

APPELLANT'S MATERIALS

VIA E-MAIL

BEFORE THE WILSONVILLE CITY COUNCIL

An APPEAL of the Development Review Board's Decision and Resolution No. 432 Affirming the Planning Director Determination in Case File AR23-0031 and denying the Appeal in Case File DB24-0003.

APPLICANT'S NOTICE OF APPEAL

This is a notice of appeal to the Wilsonville City Council ("**City Council**") for Development Review Board ("**DRB**") Decision and Resolution No. 432 (the "**Decision**" attached hereto as **Exhibit A**) denying The Home Depot, Inc.'s¹ ("**Home Depot**") Application AR23-0031 at 29400 SW Town Center Loop West (the "**subject property**"). This Appeal is timely submitted, in writing, prior to the May 8, 2024 deadline. *See* Wilsonville Development Code ("**WDC**") 4.022.02, .09.

1. STANDING AND PROCEDURAL BACKGROUND

Kenneth Kataroff and Keenan Ordon-Bakalian are legal counsel for Home Depot, and as such, are the Applicant's authorized agents. As the project proponent, the Applicant prepared and filed the Class II application upon which the DRB's Decision was issued. *See attached, Exhibit B.* The Applicant's Class II application was submitted on December 15, 2023. On March 19, 2024, the Applicant's Class II request was referred to the DRB for a public hearing rather than a decision being rendered by the Planning Director. *See* AR23-0031; DB24-0003.

As the applicant for the Class II application upon which the Decision is based on, the Applicant has standing to file this appeal.

2. FILING REQUIREMENTS

A. Name and Address of Appellant.

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¹ The applicant below was Lars Andersen & Associates, Inc. ("**Lars Andersen**"), which is an associated party to The Home Depot, Inc. For ease of reference, we refer to Lars Andersen and Home Depot as the "**Applicant.**"

B. Reference to the Subject Development and Case Number.

The decision being appealed is DRB Decision and Resolution No. 432 denying the Applicant's proposed development and operation of a Home Depot as a continuation of the existing nonconforming use at the subject property. Exhibit A, at 1-4. The Applicant hereby appeals the *entire* Decision, including the following action taken by the DRB during the April 24, 2024 deliberation where the Decision was adopted:

1. The DRB's motion to adopt the Staff Report for DB24-0003 as part of the Decision/as the Decision.

C. Statement of the Basis for Appeal.

As stated above, the Applicant hereby appeals the DRB's denial of the subject Application, including the Decision's determination that the applicant's proposed Home Depot development does not constitute a continuation of the nonconforming use at the subject property, which is that of a commercial retail operation or retail store. Home Depot also appeals the DRB's adoption of the Staff Report for DB24-0003.

i. Background.

The Applicant proposes to operate a Home Depot within the existing structure on the subject property. To this end, the Applicant sought a Class I director's determination that the commercial retail use that was established as a result of the 1991 development approval (the "**1991 Decision**" entered into the record with Home Depot's Class II application)² remained a lawfully established nonconforming use at the subject property, and that the scope of that use was a retail use of up to 159,400 square feet. Upon receipt of the Applicant's Class I application, the City attempted to bifurcate the Applicant's request to confirm the legality of a nonconforming use at the subject property from Applicant's request for a determination to establish the scope of use at the property. *See* ADMN23-0029, Enclosure. The City required the Applicant to submit two applications – a Class I application to confirm the legality of the nonconforming use, and a Class II application to establish the *actual* nature, extent, and scope of the nonconforming use at the subject property.

The City justified its requirement that the Applicant submit a Class II application by claiming that Home Depot's request to confirm that it can operate under the subject property's existing commercial retail nonconforming use rights was a request for a "written interpretation of the Development Code and requires Class 2 review." ADMN23-0029, Enclosure. But the Planning Director referred Home Depot's Class II application to the DRB, and the DRB's Decision *does not interpret the City's Development Code*. The City improperly processed the Applicant's application to confirm that Home Depot could operate as a continuation of the subject property's commercial retail nonconforming use rights under the City's Class II procedures.

² Planning Commission Resolution No. 91PC43.

In processing the subject application under the City’s Class II procedures, the City has violated its own Development Code that requires nonconforming use determinations be processed under the City’s Class I procedures unless there is “uncertainty as to the history of the property.” 4.030.01(A)(7). There is no uncertainty regarding the history of the property due to the existence of the 1991 Decision and the ample information available regarding Fry’s Electronics. Nor has the City ever made a finding or statement that there is uncertainty regarding the history of the subject property. The City’s decision to process the subject application under its Class II application procedures is not in accordance with the WDC and substantially prejudices the rights of Home Depot. For this reason alone, the DRB’s Decision should be reversed.

