormwater mitigation, and aesthetic value. (Slide 5)
 - Condition of Approval PDB 7 would require that landscape screenings installed along the western perimeter facing I-5 be substantially similar to the screening proposed on the north, east, and south perimeters. The site would be configured to allow for efficient use as well as for repairs and regular maintenance.
- Conditional use permits were intended for uses that might not be compatible with the surrounding uses, and therefore, certain uses were only permitted through Conditional Use Permits. (Slide 6)
 - Substations were only permitted through a Conditional Use Permit, and as such, were not an outright allowed use in any zone. The purpose of permitting substations solely through a Conditional Use Permit was to ensure the proposal was consistent with the Comprehensive Plan, Chapter 4, of the Wilsonville Development Code, the characteristics of the site were

suitable for the proposed use, all required public facilities and services adequately met the needs of the proposed use, and that the proposed use would not alter the character of the surrounding area.

- There was no evidence that the substation would alter the industrial character of the surrounding area as there was already an existing substation located just a few parcels south of the subject property. The immediate surrounding uses, such as the commercial use to the south and church to the north of the property, were not traditional uses within the PDI Zone. The substation fit well as a more static use that would not bring daily customers or traffic.
- The substation would fortify and enhance the performance of the electrical grid within Wilsonville, and benefit existing industrial users, and therefore it would not negatively impact the surrounding uses.
- To address potential noise impact, the PGE transformers would be the only equipment that would emit a consistent sound within the facility. The technical specifications set maximum sound levels for the transformers and the manufacturer would provide test data to confirm the actual values prior to the equipment leaving the factory.
 - It was anticipated that at its loudest, the decibel level would only be 10 decibels above a normal conversational level, and sound tests would be completed during the factory acceptance testing. Overall, it was anticipated that only a low level of noise would be produced by the substation.
- The project proposed high screen landscaping to mitigate any potential noise impacts on adjacent properties. Additionally, the site and its neighboring properties were directly adjacent to the consistent high level of noise from I-5. It was unlikely any sound emitted from the substation would impact adjacent properties greater than current conditions.
 - To mitigate the visual impact of the substation, the Applicant proposed landscaping that met the high screen standard on three sides of the substation, including along SW Parkway Ave where it was not in conflict with the Heritage Tree, along the boundary of the church property to the north, and along the boundary with the Garden Center to the south.
 - A partially-sight-obscuring fence 8 ft in height surrounded the development. Only storm water facilities and an access drive were proposed between the fence and the high screen landscape of the adjacent properties. Condition of Approval PDB 7 required that the High Screen Standard be met along the west property line that abutted I-5 as well.
 - Additionally, PGE designed all its new facilities with Dark Sky fixtures in an attempt to minimize light pollution as much as possible.
- The 100-year-old Failmezger Heritage Tree on the west property line of the site was an impressive White oak with a 42-inch DBH and had held the honor of Heritage Tree Designation since 2009.
 - The tree had been preserved through the construction of Parkway Ave as well as the sidewalk that looped to the east of the tree, and the tree's unique history was memorialized with a fencepost from the original Failmezger family farm which was melded into the trunk of the oak tree. Aside from that construction, the site had been largely undisturbed, and the tree had thrived to the best of its ability in the urban environment that had grown around it.
 - The installation of the substation would be a notable disruption in the long undisturbed parcel where the tree grew. Careful consideration had been taken to ensure the installation of the substation and associated underground lines would not negatively impact the Heritage Tree.

The tree protection radius would extend 45 ft from the center of the trunk and 90 ft parallel to SW Parkway Ave.

- A tree protection easement was proposed and would ensure that care of the Heritage Tree continued after construction.

Chair Barrett noted it was clear the Applicant had taken a number of protections into consideration and asked about fire mitigation.

Ms. McAlister replied she had not looked into that but understood TVF&R had been involved and deferred to the Applicant for further information.

Chair Barrett confirmed there were no further questions from the Board and called for the Applicant's presentation.

Jordan Messinger, PGE, 121 SW Salmon St, Portland, OR, 97204 thanked Ms. McAlister for her accurate portrayal of the project and provided some extra context with the following comments:

- The subject project, along with the existing substation to the south of the site, would benefit the City by bolstering Wilsonville's growth and would allow PGE to continue to provide more reliable power into the future and to accommodate that growth.
- Additionally, it was anticipated that the substation to the south would only be operational for approximately another decade, and the new facility would have the capacity for both future growth and to take over the load currently provided by the older substation.
- There was no space on the site of the existing substation to expand and bring the substation up to modern standards, which was why the Applicant had selected the site to the north.

John Andrews asked when construction would begin and approximately how long the project would take.

Mr. Messinger responded PGE's goal was to start in May or June provided that the Applicant could get through the permitting process before then. Total duration should be about six months.

Chair Barrett asked what steps had been taken to mitigate fire.

Mr. Messinger replied that PGE designed all substations by regulatory requirements from the FPRC and other electrical code requirements, such as no flammable materials inside the substation and transformers filled with a mineral oil. In addition, the facilities around it were designed to contain it should there be a leak. PGE also coordinated with local fire jurisdictions for mitigation efforts if there was an event.

Mr. Andrews noted that years ago, when walking under the overhead power lines on Canyon Creek Rd, he had heard a loud hum and his hair had moved around. He asked if PGE had used overhead grounding wires for the proposed substation to prevent that from happening.

Mr. Messinger answered no. He explained that the proposed facility would be converting 115 KV power down to 12.5 KV, the voltage distributed to homes and businesses. The aforementioned Canyon Development Review Board Panel B - Verbatim Excerpt
Appeal of Administrative Decision ADMN23-0029

Creek Rd line was likely 230 or 500 KV, a higher voltage which could generate some sound and induction. Although the proposed transformers themselves could hum at times, specifically during hot weather when there was higher usage, a standard had been set for maximum sound level. Additionally, because it was next to I-5, it would be unlikely that any noise would be heard above the freeway noise.

Chair Barrett called for public testimony regarding the application.

Kerry Gillespie, Owner, Gillespie Properties, noted his company was directly east of the subject property. He asked if any overhead power lines would flow east of the substation, as he was concerned about hums, buzzing, and possible interference with power equipment in his business. He asked if any shielding would be in place to mitigate those issues.

- He noted the proposal had stated that the grading was relatively flat; however, Mentor had increased the grading approximately 15 feet approaching I-5. He asked if the Applicant would bring that back to street level.

Chair Barrett confirmed with Staff that no one else present at City Hall or on Zoom wanted to testify. She called for the Applicant's rebuttal.

Mr. Messinger responded that onsite grading would be done to remove the fill that had accumulated over the years to pull that grading back down, noting that when PGE was finished, the grading would be lower than it was currently. He confirmed that new overhead power lines would go into the site to feed the substation for the higher voltage, but they would come from the west, across I-5, via an existing 115 KV line on Boones Ferry Rd. Ultimately, there would be two new, short taps that crossed the freeway directly into the substation site but nothing going east.

Ms. McAlister noted there had been a question about noise and shielding across the site and whether it would be noticeable across the street to the east.

Mr. Messinger reiterated that noise levels would be low, and no interference should extend beyond the boundary of the fence around the subject property.

Mr. Andrews noted that a lot of high-powered transformers contained fluorinated hydro-carbonated liquids and asked if the proposed transformers would contain any such material.

