



SPECIAL CITY COUNCIL MINUTES

May 17, 2024 at 12:00 PM

Wilsonville City Hall & Remote Video Conferencing

CALL TO ORDER

The Mayor began the meeting by reading aloud the City Council's Mission Statement:

To protect and enhance Wilsonville's livability by providing quality service to ensure a safe, attractive, economically vital community while preserving our natural environment and heritage.

The Mayor then told the audience on the agenda was a summary of the legislative and other matters to come before the Wilsonville City Council at this special session on May 17, 2024, at City Hall. Legislative matters must have been filed in the office of the City Recorder by 10:00 a.m. on May 8, 2024. Remonstrances and other documents pertaining to any matters listed in said summary filed at or prior to the time of the meeting may be considered there with except where a time limit for filing has been fixed.

The audience was then reminded this was a special-set Council meeting to consider an appeal from a decision by the Development Review Board (DRB), which was not a public hearing. No other City business would be conducted at this meeting.

The City Attorney added that based on the order of appeal the Council adopted at its May 6, 2024, meeting, where it designated the procedure for the meeting. The procedure was that it was an appeal on the record before the Development Review Board. Therefore, no new testimony or evidence was being provided and it was between the appellant and City staff.

The Mayor then requested that the City Recorder call roll.

1. Roll Call
2. Pledge of Allegiance

A special meeting of the Wilsonville City Council was held at the Wilsonville City Hall beginning at 12:00 p.m. on Friday, May 17, 2024. The Mayor called the meeting to order at 12:00 p.m., followed by roll call and the Pledge of Allegiance.

PRESENT

Mayor Fitzgerald
Council President Akervall
Councilor Linville
Councilor Berry
Councilor Dunwell

STAFF PRESENT

Amanda Guile-Hinman, City Attorney
Bryan Cosgrove, City Manager
Cindy Luxhoj, Associate Planner
Dan Pauly, Planning Manager
Jeanna Troha, Assistant City Manager
Kimberly Rybold, Senior Planner
Kimberly Veliz, City Recorder
Miranda Bateschell, Planning Director
Stephanie Davidson, Assistant City Attorney
Zoe Mombert, Assistant to the City Manager

3. Motion to approve the following order of the agenda.

Motion: Moved to approve the order of the agenda.

Motion made by Councilor Akervall, Seconded by Councilor Dunwell.

Voting Yea:

Mayor Fitzgerald, Councilor Akervall, Councilor Linville, Councilor Berry, Councilor Dunwell

Vote: Motion carried 5-0.

MAYOR'S BUSINESS

There was none.

COMMUNICATIONS

There was none.

CITIZEN INPUT AND COMMUNITY ANNOUNCEMENTS

There was none.

COUNCILOR COMMENTS, LIAISON REPORTS AND MEETING ANNOUNCEMENTS

There was none.

CONSENT AGENDA

There was none.

NEW BUSINESS

4. Appeal of DRB Resolution No. 432, A Resolution Denying the Proposed Occupant's (The Home Depot) Proposed Use at 29400 SW Town Center Loop West is a Continuation of the Existing Non-Conforming Use in Case File No. DB24-0003 (Planning Director Referral of AR23-0031).

At 12:04 p.m. the Mayor called to order the Wilsonville City Council meeting on the appeal by Lars Andersen & Associates, Inc. concerning the Development Review Board Resolution No. 432, case file DB24-003.

The Mayor read the quasi-judicial appeal procedure script.

No Councilor declared a conflict of interest, bias, or conclusion from information gained outside the hearing. No member of the audience challenged any of the Councilor's participation.

The Mayor stated she had no exparte communication to report. The Mayor added that Councilors had heard there was discussion about this agenda item out in the community and some residents had brought up the issue with Council. However, the Mayor had not engaged in those discussions. Furthermore, she referred those individuals to the City Council packet.

All Councilors familiarized them self with the record.

It was noted that no new evidence was to be taken or considered.

Cindy Luxhoj, Associate Planner presented a factual report related to the Appeal of Development Review Board Resolution No. 432, Case File No. DB24-0003, as required under Wilsonville Code 4.022 (.06) A. 1.

