



**CITY COUNCIL MEETING
STAFF REPORT**

Meeting Date: April 3, 2024		Subject: Order on Appeal: DRB Resolution No. 429	
		Staff Member: Miranda Bateschell, Planning Director; Stephanie Davidson, Assistant City Attorney	
		Department: Community Development, Legal	
Action Required		Advisory Board/Commission Recommendation	
<input checked="" type="checkbox"/> Motion <input type="checkbox"/> Public Hearing Date: <input type="checkbox"/> Ordinance 1 st Reading Date: <input type="checkbox"/> Ordinance 2 nd Reading Date: <input type="checkbox"/> Resolution <input type="checkbox"/> Information or Direction <input type="checkbox"/> Information Only <input type="checkbox"/> Council Direction <input type="checkbox"/> Consent Agenda		<input type="checkbox"/> Approval <input type="checkbox"/> Denial <input type="checkbox"/> None Forwarded <input type="checkbox"/> Not Applicable Comments: Development Review Board Resolution No. 429 issued a decision of non-conformance in Case File No. DB24-0002 (appeal of ADMN23-0029) that the Applicant has appealed to City Council.	
Staff Recommendation: Staff recommends Council affirm the decision of the Development Review Board Resolution No. 429.			
Recommended Language for Motion: I move to adopt an Order on the Appeal of Development Review Board Resolution No. 429 affirming the decision in DRB Resolution No. 429.			
Project / Issue Relates To:			
<input type="checkbox"/> Council Goals/Priorities:	<input checked="" type="checkbox"/> Adopted Master Plan(s): Comprehensive Plan, Town Center Plan	<input type="checkbox"/> Not Applicable	

ISSUE BEFORE COUNCIL:

An appeal of the Development Review Board (DRB) Resolution No. 429 dated March 14, 2024, issuing a decision of non-conformance in Case File No. DB24-0002 affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029).

EXECUTIVE SUMMARY:

The DRB held a special meeting on March 14, 2024, to consider all evidence timely submitted regarding DB24-0002. Following deliberation on the matter, the DRB approved Resolution No. 429 affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029) dated December 28, 2023. The Notice of Decision for Case File No. DB24-0002 was issued on March 15, 2024. On March 27, 2024, the Applicant filed an Appeal with the City Recorder noting the following issues being appealed:

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

Thus, the primary question before City Council is the scope of the recognized legally established non-conforming use at the Location. The DRB recognized this scope to be "a 159,400 square-foot electronics-related retail store." Additionally, the Appellant challenged two actions taken by the DRB as part of their decision, which are discussed in more detail in Attachment 1.

FACTUAL BACKGROUND:

This Staff Report provides a factual summary of the proceedings and summary of the evidence in the record that was considered in reaching the decision under review. It includes a statement of relevant facts, including important procedural background related to the appeal.

Given the nature of the issue under review, this staff report is supplemented by a legal memorandum (Attachment 1). Determination of non-conforming uses is very specific and there is a significant amount of relevant Oregon case law that provides guidance for the City Council in making its determination on this appeal. The attached memo describes the issue before City Council, the issues not appealed, and issues beyond the scope of this appeal; the burden of proof; the law regarding non-conforming uses, including the definition of non-conforming use, scope of non-conforming use, required evidence, and local government discretion; City staff's response to other arguments raised by the Appellant at DRB; and finally, the staff recommendation.

The property that is the subject of this appeal is located at 29400 SW Town Center Loop West (the "Location") within the Wilsonville Town Center. The Location is developed with a 159,400 square-foot electronics-related retail store. As Council is aware, the community engaged in a two-year planning process with City staff to establish a new vision for the Wilsonville Town Center. This culminated in Council's adoption of Ordinance No. 835, the Town Center Plan and new Town Center (TC) zoning designation, which went into effect on June 5, 2019.

At that time, several buildings and sites in Town Center, including the Location, became non-conforming (use, structure, and/or site conditions) to the new TC zoning and development standards. While established legally under a prior zoning designation and therefore allowed to continue as-is, the developed sites are not consistent, and therefore, non-conforming with the new vision, plan, and zoning standards for Town Center. Pages 49-54 of Attachment 3 detail the determination of non-conformance for use, structure, and site conditions. The Appellant does not challenge the fact of non-conformance for use, structure, and site conditions. However, it does challenge the nature and extent of the non-conforming use at the Location.

The City's non-conforming development standards (Sections 4.189 through 4.192 of the Development Code) intentionally encourage future uses and developments that become more in line with the vision and standards of the Town Center Plan and ensure ongoing and future uses of these locations and buildings are no more non-conforming with the TC Zone than the use, structure, or site conditions existing at the time the new regulations went into effect. This is consistent with best practices and supported by the Land Use Board of Appeals, as non-conforming uses inherently detract from the effectiveness of the new comprehensive plan. As further detailed in Attachment 1, local governments do not consider a property's original zoning or the prior land use approvals in establishing the nature and extent of the legally established non-conforming use at the point in time it becomes non-conforming, but rather what use preexisted and has continued after adoption of the new regulations.