Mr. Messinger explained that although Mr. Andrews was correct regarding older transformers, PGE had shifted over to mineral oil for new ones.

Mr. Andrews understood that immature trees and shrubbery would be planted that would grow to eventually screen the facility from the roadway.

Mr. Pauly received confirmation from Mr. Messinger in the audience that Mr. Andrews was correct.

Chair Barrett confirmed there were no additional questions or discussion and closed the public hearing at 7:02 pm.

Alice Galloway moved to adopt the Staff report as presented. Kamran Mesbah seconded the motion, which passed unanimously.

John Andrews moved to adopt Resolution No. 428. The motion was seconded by Alice Galloway and passed unanimously.

Chair Barrett read the rules of appeal into the record.

- 3. Resolution No. 429. Appeal of Administrative Decision.** The Applicant is appealing the Planning Director's Determination of non-conformance in Case File ADMN23-0029.

Case File:

DB24-0002 Appeal of Administrative Decision

Chair Barrett called the public hearing to order at 7:05 p.m. and read the conduct of hearing format into the record. Alice Galloway and John Andrews declared for the record that they had visited the site. No board member, however, declared a conflict of interest, bias, or conclusion from a site visit. No board member participation was challenged by any member of the audience.

Kamran Mesbah noted for the record that he was on the Planning Commission when the Town Center Plan was adopted.

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

The following exhibit was entered into the record:

- Exhibit C1: Written comments received from the Home Building Association (HBA) after publication of the DRB B February 26, 2024 meeting packet.

Presentation references Staff's Appeal of Administrative Decision PowerPoint (Exhibit A2)

[Verbatim transcript begins]

Ms. Luxhoj: The property subject to the appeal is located at 29400 SW Town Center Loop West referred to as the "Location" in my presentation and outlined in red in the aerial photograph on the left of this slide. The existing development on the property is shown in the photograph on the right. The Comprehensive Plan designation is Town Center, and the property is zoned Town Center and located in three sub districts: Commercial Mixed-Use, Mixed-Use, and Main Street District. (Slide 2, Exhibit A2)

On October 30, 2023, the City received an application for Class 1 Review to confirm the status of an existing non-conforming use and structure at the Location, which was previously occupied

by Fry's Electronics, an electronics retail store, and has been vacant since 2021. The City deemed the application complete on November 29, 2023, and processed the request as a Class 1 Planning Director Determination per Subsection 4.030(.01)A7 of the Development Code.

- On December 28th, 2023, the City's Planning Director issued a notice of Planning Director Determination, which provided the Planning Director's decision on the Class 1 Review application. The Appellant submitted a notice of appeal of the Planning Director's decision on January 10th, 2024. The Planning director has the authority under Section 4.030(.01)A of the Development Code to deal with non-discretionary matters including Class 1 Review applications, and to process these applications as a ministerial action without public notice or public hearing.

Per Section 4.030(.01)A7, a determination that an existing use or structure is a non-conforming use or non-conforming structure is to be processed as a Class 1 Review, except, however, that the Planning Director may, in cases where there is any uncertainty as to the history of the property, choose to process such determinations as a Class 2 Review. Appeal of a decision on an administrative action by the Planning Director, such as the Class 1 review application in this case, is to be heard by the Development Review Board. Only the Applicant has standing to appeal a Class 1 decision.

The appeal of the Class 1 Review application ADMN23-0029 currently before the DRB is a de novo review under Subsection 4.022(.01) of the Development Code. De Novo is Latin for from the beginning. This means that that the DRB must review the Class 1 Review application as if the action had not been previously heard, and as if no decision had been rendered by the Planning Director. The DRB should base its decision on the testimony, evidence, and other materials submitted by the Applicant to the City in the Class 1 Review application, as stated in Subsection 4.022(.07)B of the Development Code. Further, the DRB must, by order, affirm, reverse or modify in whole or part a decision that is under review.

In this proceeding, the decision under review is the Planning Director's decision in Case File Number ADMN23-00 29. For the purpose of applying the applicable 120-day time limit, a final decision on the Class 1 Review application, including any appeals must be rendered by March 28th, 2024. Staff notes that the City is currently processing a separate but related Class 2 Review application per Subsection 4.030(.01)B3 of the Development Code filed by the Applicant on December 15th, 2023. That case file number is AR23-0031. Any issues that are subject to the Class 2 Review, such as the scope of what non-conforming use may be continued at the location, are beyond the scope of this appeal proceeding.

Staff further notes that the findings related to General Submission Requirements on Pages 13 to 14 of the DRB staff report for tonight's public hearing include a list of documents and/or testimony contained within the Appellant's Exhibit B1 that are deemed rejected or excluded from the record. This is because the materials are beyond the scope of and/or not relevant to the Class 1 Review. Staff respectfully requests that the DRB keep this in mind during tonight's

public hearing as testimony is presented. If this raises any questions related to the scope of review, please feel free to ask Staff what is relevant to tonight's proceedings.

The applicable legal standards related to non-conformance are discussed in detail in the DRB Staff report. However, Staff thought it would be helpful to briefly summarize some key points of case law as follows:

- Before use can be deemed non-conforming, it must be impermissible under a current land use ordinance. 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. Non-conforming uses are not favored because by definition, they detract from the effectiveness of a comprehensive zoning plan. Accordingly, provisions for the continuation of non-conforming uses are strictly construed against continuation of the use, and conversely, provisions for limiting non-conforming uses are liberally construed to prevent the continuation or expansion of non-conforming uses as much as possible. Once the use is determined to be impermissible under a current land use ordinance, the question becomes, may the use continue because it is legally protectable as non-conforming? The purpose of a local government proceeding to determine the existence of a non-conforming use is to determine what use existed on the date restrictive regulations were applied.

As stated in the DRB staff report, City Staff believed that the Applicant in the Class 1 Review application requests an answer to the following questions: One, is the location a non-conforming use? Two, does the location contain a non-conforming structure? And three, does the location contain non-conforming site conditions? Considering that tonight's public hearing is a de novo review of the Class 1 Review application, the DRB should address all three questions listed on this slide. However, the Notice of Appeal does not challenge the Planning Director's decision on the second and third questions. Accordingly, City Staff believe that there is no disagreement between the Applicant and the City with respect to those points. The main point of disagreement between the Applicant and the City is the Planning Director's decision regarding the first question of non-conforming use. (Slide 8)

The Staff report addresses each question in order outlining the legal standard that applies to the question, then highlighting facts that Staff believe are relevant to the question and finally quoting the determination of the question as stated in the Planning Director's decision. I'll briefly summarize this information. However, DRB has requested to refer to the detailed findings in the Staff report as the basis for tonight's deliberation and decision.

Before a use can be deemed non-conforming, it must be impermissible under a current land use ordinance. 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. As stated earlier in this presentation, the Location is currently in the Town Center (TC) Zone. The ordinance implementing the Town

Center zoning became effective on June 5th, 2019. Permitted uses include retail sales and service of retail products under a footprint of 30,000 sq ft per use, office, personal and professional services. The Commercial Mixed-Use subject strict of the TC zoning applies to roughly two-thirds of the Location, which also allows single-user commercial or retail such as a grocery store or retail establishment that may exceed 30,000 sq ft if located on more than one story of a multi-story building, provided the footprint of the building does not exceed 30,000 sq ft.