Stephanie Davidson, Assistant City Attorney next presented the Legal Standard Applicable to Appeal of DB24-0003.

The PowerPoint displayed by staff was added to the Council record.

The Council asked clarifying questions of staff throughout the presentation.

The appellants were then invited to present to the Council.

The following individuals presented on behalf of the applicant/appellant Home Depot:

- Attorney Keenan Ordon-Bakalian of Schwabe, Williamson & Wyatt
- Daniel J. Zoldak of Lars Andersen & Associates, Inc.
- Barry L. Simons of The Home Depot, Inc.

During the presentation appellants addressed challenges to the decision. In addition, the appellants addressed disagreements between the applicant and staff.

The PowerPoint displayed by appellants was added to the Council record.

The appellants addressed the Council's clarifying questions.

Next, the following City staff members presented arguments in response to appellants' presentation:

- Miranda Bateschell, Planning Director
- Stephanie Davidson, Assistant City Attorney

The slides shown by City staff were added to the Council record.

Recess Motion: Moved for a five-minute recess of Council.

Motion made by Councilor Dunwell, Seconded by Councilor Linville.

Voting Yea:

Mayor Fitzgerald, Councilor Akervall, Councilor Linville, Councilor Berry, Councilor Dunwell

Vote: Motion carried 5-0.

The City Attorney reminded Council there was to be no discussion of the item during the recess. Additionally, the audience was informed not to approach Council during the recess.

The Mayor recessed the meeting at 2:30 p.m.

The Mayor reconvened the meeting at 2:36 p.m.

City staff answered further questions from the Council.

The City Attorney informed that for both Development Review Board and City Council follow Wilsonville City Code Section 4.022, Appeal and Call-up Procedures, Subsection (.08) Review Body Decision, which reads:

- A. Upon review, the referee, Commission, or Board may by Resolution or the Council shall by order, affirm, reverse or modify in whole or part a determination or requirement of the decision that is under review.

Subsections of requirements follow.

The City Attorney's review of Wilsonville Code provision was clear that the only thing Council was reviewing at this time was DRB Resolution No. 432, not the Class 1.

Further discussion between Council and City staff ensued.

The Appellants then presented their rebuttal and answered additional questions for Councilors.

The Council had no further questions. Therefore, the Mayor asked for a motion.

Motion: Moved to Order On Appeal: Development Review Board Resolution No. 432

WHEREAS, on December 15, 2023, the City received an application for Class II Review with respect to the real property located at 29400 SW Town Center Loop West (respectively, the "Location") from applicant/appellant Dan Zoldak, of Lars Andersen & Associates, Inc. ("Appellant") (this application is referred to as "AR23-0031" in City records); and

WHEREAS, in its application, Appellant requested a "Class II Staff Interpretation to confirm that The Home Depot and Fry's Electronics are both warehouse retail uses" at the Location, and alternatively, a "staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for [the Location] constitutes a warehouse retail use and may operate in the existing structure"; and

WHEREAS, the City processed the Appellant's application as a request to confirm that the Home Depot's (the "Proposed Occupant") proposed use of the Location will constitute a continuation of the non-conforming use, as provided in Wilsonville Code (WC) Section 4.189(.01), which existing nonconforming use was confirmed in the related but separate Class I decision relating to the Location (which was established by the Development Review Board ("DRB") in Resolution No. 429, and later confirmed by Order on Appeal by City Council dated April 15, 2024); and

WHEREAS, the Planning Director referred the application to the DRB for a public hearing per WC 4.030(.01)B., and did not issue a Planning Director's decision; and

WHEREAS, the DRB held a public hearing on April 8, 2024 (this proceeding is referred to as "DB24-0003" in City records); and

WHEREAS, the DRB closed the public hearing on April 8, 2024, but kept the written record open to allow the submission of evidence and legal argument, and reconvened to consider the application and issued a decision on April 24, 2024; and

WHEREAS, on April 24, 2024 the DRB unanimously adopted Resolution No. 432; and

WHEREAS, during its regularly scheduled meeting on May 6, 2024, anticipating that Appellant would appeal Resolution No. 432, City Council adopted an order establishing the scope of this appeal proceeding and the procedure that City Council would follow during the appeal proceeding, and set May 17, 2024 at 12:00 p.m. as the date and time of the appeal proceeding (the “Procedural Order”); and,