As of June 5, 2019, the effective date for the new Town Center development regulations, a Fry's Electronics store existed on the site; thus, the actual use of the Location was an electronics retail store with a total interior square-footage of 159,400 square feet. This became the recognized, legally established non-conforming use at the Location on that date. As shown in Attachment 3, pages 24-25, the Appellant does not dispute this point. The DRB recognized a non-conforming use in its Notice of Decision for Case File No. DB24-0002, which was issued on March 15, 2024; it defined the nature and extent of this non-conforming use to be "a 159,400 square-foot electronics-related retail store." Attachment 2, pp. 3-4 of 20.

Thus, Staff recommends that City Council affirm the DRB decision in Resolution No. 429, affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029) determining that the scope of the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store."

PROCEDURAL BACKGROUND:

On October 30, 2023, the City received an application for Class I Review (ADMN23-0029) to confirm the status of the existing use and structure at 29400 SW Town Center Loop West (respectively, the "Class I Review Application" and the "Location"). The Location was previously occupied by Fry's Electronics, an electronics retail store and has been vacant since 2021. In its submittal, the Appellant requested a Class I Review to confirm the status of the existing non-conforming use at the Location, but included information regarding a potential determination of a continuation of use by another party. A determination of a continuation of use is not subject to

a Class I Review.

As a result of the issues with Appellant's initial Class I Review Application, on November 28, 2023, City staff contacted the Appellant by email providing options for processing the application and requesting that they notify staff of its preference by December 8, 2023 (Attachment 3, pp. 438-439 of 660). Appellant did not contact the City to withdraw the Class I Review Application, so the City deemed the application complete on November 29, 2023 and processed the request as a Class I Planning Director Determination per Subsection 4.030 (.01) A. 7. of the Development Code. Since Appellant did not notify staff of its preference, staff's review only covered the portion of the Class I Review Application that qualified under the Class I Review. On December 28, 2023, the City's Planning Director issued a Notice of Planning Director Determination, which provided the Planning Director's decision on the Class I Review Application (the "Planning Director's Determination").

The Appellant submitted a notice of appeal of the Planning Director's Determination on January 10, 2024. A public hearing before the Development Review Board regarding this appeal (DB24-0002) was held on February 26, 2024 (see written transcript, Attachment 4). During the public hearing, Appellant requested that the record be kept open for seven days pursuant to ORS 197.797 to allow it to respond to testimony entered into the record. The DRB closed the public hearing and unanimously approved the request to keep the written record open for Resolution No. 429 until March 4, 2024, at 5:00 pm. On March 4, 2024, Appellant filed a first written submittal, and on March 11, 2024, filed its final arguments to the record. The Development Review Board held a special meeting on March 14, 2024, to consider all evidence timely submitted regarding DB24-0002 (see record, Attachment 3). Following deliberation on the matter, the Development Review Board approved Resolution No. 429 affirming the Planning Director's Determination of Non-Conformance (ADMN23-0029) dated December 28, 2023, determining that:

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

The Notice of Decision for Case File No. DB24-0002 was issued on March 15, 2024. For the purpose of applying the applicable 120-day time limit, a final decision on the Class I Application, including any appeals, must be rendered by April 11, 2024.

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

scheduled for April 8, 2024.

TIMELINE:

The decision made by the City Council shall become effective immediately. There is a 21-day appeal period during which the Appellant could file an appeal with the Land Use Board of Appeals.

EXPECTED RESULTS:

City Council will issue an order on the appeal to affirm, reverse or modify in whole or part the determination of non-conformance by the DRB in Resolution No. 429.

CURRENT YEAR BUDGET IMPACTS:

Cost is covered partially by fees paid by appellant, otherwise Staff time is non billable within existing department budgets.

COMMUNITY INVOLVEMENT PROCESS:

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

POTENTIAL IMPACTS OR BENEFIT TO THE COMMUNITY:

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

ALTERNATIVES:

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

which final action needs to occur on this application as required by ORS 227.178.

CITY MANAGER COMMENT:

ATTACHMENTS:

1. Legal Memorandum dated April 2, 2024
2. Development Review Board Panel B Decision – Resolution No. 429
3. Development Review Board Panel B Record – Case File DB24-0002 (ADMN23-0029)
4. Development Review Board Panel B Verbatim Minutes Excerpt dated February 26, 2024
5. Development Review Board Panel B Verbatim Minutes Excerpt dated March 14, 2024