The existing structure at the location has a footprint of 124,215 sq ft in a single-story with a partial mezzanine, which exceeds the footprint of 30,000 sq ft per retail user and footprint limitation that is allowed in the TC Zone. As of June 5th, 2019, the actual use at the location was a Fry's Electronics store, an electronics retail store with a total interior square footage of 159,400 sq ft and a footprint of 124,215 sq ft. Therefore, the Planning Director's decision addressed the non-conforming use inquiry as follows: the use is a legally established non-conforming use in the TC Zone.

The structure as it currently exists does not conform to many of the design and development standards in Subsection 4.132(.06), such as building placement and frontage requirements, location of parking in relation to the building, building setbacks, height and number of stories, facade design, and architectural materials and treatments. A waiver to these standards for the existing structure has not been applied for nor has a waiver been granted. The Planning Director's decision addressed the non-conforming structure inquiry as follows: the structure is a legally established non-conforming structure in the Town Center Zone.

The existing site conditions do not comply with at least two City Code sections including Subsection 4.132(.04)A, which requires that all development in the Town Center Zone be consistent with the street network and multimodal network, and Subsection 4.132(.05)A, which requires that all development be consistent with the open space network. Other site improvement standards of the TC Zone address such features as walkway connection to building entrances, parking location, landscape design and plaza areas. Existing site conditions do not comply with these applicable standards. The Planning Director's decision addressed the non-conforming site conditions inquiry as follows: the existing site conditions are legally established non-conforming site conditions in the TC Zone.

Staff recommends that the Development Review Board affirm the Planning Director Determination of non-conformance in ADMN23-0029, determining that there is a legally established non-conforming use at the location, specifically that the protected use is a 159,400 sq ft electronics related retail store. Two, there is — that there is a legally established non-conforming structure at the location and that there are legally established non-conforming site conditions at the location.

This concludes my presentation. Tonight, the Applicant is participating in the hearing and is prepared to make a presentation when invited by the Development Review Board. I'm happy to

take the next few minutes to answer any questions you may have for Staff before moving on to the Applicant's presentation. Additional questions can be asked of Staff after the Applicant's presentation. Thank you.

Chair Barrett: Do we have any questions right now or should we wait?

John Andrews: No questions now.

Kamran Mesbah: None for me.

Chair Barrett: All right. We are going to – will the Applicant please come to the podium with the microphone or commence your presentation when unmuted on Zoom. State your name and address and present any testimony you'd like to present to the Development Review Board.

Daniel Pauly, Planning Manager: Something that'd be helpful if you would, for the record, is who all is here as part of the Applicant's team to be clear.

Presentation references the Appellant's Resolution No. 429 Appeal of Administrative Decision PowerPoint

Keenan Ordon-Bakalian, Schwabe Williamson & Wyatt: Absolutely. One second here guys, I'm sorry. There is a lot of things on this view point. Okay. Can everyone see that on their screens? Awesome. For the record, my name is Keenan Ordon-Bakalian with the law firm Schwabe Williamson and Wyatt. I'm here on behalf of the Applicant/Appellant, Home Depot. My corporate address is 1211 Southwest Fifth Avenue, Suite 1900, Portland, Oregon 97204. With me today is Barry Simmons, representing Home Depot, as well as another member of our project team, Dan Zoldak with Lars Anderson. If you'd like, they can provide their addresses as well.

Barry Simmons: Barry Simmons with Home Depot. Address is 2455, Paces Ferry Road, Atlanta, Georgia 30339.

Daniel Zoldak: Dan Zoldak, Lars Anderson Associates. Address is 4694 West Jacqueline, Fresno, California 93722.

Mr. Ordon-Bakalian: Before I get into the substance of our appeal, I'd just like to take a moment to thank you guys, members of the Development Review Board for your time tonight. It's very much appreciated. I'd also like to thank Cindy and the rest of Staff for their work on this project.

I was going to start off with a brief background here, but I did want to address one preliminary matter. Turns out that apparently a comment has been received after the Development Review packet was submitted. We haven't been provided that comment. I haven't been able to read it, so because of that, we'd request that the record be held open for written testimony after this hearing.

So, moving on to my presentation. First, I'm going to provide a brief background of the procedural history for this appeal. I'm also going to address the findings of the Planning Director's Determination.

Mr. Pauly: It was on the side of the room.

Mr. Ordon-Bakalian: Thank you. So, I'm not going to read this whole comment right now and develop thoughts to it. Again, my request to have the record remain open stands. Unfortunately, we weren't provided that via email. I understand it was in the room, but I wasn't aware. So, moving back to the procedural history, on October 30, 2023, Home Depot applied for a Class 1 Review to confirm the non-conforming use status of the existing use and structure at the property. Within this application, Home Depot indicated that its intention was to operate a Home Depot within the existing structure at the property once the property's non-conforming use status was confirmed.

On November 28, 2023, the City emailed the Appellant, Home Depot, stating that the Appellant's request for confirmation that Home Depot could continue operating at the property under the scope of the non-conforming use required an interpretation of the City's Development Code under the City's Class 2 procedures.

The City provided the Appellant with several options including an option where Staff proceeds with the Class 1 Review and in addition, Home Depot applies for a Class 2 Review, requesting a written interpretation regarding the classification and scope of the non-conforming use of the property. This email is in the record as well as your Staff packet, and Home Depot did choose to proceed with the option I just detailed to submit a Class 2 application. Home Depot submitted the Class 2 application on December 15th, 2023. The application was deemed complete on January 12th, 2024. On December 28th, 2023, the City issued its decision for the Class 1 decision—for the Class 1 application. That's the decision before you on appeal today.

So, there's a lot of text on this slide. (Slide 2, Applicant's/Appellant's Appellant's Resolution No. 429 Appeal of Administrative Decision PowerPoint) It's the only slide with a lot of text. I do apologize, but I wanted to capture the City's findings pretty accurately here. They're also contained in our notice of appeal. The City's decision for a Class 1 application approved the non-conforming use of the property, but it contained several findings that we take issue with. Some of these findings are that it is a 150,940 sq ft electronics retail store; a large format, single-story with partial mezzanine, single-user electronics retail store, or that it's a Fry's Electronics. In fact, the City's decision or Staff's decision is inconsistent, because at some points, it finds that the non-conforming use is a Fry's Electronics, where at other points, it finds that the non-conforming use is a single-user electronics retail store. Those are two very different things. Although Fry's Electronics is an electronics retail store, the scope of the use is much different for those two purposes. Regardless, we disagree with both of those conclusions within the Staff decision.

The City's findings around the nature of the non-conforming use of the property are entirely unsupported within their decision. They don't cite to any evidence for coming to these conclusions; they just effectively find that the non-conforming use is what they say it is. Moreover, Staff's packet for tonight's appeal hearing is also inconsistent because it contains a draft resolution that would have the DRB find that non-conforming use of the property as a 159,400 sq ft electronics related retail store, whereas the Staff report request the DRB affirm the Planning Director's decision, that the non-conforming use is a Fry's Electronics. Those again are two very different things.