WHEREAS, on May 7, 2024, Appellant submitted the document titled “Appellant’s Notice of Appeal” to the City (the “Notice of Appeal”) within the prescribed appeal period; and

WHEREAS, City Council held an appeal proceeding to address this matter on May 17, 2024 in accordance with the Procedural Order; and,

WHEREAS, all references to the “staff report” in this order are to the staff report prepared by staff for the May 17, 2024 titled “Order on Appeal: DRB Resolution No. 432” (the “Staff Report”) and all citations in the following findings are to the attachments to this Staff Report.

FINDINGS:

1. The foregoing recitals are hereby incorporated as findings of the Council, as if fully set forth herein.
2. As of the date of this order, the recognized non-conforming use at the Location is “a 159,400 square-foot electronics-related retail store,” which was determined by the DRB Decision in Case File DB24-0002 (Resolution No. 429), and affirmed by Council in its Order on Appeal dated April 15, 2024 (the “Recognized Non-Conforming Use”). Council finds re-argument of the settled issue of the Recognized Non-Conforming Use in the Class I land use proceedings irrelevant to this decision.
3. Appellant describes itself as a “home improvement warehouse store” (Attachment 3b, page 89), which is not the same as an “electronics-related retail store.”
4. Appellant has the burden of proof in this appeal to establish that the Proposed Occupant’s proposed use of the Location would be a continuation of the Recognized Non-Conforming Use at the Location. Council finds that Appellant has not satisfied its burden of proof for the following reasons:
 - a. Council finds that Appellant relies on evidence irrelevant to this Class II Review, including: (1) the exhibits attached to Appellant’s April 15, 2024 “Open Record Submittal” to the DRB, (2) discussion of the Town Center Plan and related zoning, and (3) the document referred to as the “1991 Decision” throughout these proceedings (Attachment 3b, pages 94-254). Council finds the reasoning on pages 14-17 of the Staff Report persuasive.

- b. Proposed Occupant proposes to engage in the following activities at the Location, and there is no evidence in the record that establishes that the Current Occupant engaged in these activities at the Location as of June 5, 2019. Regardless of any ancillary commonalities that may be shared by Proposed Occupant and Current Occupant, these activities amount to a “fundamental change in the nature of the use” and go beyond the scope of the Recognized Non-Conforming Use. *See Hendgen v. Clackamas Cnty.*, 115 Or App 117, 121 (1992). The ancillary commonalities are insufficient to compel the Council to grant the relief that has been requested by Appellant.
- i. Based on the document titled “Applicant’s Narrative and Exhibits Demonstrating Compliance with the Relevant Approval Criteria,” which was submitted by Appellant to the DRB, Proposed Occupant plans to sell tools and construction products (Attachment 3b, page 89). This description is supported by photos showed during Appellant’s presentation at the DRB public hearing on April 8, 2024 (Attachment 3b, pages 468-484), which showed images of merchandise, often stocked floor-to-ceiling, that included large electric power tools, floor polishers, tools, hardware, chainsaws, flooring, paint, cleaning products, windows and doors, large household appliances (e.g. washing and drying machines, refrigerators), light fixtures and lighting systems, saw blades, and patio furniture. There is no evidence in the record of Current Occupant selling these products, or even these types of products. Further, the as-built floor plan submitted by the Current Occupant to the City’s Building Division in 2014 (Attachment 3b, page 15) supports this assessment; the only similar type of product shown on this floor plan is small appliances, which are not the same as large household appliances such as washing and drying machines. The as-built floor plan predates the date of non-conformance by five years, which lessens the weight Council assigns to this evidence. However, Council finds it more credible than other evidence submitted by Appellant that is: (1) not from the Location (i.e., other Fry’s Electronics stores), (2) earlier in time, and/or (3) fails to demonstrate that the Current Occupant and the Proposed Occupant engaged in the same retail sales.
 - ii. Proposed Occupant plans to have a garden center (i.e., a nursery that sells live plants). The site plan included in Appellant’s application materials shows a garden center at the front of the building (Attachment 3b, page 256). During the DRB public hearing on April 8, 2024, Barry Simmons, a real estate manager for the Proposed Occupant, acknowledged that there would be a garden center with “live goods” inside the existing building (Attachment 5, page 10). A garden center that contains live plants would require some kind of irrigation or watering. There is no evidence in the record of Current Occupant selling these types of products, or anything live that required irrigation or watering.