What should be controlling in this appeal is what was determined in 1991, when the original use was approved of the subject property. The 1991 Decision is attached to our notice of appeal, as well as the application. It's certainly within the record, and it contains findings that conflict with Staff's findings in terms of the Planning Director Determination. The 1991 Decision was prepared on the basis of an anonymous company. Fry's Electronics is not within the decision whatsoever, so the fact that the non-conforming use could be a Fry's Electronics is inconsistent with the controlling document which approved the underlying use, the 1991 Decision.

Specifically, if you look at the request for the 1991 Decision, it is seeking approval of a 159,400 sq ft retail commercial building, not a single-user electronics retail store. The Staff report was adopted by a resolution as findings and conditions of approval for the 1991 Decision, so it is, in effect, the decision.

Throughout the decision—throughout Staff report for the decision, which was adopted as part of the City's approval, the use as being approved is repeatedly being stated as a commercial retail use and conclude a couple other findings for your review. Here, they detail the building use. (Slide 4) You have office, warehouse, manufacturing and service and retail. There is some comments in the Staff report that these relate to parking standards, but if you actually look at the decision itself, which is on page 3, there is no reference to parking standards whatsoever. This is the use of the building, which is the use of the property. At this point, we're talking about a commercial retail use.

There are some other findings and comments within the Staff report, which again, were adopted as the decision, where it stated that the use is a commercial retail use. It is apparent the remaining undeveloped property has become very desirable as reflected by this application for a 159,400 sq ft commercial retail store. That's on page 3 of the 1991 Decision. It's also a conclusionary finding that it is a retail commercial center. There are other statements throughout the record and the application materials for the 1991 Decision talking about a retail anchor store—or a commercial retail anchor store. Sections 4.130 to 4.140 were the findings within the 1991 Decision related to zoning consistency, whether the use is allowed in underlying zone, which at the time was Planned Development Commercial, if I'm not mistaken. In this finding, there's a statement that the proposed commercial office units—uses are permitted in the overlay zones as part of the Town Center Master Plan. So, there's no reference

to a single user electronic retail store. There's certainly no reference to Fry's Electronics. That's nowhere in the decision. So, this is really where we take issue with the Planning Director's Determination.

Moving forward, we obviously respectfully disagree with the Planning Director's Determination of the nature of the non-conforming use of the property. We believe it is a commercial retail use because as detailed, that is controlled by the 1991 Decision. Frankly, we were a little surprised that the Planning Director's Determination contained interpretations of use because we were under the impression, based on the November 28 email, that this would be addressed in the Class 2 proceeding. When we received the Class 1 Determination that found non-conforming use, but then went as far as to find what the nature and scope of the use was, we were effectively forced to appeal to preserve our rights here.

We believe the City's interpretation of the non-conforming use is wrong. It's neither a single-user electronics retail store or Fry's Electronics because that is an impermissibly narrow interpretation of what was approved in the 1991 Decision. It's also certainly not in accordance with any of the findings that were adopted.

In addition, I'd like to note, just for the record, that the City's interpretation of a prior decision is not afforded any deference were there to be an appeal to the Land Use Board of Appeals. The case regarding that is *Gould v. Deschutes County*. There are several of them. This is the one detailed on the screen here. (Slide 7) This is important because, generally, local jurisdictions may have deference in interpreting their land use code, but because this is a decision and not the land use code, it would be reviewed effectively as a clean slate before the Land Use Board of Appeals.

The DRB has the responsibility of reviewing the 1991 Decision in the first instance, as noted by this de novo hearing procedure. From the unambiguous request statement in the 1991 Decision, where it references a commercial retail use to the numerous references of the use being reviewed and approved, it's absolutely clear that the use approved within the 1991 Decision is commercial retail. Due to the City's adoption of the Town Center Plan, which Commissioner Mesbah noted he was on the Planning Commission for, the commercial retail use has been rendered non-conforming. Staff did a very good job of detailing why those—why it conflicts with the current zoning designation for the subject property.

We're not disputing that there's a non-conforming use here, just effectively what the nature of that use is. We believe that the commercial retail use was lawfully established, and this is, again, why we've appealed the Planning Director's Determination narrowing the non-conforming use to a single user electronics retail store or even a Fry's Electronics.

In short, Staff may dislike the idea of a Home Depot at the subject property. We acknowledge that. We understand the Staff may believe a Home Depot is inconsistent with the City's Town Center Plan that was adopted in 2019; however, Staff's position is inconsistent with the legal

authorization and non-conforming use law in the State of Oregon, and certainly, Home Depot has the right to continue its lawfully established commercial retail non-conforming use of the property.

That said, we're not talking about a traditional big box retail use of the property. Because of this, and the fact that the Home Depot's Class 2 application will likely be before the DRB in the near future, we briefly want to show Home Depot's vision at the site in which we believe is consistent with the vision and goals for the City's Town Center Plan.

With me tonight to do so is Mr. Barry Simmons with Home Depot. Barry, I will turn it over to you.

Mr. Simmons: Thank you. I appreciate the chance to speak to you guys tonight. As you see here, we did pull out—we have reviewed the Town Center Plan, and we actually believe, as we've said earlier, we're actually in alignment with the Plan, and we hope to further the Plan and with the—in partnership with the City of Wilsonville—town of Wilsonville.

So, in the Table 3.1 here, that was that was pulled from the Town Center Plan, the commercial square footage, the 300,000 existing square footage, clearly, this was adopted back in 2019. (Slide 9) Obviously, at the time, you guys had no way of knowing that Fry's would no longer be operating as of 2021. But, certainly, today Home Depot would like to reoccupy, re-energize, and make use of the existing 125,000 sq ft for our purpose.

We also have a vision that, again, that closely aligns with the Town Center Plan for multifamily use in the area. We believe, based off of the size of our out-parcels around that store, that we could put another 250 to 300 housing units around our store. So based off of this table, I think that, you know, the Home Depot use, again, that's a—we may be getting a little further down the road, but, at least, to communicate the vision that that Home Depot could bring back 125,000 sq ft of commercial retail as well as up to 300 housing units towards the—this future town home center or a future Town Center vision.

I will highlight there, in the right corner, that, one, this is over a 40-year plan. And the note, the first sentence there says that this will take time; there will be many steps. And we believe that this partnership or this future partnership with Wilsonville and Home Depot could be one of those steps to further that vision. Next slide.

Mr. Ordon-Bakalian: Sure.

Mr. Simmons: So, the Town Center Future Scenario. (Slide 10) As you can see on the left, is your Phase 1, directly from your Town Center Plan, that indicates the existing 125,000 sq ft building with the purple indicating some infill of new housing, new street-level retail, etcetera. On the right side of that plan is effectively our site plan, is what we envision, and within the four or five acres of out lots that we would—we would identify them as out lots. We believe that we can

get those 200 to 300 additional housing units with multifamily housing and street-level retail. So, we have a couple of slides here, and, again, these are high level representations, I guess, or renderings, but we have a couple of pictures that we can show you what we think this might look like in the future.

Go ahead and go to the next slide. (Slide 11) These are just a couple of aerial shots of what we think that our store, kind of tucked in behind multifamily residences here in the Town Center, again, might look like within this 15-acre property. Click the next slide. (Slide 12) So, just a couple of pictures there to give that picture and image of how we can kind of walk along for this Town Center Plan together. Now, the question may be asked, you may be thinking like, “No one really wants to live next to a Home Depot.”

We don't believe that's true. In several places around the country, we have several examples that are exactly like this, where Home Depot's have found themselves in the middle of kind of play – live-play-work communities. And we can—we can show you a couple of examples of those. This is Atlanta, Georgia. This is the Buckhead store. (Slide 13) This is a very high performing store for us. As you can see, there's multifamily—large complex and multifamily both in front and behind the store. In front of the store, before you get to the main road, there's some street-level retail. Again, we fit right in with this community. Again, this is a high performing store for Home Depot.

The next one is Surrey, Canada. (Slide 14) Now, this is a rendering of residential in front of our store. The next slide, and this is what it looks like in real life. (Slide 15) These are Google Earth images of a Home Depot store tucked in behind as a part of a larger development of multifamily housing units. And the last I have is Lynnwood Washington, which is not too far up the road here, where you see a couple of shots here. (Slide 16) The Atlanta store was—I think that was built in 2006, and the housing was finished about 2008. The Lynnwood Washington site here was built in 2021 and finished—and the housing was finished in about 2022. So these are relatively recent developments that Home Depot was involved in, that included multifamily, street-level retail, all the things that we believe closely align with what you guys are expecting with your Town Center Plan.

So again, I appreciate you having us here, allowing us to, kind of, share our thoughts with you guys. But we do believe that there's a benefit, potentially, for everyone to, kind of, walk hand-in-hand with this Town Center Plan, and I think we're—like I said, I think we're more in alignment than opposed to it. Thank you.

Mr. Ordon-Bakalian: Thank you, Barry. I'm just going to move back to one slide here. So, just kind of put the requested relief up here in terms of what we're looking for. (Slide 8) To wrap up, again, this appeal proceeding is only necessary because of the Planning Director Determination, which we think impermissibly narrowed the scope of the approval in the 1991 Decision, which is controlling for the property.

Like Barry noted, we want to be a collaborative partner with the City. We don't intend for this to be an adversarial process. At the same time, based on the findings of the decision, we were obligated to file this appeal. We certainly disagree with the scope and nature of the non-conforming use determination within the Director's Determination.

We respectfully request the DRB find that the legally established non-conforming use of the subject property is a commercial retail use as approved in the '91 Decision, not a Fry's Electronics, not a single-user electronics retail store. And again, I'd like to request the record remain open, not only so we can respond to the comment, which was received earlier tonight, but also to provide additional written testimony. We'd also like to thank you again for your time and request that we have the opportunity to provide rebuttal or final argument should Staff have any additional testimony. At this point, happy to take any questions or wait till the end.

Chair Barrett: Well, do we have any questions?

John Andrews: 1991 seems like a long time ago. The community here has changed a lot, and Fry's has kind of abandoned ship. So why should—why do we need to continue with that?

Mr. Ordon-Bakalian: Very good question, Commissioner Andrews. So, we can certainly detail this more in writing in our written response as well, but Oregon non-conforming use law allows certain uses that may no longer be consistent with the underlying zoning of a property to continue. The 1991 Decision approved a commercial retail use. So, although Fry's may be gone and bankrupt, a commercial retail use is still allowed at the subject property. We believe, based on what Barry detailed, that Home Depot would be a willing and able partner to achieve both the City's vision under the Town Center Plan while also providing an anchor commercial retail use at the property stepping into Fry's shoes.

Mr. Andrews: One more thing. So, the proposal for all the residential things around that, I mean, that just kind of came up. Is there—I mean, has there been any formal proposal or anything like that that involves that? Or is that something that may happen later if you decide to do that, instead of layout more parking?

Mr. Simmons: We have not marketed those spots yet. Yeah, I mean, we can't go that far yet. We haven't even built a store yet. But certainly, it's our plan, as we have done at other locations, is to market the excess property or what we would consider excess property; those out parcels—out lots to multifamily home builders to get that work done. So yes, we would—if it is in alignment with the vision of the Town Center Plan, we could more specifically look at targeting that type of use for that land if we were to get a store at this location.

Mr. Ordon-Bakalian: Just to follow on Barry's comments here, I mean, again, Home Depot is trying to approach this as a collaborative partner with the City. We've had some initial discussions with, kind of, what our vision is for the site. That said, I think it's everyone's understanding at this point that until we sort out the issue with the non-conforming use, those discussions are kind of on hold. From a certainty perspective, both for the City and also for Home Depot, trying to pull

the cart before the horse, if you will, doesn't really benefit anyone here. So again, we are willing and open to have those discussions. I think we just need to kind of get alignment together as partners.

Mr. Andrews: Okay, thank you.

Chair Barrett: I have a question, but maybe I don't know who can answer it. It might be any lawyer in the room. What is an effective date for non-conforming use, like, when does that go into effect?

Mr. Ordon-Bakalian: I'm happy to answer first unless—so, effectively, a use becomes non-conforming when it is prohibited by the underlying zoning district. This may be a kind of oversimplification of the Oregon case law at this point. But, the use only became non-conforming when the Town Center Zone was adopted for the subject property, which has that 30,000 sq ft maximum and several other standards that, in full disclosure, the subject property nor the structure do not comply with. However, uses that were lawfully established prior to the change of the zoning are allowed to continue. And so in this case, it is our position the commercial retail use that was approved in 1991 was lawfully established. It was approved by the City. It has never been abandoned. Your Code actually has provision for abandonment, which we detail in our application, and I think both the City and us believe is met. I don't want to speak for them, however.

So, because the use was established in 1991, it may continue. The effective date for its non-conformance was when the zoning designation changed, and I believe that was in 2019 with the adoption of the Town Center Plan.

Stephanie Davidson, Assistant City Attorney: City Staff agree with that. The effective date of that zoning regulation was June 5th of 2019.

Mr. Ordon-Bakalian: Thank you, Stephanie.

Chair Barrett: So, what was the use? It was the Fry's retail store in 2019.

Ms. Davidson: The legal standard, this is outlined in the Staff report, one of the key cases here is the Nehoda LUBA case. I'm going to read from it right now. "The purpose of the local government proceeding to determine the existence of a non-conforming use is to determine what use existed on the date the restrictive regulations were applied." So, essentially, the question is, what was the actual use of the property as of June of 2019?

Mr. Ordon-Bakalian: And in our position, the use was commercial retail. In the Planning Director Determination, they've narrowed it to a Fry's Electronics; in some instances, maybe a single-user electronic retail store. Again, the stuff I showed you on the presentation is directly pulled from the 1991 Decision. It is clear in 1991, the use approved was a commercial retail use.

Electronic stores, including Fry's, fall within that subset of uses, but I don't think the '91 Decision intended to narrow such a use to that level.

Chair Barrett: Okay. One last question. Fry's went out of business—sorry, the retail store went out of business in 2021. So, how is it being used since?

Mr. Ordon-Bakalian: So that's actually a very good question and kind of a unique facet of Wilsonville's Code here. So, the property itself has been vacant since Fry's went out of business. But for the purposes of the City's non-conforming use standards, the use has continued. It has not been abandoned. I can, again, respond more detailed—in more detail in writing. However, I believe the standards for continuance of a non-conforming use include continuing to pay utilities, taxes, and other facets of continuing to employ the site. The current owner of the site has done so. There's no evidence that they have stopped doing any of those things. So, it is our position, and, again, I believe Staff's position as well, just based on the findings in the Planning Director Determination, that there is a non-conforming use there. It has not been abandoned. The question just is what is the nature of that use.