- iii. Proposed Occupant would have at least some operations outside of the existing building at the Location. The site plan included in Appellant's application materials shows a "lumber pad" at the back of the building (Attachment 3b, page 256). The extent of the activities that would occur in this area is not clear. During the DRB public hearing on April 8, 2024, Barry Simmons stated that the lumber pad area would be used to unload heavier products off of a flatbed truck, and that it would not be used for exterior storage (Attachment 5, page 10). There is no evidence in the record of Current Occupant having any operations outside of the building that currently exists at the Location, whether for receiving, unloading, temporary storage, or for some other purpose. Although the extent of these activities is unclear, Council must rely to some extent on what has been represented in Appellant's initial application materials.
 - iv. Contractors and other home improvement professionals would account for close to half of the Proposed Occupant's annual sales (Attachment 3b, page 90). There is no evidence in the record of Current Occupant selling to contractors or other home improvement professionals.
 - c. During the DRB public hearing on April 8, 2024, Barry Simmons suggested that Proposed Occupant would probably invest about \$20 million into redeveloping the Location, including upgrading roads, the water system, sewer system, and called the project a "redevelopment" (Attachment 5, page 14). This statement strongly suggests that Proposed Occupant's plans involve significant changes to the Location, which go far beyond a mere continuation of non-conforming use.
5. Appellant failed to preserve any argument regarding the utilization of both Class I and Class II review processes in this matter. Assuming, without acknowledging, that the argument was preserved, WC 4.030(.01)A.7. states that confirmation of an existing non-conforming use is subject to a Class I Review, not the determination whether a proposed use is a continuation of an existing non-conforming use. A Class II Review is required for determining continuation of existing non-conforming use, as explained in the Staff Report. Further, Council finds that City staff proposed that Appellant withdraw its Class I application, while preserving its arguments concerning existing non-conforming use, in order for the Class I and Class II applications to be processed together, and Appellant refused (Attachment 3b, pages 63-65).
6. DRB followed correct procedures, and in particular, the DRB did not err when it adopted the staff report dated April 1, 2024 for the reasons stated on pages 2-3 of the Staff Report. DRB properly applied the relevant Wilsonville Code provisions, including, but not limited to, WC 4.030 and 4.189, as evidenced by findings A5 through A11 of DRB Resolution No. 432.
7. For the reasons provided in the Staff Report, Council finds Appellant's arguments unpersuasive regarding: (a) parking spaces and traffic impacts, (b) certificates of occupancy, (c) the 1991 Decision, (d) the 1992 CCRs, (e) current Town Center zoning regulations; (f) the "codification" rule and, relatedly, Ordinance No. 55; and (g) the "common nucleus" test.

IT IS THEREFORE ORDERED, by the City of Wilsonville City Council, at its special meeting on this 17th day of May 2024, that the Development Review Board decision in Resolution No. 432 is affirmed, and further, that this was the correct and appropriate decision made based on applicable laws, policies, and standards. The Appeal is therefore respectfully denied.

Motion made by Councilor Akervall, Seconded by Councilor Berry.

The Council provided comments in support of the motion.

Voting Yea:

Mayor Fitzgerald, Councilor Akervall, Councilor Linville, Councilor Berry, Councilor Dunwell

Vote: Motion carried 5-0.

In closing the Mayor announced if you desire to appeal this decision to the Oregon Land Use Board of Appeals, you must make application, stating the grounds of the appeal, in the form and within the time prescribed by State law.

CONTINUING BUSINESS

There was none.

PUBLIC HEARING

There was none.

CITY MANAGER'S BUSINESS

No report.

LEGAL BUSINESS

No report.

ADJOURN

The Mayor adjourned the meeting at 3:56 p.m.

Respectfully submitted,

Kimberly Veliz, City Recorder

ATTEST:

Julie Fitzgerald, Mayor

DRAFT