Chief Barrett: Thank you. Any other questions? Yeah, okay.

Mr. Mesbah: You mentioned in your presentation that you were essentially forced to appeal the decision of the Planning Director. Could you explain why that is?

Mr. Ordon-Bakalian: I think "compelled" might be a better word than forced. Certainly, we could have chosen not to appeal the decision. However, again, this all kind of goes back to the November 28th email, which is in the record for this appeal proceeding. We requested confirmation there was a non-conforming use of the property. Within that, we did state our intention to operate a Home Depot at the site. In response, Staff responded and stated that that second part of our request required a Planning Director interpretation, which should be processed under a Class 2 application. So, we believed the Class 1 would just be, effectively, a stamp that said, this is either a non-conforming use or it's not; it's non-conforming structure, it's not. However, when we received the Planning Director Determination, the Director determined that the non-conforming use, the nature of the use, was a Fry's Electronics or a single-user electronic retail store. That would mean if that decision was not appealed, that would be the only use allowed at the site under its non-conforming use rights. We're not denying Home Depot is not a single-user electronic retail store or a Fry's, so we were obligated to appeal because we believe that '91 Decision, again, approved a commercial retail use; not something as narrow as was in the determination.

Mr. Mesbah: So, I guess my second question is if a Class 2 Review, which is going to be coming in front of us, is going to be dealing with that specific question?

Mr. Ordon-Bakalian: Yes.

Mr. Mesbah: What's the difference?

Mr. Ordon-Bakalian: The difference is if we hadn't appealed the decision within the allotted appeal timeline, the decision would become final. And the decision in the Class 1 Determination which, again, we think may be outside the scope of what should have been decided, is that the use is a Fry's Electronics or a commercial—or a single-user electronic retail store. So, in effect, the Class 2 decision had already been made, even though it wasn't our understanding that was supposed to occur. If we let that decision stand, there's a decision that hangs out there that says the non-conforming use is a Fry's Electronics. And so, the Class 2 process effectively would be moot. There's no reason for us to proceed at that point.

Mr. Mesbah: As a person who needs to figure out the complexity of this, I don't feel there is enough information, other than your say so, for me to determine whether or not this is conforming or not. In other words, there's a continuation of use or not. I'd rather wait until a Class 2 Review with a thorough kind of evaluation of that, and so I don't know if there's an option of withdrawing your application for Class 1 so that we can go forward with Class 2 with an open slate or something like that, instead of prejudicing it, as you're worried it will happen. That's the nature of my questioning is—

Mr. Ordon-Bakalian: It makes perfect sense. I think that's very astute observation there. I think, you know, again, we are open to discussing potential solutions with the City in terms of what we can do to kind of focus this process before the DRB, so we don't have two different processes proceeding at once. That said, like you noted, we were, maybe not, forced to, but we were obligated to appeal based on the substance of the determination in the Class 1 decision. You know—

Ms. Davidson: Yeah, I'd just like to chime in here. There have been negotiations with the Applicant. Even late on Friday afternoon, there was some talk about potentially withdrawing the Class 1 application, but the Applicant has to agree. I think the document that I saw circulated said—one of the resolutions within that document said that, you know, as part of this withdrawal, the Planning Director would modify her letter dated December 28th of 2023, to say that no determination of non-conformance is made. So that's something that the Applicant would have to agree to, but City Staff agree that the record is a little confused between the Class 1 and the Class 2 applications proceeding at the same time.

Mr. Mesbah: So, it is—it is possible—

Ms. Davidson: It is possible.

Mr. Mesbah: —to have a clean slate for a Class 2?

Ms. Davidson: But the Applicant has to agree.

Mr. Mesbah: Yes.

Mr. Ordon-Bakalian: Yeah, and I think just to kind of flush that out a little bit more. I also saw the same correspondence, and I believe we also corresponded with Amanda this morning on that. We would have to have an agreement between the City and us, Home Depot, that the DRB would adopt a new resolution, effectively cleaning the slate from the Planning Director's Determination before we dismissed our appeal. Because if we dismiss or appeal prior to that, we would have a decision which is inconsistent with what we agree with, so we would need some certainty there. I think that, maybe, there's a benefit to having the open record period here because we may be allowed to continue to have these discussions proceeding from this. I mean, I don't know if you're interested in kind of exploring that option a little bit more, but I do understand the DRB's concerns here.

Ms. Davidson: Absolutely. And we have heard your request to keep the record open, so that is going to happen.

Mr. Mesbah: Do we have another DRB meeting – do we need to have another DRB meeting if you continue this kind of negotiation and leaving the record open? DRB, essentially at the end, will need to adopt some resolution, right?

Mr. Ordon-Bakalian: Yes.

Ms. Davidson: Yes.

Mr. Pauly: And we may have to do a special meeting to do that, so—

Mr. Mesbah: Because March 28th is before the next meeting or after the next meeting or what?

Mr. Pauly: No, but there's also—Stephanie, do you want to cover it?

Ms. Davidson: I think we —

Mr. Mesbah: The deadline, I understand, is March 28th.

Ms. Davidson: Given the timelines at play here, I think we need to discuss your availability on March 5th, but also March 21st.

Mr. Mesbah: I'm not here on the 21st, I can tell you that.

Ms. Davidson: Okay.

Mr. Mesbah: But there's others. I mean, you can have a quorum.

Alice Galloway: I'm not here on the 5th.

Ms. Davidson: Chair Barrett?

Chair Barrett: I am here all of those days.

Paula Pinyerd, Scribe, ABC Transcription Services, LLC: Mr. Andrews? Can you speak into the mic so we can record that?

Mr. Andrews: Oh, I just said I will be here. My current plans are to be here both those days, and the rest was nonsense.

Ms. Galloway: Sorry—

Ms. Pinyerd: —for clarity of the record.

Ms. Galloway: I am going to be here on the 5th. It's the end of the month that I'm not going to be here. I'm here on March 5th.

Miranda Bateschell, Planning Director: Good evening, Board. Miranda Bateschell, Planning Director for the City of Wilsonville. I'm just coming up because I want to try to do a raise of hands inventory for each of the days that week. So first of all, just given that we're going to leave the record open for seven days. Please show me your hands if you're available on March 5.

Mr. Pauly: We did talk that Chair Barrett isn't available till later, till 7:30—

Ms. Bateschell: 7 p.m. or later.

Mr. Pauly: And, I have the same conflict.

Ms. Bateschell: That's fine. We can have it as—whatever time is needed. Okay, so we have at least three on the 5th. So now, I'm going to go through the whole week of March 18th, one by one. So, Monday, March 18th?

[Multiple responses off-mic]

Ms. Bateschell: Yeah, okay, so four on the 18th. How about the 19th? Four? Okay. 20th? Four. 21st? Three. Okay. Thank you very much.

Chair Barrett: Do we have to have a motion to continue that?

Ms. Davidson: I think that should come later.

Chair Barrett: Later?

Ms. Davidson: Yes.

Chair Barrett: Okay.

Mr. Pauly: We'd still—I mean, we do have a public hearing still open so we'd—

Chair Barrett: So let's gather as much as we can.

Mr. Pauly:—still want to take testimony from others that may be here as well.

Chair Barrett: Okay. I have one further question just for clarity. What is the difference between a Class 1 and a Class 2 Review?

Mr. Pauly: I can take that one for starters. So for the record, Class 1—both of them are administrative decisions by the Planning Director or the designee. Class 1 is a—what we call a ministerial or administrative decision where there's no discretion. It's—and there's no notice to surrounding property owners. The only person noticed of the application is the applicant. A Class 2 is also administrative with the difference being is that the DRB receives notice where they can call it up as well as surrounding properties receive notice of a Class 2. And, as well as a—the Planning Director can actually refer a Class 2 to the Development Review Board. So more notice, more process for a Class 2; where the Class 1 —essentially some Class 1s we essentially issue over the counter.

Chair Barrett: Are the questions different?

Mr. Pauly: There's more discretion, really, allowed under a Class 2.

Kimberly Rybold, Senior Planner: And are you speaking specifically to as it pertains to the two applications that are in from this Applicant in terms of the questions that they have posed?

Chair Barrett: Would the question they would pose be different for a Class 1 versus a Class 2?

Ms. Rybold: Yes. So, the Class 1 application that they submitted is the determination of non-conforming status related to the Location, so that would be the use site conditions and structure. The Class 2 is a Planning Director's interpretation of essentially, the question that is posed is related to the two, the Fry's Electronics and the Home Depot, and whether or not that is a continuation of use. So that really gets to the bigger question about, you know, use and, you know, whether or not in our Code, that would be a continuation, and so that is what requires an interpretation of the standards within the Development Code.

Chair Barrett: And who interprets?

Ms. Rybold: So that would be a Planning Director's interpretation. So, that's the nature of the difference. They're both decisions issued by the Planning Director. It's just that one really is just a determination of status, versus the second piece, which is making an interpretation as to whether or not those two retail users would constitute a continuation of use. And so, again, that's why in Cindy's presentation tonight, as she's highlighted, really any testimony, any

conversation related to the proposed user in this case is tied more to the Class 2 Review than it is the current Class 1 Review.

Mr. Ordon-Bakalian: Respectfully, I would just like to add one thing. Although we agree in premise with what Ms. Rybold just said, ORS 197.979 - excuse me, ORS 197.797 says that, "For a quasi-judicial hearing, to the extent there's argument or evidence that the Appellant believes is relevant, we are allowed to offer that." So, I think like you noted, because these two proceedings have gotten so intertwined, there are things that we feel obligated we must raise during this hearing to preserve them going forward. Whether or not they are deemed relevant is effectively up to you guys, not the City and not us.

Chair Barrett: Okay. Lots of testimony, but I think we need to give an opportunity for the public to continue.

[Break in verbatim transcript]

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

[Verbatim transcript resumes]

Chair Barrett: Okay. Well, that was simpler than I expected. Does the Applicant have any rebuttal or responsive testimony that the Applicant wishes to present?

Mr. Ordon-Bakalian: Point of clarification, will we also be able to respond any Staff testimony?

Amanda Guile-Hinman, City Attorney: You need to come before the microphone.

Mr. Ordon-Bakalian: Oh, excuse me. For the record, Keenan Ordon-Bakalian on behalf of the Applicant. Would we have the opportunity to rebut any Staff testimony that comes after us, or is this our final time to speak?

Chair Barrett: We will just be asking questions now, so you can stay there and answer.

Mr. Ordon-Bakalian: Absolutely. And if you'll permit me, I do have an answer to Commissioner Mesbah's earlier question about non-conforming use standards for whether a use is continued. That was detailed in our application because that was application criteria. That's Exhibit 429 of the City's Staff report and packet. Wilsonville Development Code (WDC) 4.189(.01) says, "A non-conforming use may be continued subject to the requirements of this Section." One of the requirements of this section is to determine whether the use has been abandoned, that is WDC 4.189(.03). That says, "If a non-conforming use is abandoned for a period of 18 consecutive months, the use shall not be reestablished without fully complying with the use requirements of the zone." That would be the TC Zone. "Mere vacancy of a site or building while it is being marketed, or other plans for its use are being readied, does not constitute abandonment. In

order for it to be considered abandoned, a site must not be receiving city utilities, must not be actively marketed for rent, lease, or sale. These standards concerning abandonment do not affect the City's process for abating nuisances..." That part is, in our opinion, likely not relevant to this proceeding. However, what is relevant is whether the property was receiving City utilities, whether it was marketed for rent, lease, or sale. Both of those are true. There's evidence in the record demonstrating as much. That is the City's standard for abandonment. We believe the use has not been abandoned because the City—the site is receiving utilities, and it was currently being—is currently being marketed for rent, sale, or lease.

So again, we believe the use, the commercial retail use that was approved in 1991 has not been abandoned and has continued. To our knowledge, based on the Planning Director's Determination, the Staff report for this appeal, the City does not appear to dispute that, but again, I do not want to speak for the City on that point.

Mr. Mesbah: To be clear, the kind of line of questions that I had for you was not that I was confused about your position. I was very clear about what you're saying. I read the Staff analysis and your submittal. It was that the Staff doesn't necessarily agree with all of what your positions are, and my understanding is that during a Class 2 Review, because we are expanding the scope of analysis and all of that, that may become clearer to those of us who are sitting on this side of the dais, and I was, I guess, kind of raising that into — beg the question, if this becomes clearer later, why do we rush it now? I think we got to that answer is that yeah, really there isn't any reason to rush it now, if there is some understanding that can be engineered here.

Mr. Ordon-Bakalian: Absolutely.

Chair Barrett: All right. Do we have any further questions of Staff or Applicant or the other members of the audience?

Mr. Andrews: I guess I have one question. The 2019 date that you mentioned, is that really the effective date for when the use of the property becomes defined?

Ms. Davidson: Well, June 5th 2019, that is the date that the Town Center Plan became effective, and based on the content of the Town Center Plan, the proposed use would not be allowed. So that's the date of the more restrictive land use regulation.

Mr. Pauly: Because, yeah, per current City Code, even though it's Planned Unit Development, that that is now non-conforming Planned Unit Development because the zoning did change.

Ms. Galloway: So, we're here this evening to affirm or reject a Planning Director's decision, and I think that's our focus for this evening. So, I don't know if this is the right time to do this, but I'd like to move to reject from the record certain information from the Applicant.

Ms. Davidson: Oh, Alice?

Ms. Galloway: Uh-huh?

Ms. Davidson: Because the Applicant has requested to keep the record open for seven days, we will not do anything with the record tonight. We'll just leave it open, and we will talk about when you will reconvene to make a decision on this application.

Ms. Galloway: All right. Thank you.

Ms. Davidson: Thank you.

Mr. Ordon-Bakalian: Respectfully, we would formally object, based ORS 197.797 and the standards that allow us to make argument in evidence in a quasi-judicial setting, so just for the record.

Mr. Davidson: I'm sorry, what are you objecting to?

Mr. Ordon-Bakalian: The future excludence of testimony and evidence in the record that was intimidated by Commissioner Galloway.

Ms. Davidson: Okay. And I want to add something before the public hearing is closed tonight. So, the plan would be to close the public hearing tonight, but leave the record open for seven days. So, before we close the public hearing, I just wanted to comment on the legal standard that was presented by the Applicant. I think the slide that this information was on was Slide Number 7. So, I just want to add into the record that City Staff reviewed the case that was cited, which is Gould v. Deschutes County 79 or LUBA 561. It's a 2019 case. That case does not cite – does not cite the statute ORS 197.829, which is what the slide says it does. I just want to encourage that the legal standard is outlined in the Staff report, which you've reviewed.

Chief Barrett: Can I get that ORS standard one more time?

Mr. Ordon-Bakalian: Which one?

Chief Barrett: The one you cited?

Mr. Ordon-Bakalian: Yes. So, ORS 197.797 sub 9.

Chief Barrett: Hold on, 197?

Mr. Ordon-Bakalian: 797.

Chief Barrett: 797, thank you.

Mr. Ordon-Bakalian: Sub 9. And that is the procedure for local quasi-judicial land use proceedings or hearings. It details both hearing process as well as notice requirements. Subsection 9 of that — statute says that arguing evidence constitutes — and I mean, I can read through the entire thing here, "Argument means assertions and analysis regarding the satisfaction or violation of

legal standards or policy believed to be relevant by a proponent to a decision. Evidence means facts, documents, data or other information offered to demonstrate compliance or non-compliance with the standards believed to be relevant by the proponent."

In this case, we believe that all the information we've entered into the record is relevant for the decision before the DRB.

Chief Barrett: Okay. And that was in Gould?

Mr. Ordon-Bakalian: No, that was not in Gould. That was the other standard.

Chief Barrett: I'm sorry. I'm trying to make sure I get it all straight.

Mr. Ordon-Bakalian: So, again, we can follow up more in writing because the record will be open on this. However, the Gould decision, what we believe it stands for is that a local government's interpretation of a prior land use decision, in this case, the 1991 Decision, is not afforded the same level of deference before the Land Use Board of Appeals that the City would be afforded if they were interpreting their Development Code. That's called Sapporan deference and the City is generally afforded deference when it's interpreting its own code. But in this case, because you are interpreting the 1991 Decision, and the nature of the use that is allowed to continue at the property, that would not be afforded any sort of special deference. It's more of just some context for the decision before the Board here.

Chair Barrett: Thank you. Oh, I see testimony.

Ms. Guile-Hinman: Thank you, Chair. Amanda Guile-Hinman, City Attorney. I just want to keep the record very clear about it because there was something left out of that definition. It ends with "argument does not include facts." And then "Evidence means facts, documents, data or other information offered to demonstrate compliance or non-compliance with the standards believed by the proponent to be relevant to the decision." So, I just want to make sure that we're clear about that argument and evidence are different and they're discussed differently in ORS 197.797.

Mr. Ordon-Bakalian: I would agree with that, Sub A and Sub B.

Chair Barrett: Okay, argument versus evidence. Okay, do we have all of the evidence and testimony that we want submitted in this record?

Ms. Rybold: I would add one clarification just as it pertains to uses and the new zoning and what's applying. I just want to clarify that from our perspective of how—when the Planning Director is making determinations or interpretations, I just want to be clear that our standards from—for the uses that are allowed are agnostic of a specific business or user. So, just to be clear that there are no preferences being expressed in terms of a specific business, either being preferred or not preferred by Staff. Staff in making these determinations is doing so based on uses and

interpretations of uses and looking at things like prior decisions or legal case law to determine how to define those uses, not businesses.

Chair Barrett: Does a business name have to go into a use?

Ms. Davidson: The DRB has discretion to decide the nature and the extent of the use in the Class 2 proceedings.

Chair Barrett: Thank you. Okay. Do we have any other testimony? Any other questions? What kind of motion should we make in order to make sure that we maintain the record?

Mr. Pauly: First, we'd want to close the hearing

Chair Barrett: Okay. Hearing no further discussion, I'm prepared to close the hearing. Once the hearing is closed, there cannot be any other discussion, comment, or questions except among board members. The Board may ask Staff specific procedural questions confirming there's no additional discussion at this point and no further questions of Staff or any party. Okay. I declare this public hearing closed at 8:18 p.m.

Ms. Bateschell: So, before I give you additional instruction, I know we talked about a few dates that might work for you all for reconvening. I think all of you were available March 18th, March 19th, and March 20th. Are there any preferences? Shall we shoot for March 18th?

Chair Barrett: That would be my preference.

Ms. Bateschell: March 18th?

Chair Barrett: March 18th.

Ms. Bateschell: Do you have a time preference? 6:30?

Chair Barrett: Yeah.

Ms. Rybold: I believe that is during a City Council meeting.

Mr. Pauly: So we'd have to —

Ms. Bateschell: Yeah, if I may, I think what we're going to have to do is get back to you on the specific day. And at this point hold March 5th and March 19th. We have to work internally on determining what other meetings are happening in this building and how we can shift people around. And then also, we'll determine if the seven days—the seven days maybe all we need for the additional argument. But if for some reason somebody who else who has been on the record submits anything, then the Applicant has an opportunity for additional time in order to respond to that.

So, I think the plan would be hopefully to move forward with this next week. But if additional information is submitted, they are granted additional time to respond to that other argument, in which case, we would then be looking at March 19th. So, Staff will confirm once we're able to confirm with the rest of the calendars in the building. Unfortunately, many boards and commissions meet in this room.

Mr. Mesbah: Amanda, day and time you're going to confirm, so we're keeping the whole day open?

Ms. Bateschell: Most of our meetings of this nature are held in the evening, in order to provide—

Mr. Mesbah: So, six-ish?

Ms. Bateschell: Most likely, yes. And so, we will confirm the time but at this point in time, I would say hold the evenings. And if you, for example, are only available after a certain point on one of those evenings that we've discussed, please communicate that as soon as possible to Mr. Pauly.

Ms. Davidson: So, in the meantime, you should—someone should move to keep the written record open for seven days until March 4th, 2024 at 5:00 p.m. That's the date that the record will close and we will have to separately determine the date of the—date when you reconvene. So that's a motion to keep the written record open for seven days until March 4th, 2024 at 5:00p.m.

Mr. Andrews: So moved.

Ms. Galloway: So, I move that we keep the record written record open until 7:00 p.m. on March 4th, 2024 at 5:00 p.m.

Mr. Pauly: Seven or five? You said both. Five?

Ms. Galloway: That's what she said, 5:00 p.m.

Ms. Davidson: 5:00 p.m. Yeah.

Mr. Pauly: Just making sure the record is clear on that.

Chair Barrett: So, the motion was for March 4th, 2024 at 5:00p.m.

Ms. Galloway: Right.

Mr. Ordon-Bakalian: Understood.

Chair Barrett: Do I hear a second?

Mr. Mesbah: Second.

Chair Barrett: Okay. All in favor of leaving the written record open until March 4th, 2024 until 5pm?

ALL: Aye.

Chair Barrett: Okay. The motion carries, four to zero.

[End of Verbatim Excerpt]

BOARD MEMBER COMMUNICATIONS

1. Results of the February 12, 2024 DRB Panel A meeting
2. Recent City Council Action Minutes

There were no comments.

STAFF COMMUNICATION

There were no comments.

ADJOURNMENT

The meeting adjourned at 8:23 p.m.

Respectfully submitted,

Paula Pinyerd, ABC Transcription Services, LLC. for
Shelley White, Planning Administrative Assistant