Concurrent with the City’s processing of Home Depot’s Class II application, the City also issued a Director’s Determination for Home Depot’s Class I application,³ finding that “Fry’s Electronics, on the subject property at 29400 SW Town Center Loop West, is a legally established Non-Conforming Use.” *See* ADMN23-0029. Home Depot appealed the Director’s Determination to the DRB,⁴ who affirmed – but also modified – Planning Director Determination ADMN23-0029 and denied the Applicant’s Appeal. *See* DRB Resolution No. 429. On March 27, 2024, Home Depot filed a Notice of Appeal of the DRB’s Decision. On April 15, 2024, the Wilsonville City Council denied Home Depot’s appeal of the DRB Decision. *See* Order on Appeal – DRB Resolution No. 429 (Apr. 15, 2024). That decision has been appealed to the Land Use Board of Appeals (“LUBA”).

Home Depot has regularly and consistently requested that the City meet to discuss Home Depot’s proposal and how Home Depot might partner with the City to realize the City’s goals in its Town Center Plan. Until recently, the City has denied these requests for a meaningful meeting. On April 8, 2024, Home Depot’s applicant team met with City staff to discuss a collaborative path forward entailing the development of a Wilsonville-specific Home Depot store that would meet the intent and vision of the City’s Town Center Plan. Although discussions with the City remain ongoing, the City has taken the controversial position that the only path forward for Home Depot to operate in Wilsonville is to apply for a waiver to standards or other form of application regulated under the subject property’s current Town Center (“TC”) zoning. The City’s position disregards Home Depot’s lawful right to operate at the subject property under the property’s existing nonconforming use rights. Moreover, in processing and presenting Home Depot’s Class II application to the DRB, City staff repeatedly took actions inimical to the Applicant – in furtherance of City staff’s apparent goal to abrogate subject property’s lawfully established nonconforming use rights.

As will be detailed below, the DRB’s Decision is not based on the substantial evidence in the record, is premised on an inaccurate understanding of applicable Oregon caselaw, and fails to

³ The Planning Director issued their Director’s Determination on December 28, 2023. *See* ADMN23-0029.

⁴ APPL24-0001.

contain adequate findings and justification for denying Home Depot's Class II application. City Council should reverse the DRB's Decision and find that Home Depot's proposed development constitutes a continuation of the nonconforming commercial retail use at the subject property.

ii. Standard of Review.

The DRB's Decision (and the City Council's decision on appeal) must be supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely upon to reach a conclusion, notwithstanding that different reasonable people could draw different conclusions from the evidence. *Adler v. City of Portland*, 25 Or LUBA 546 (1993). In making its decision, the DRB must also take care not to improperly construe applicable law, which includes Oregon's nonconforming use caselaw. See ORS 197.835(9)(a)(D).

iii. Scope of Home Depot's Request in the Class II Application.

Home Depot's Class II application requested the continuation of the commercial retail, or retail use of the subject property. Throughout the staff report and staff presentation to the DRB, City staff suggested or commented that the Applicant has asked to continue a different commercial retail use than the lawfully established commercial retail use currently occurring at the subject property. The DRB incorrectly adopted staff's reasoning, ignoring the fact that the City has pointed to no provision of its code or the law that permits it to limit the type of retail use of the structure. Staff is incorrect that the use of the property may be limited to a "single-user electronic retail store" as was the decision in the Class I, which is currently subject to an appeal to LUBA. Resolution No. 429 is not binding on the City Council's decision for this Class II application, as the City Council can, and should, determine that Home Depot's application is a continuation of the property's commercial retail nonconforming use rights.

The evidence and testimony within the record demonstrate that the scope and nature of the commercial retail use that was occurring on June 5, 2019 is consistent with that of Home Depot's operations, even down to the layout of the respective stores. Moreover, the record also demonstrates that Home Depot's operations will be *less intensive* than Fry's, including in terms of parking requirements and traffic impacts. Therefore, the Applicant respectfully requests that the City Council reverse the DRB Decision and find that Home Depot may continue the commercial retail nonconforming use that has been lawfully established at the subject property.

iv. The nonconforming use at the subject property is the commercial retail use that was approved within the 1991 Decision.

The DRB erred in failing to find that the 1991 Decision is the controlling authority for determining the nature and extent of the nonconforming commercial retail use at the property because the 1991 Decision lawfully established the nonconforming use in the first instance. "The purpose of a local government proceeding to determine the existence of a nonconforming use is to determine what use existed on the date restrictive regulations were applied." *Nehoda v. Coos*

Cnty., 29 Or LUBA 251, 1995 WL 1773153, at *5 (1995). A nonconforming use is “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.” *Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (citing *Rogue Advocates v. Board of Comm. Of Jackson Cnty.*, 277 Or App 651, 654 (2016), *rev. dismissed*, 362 Or 269, 407 (2017)); *see* WDC 4.001.196 (defining a nonconforming use as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform”).

The commercial retail use at the subject property is a lawfully established nonconforming use pursuant to WDC 4.001.196 and *Morgan*. As explained in Home Depot’s application materials and throughout the proceeding before the DRB, the City approved a commercial retail use at the subject property on December 9, 1991 with the adoption of the 1991 Decision. Specifically, the 1991 Decision approved a 159,400 retail commercial building and associated commercial retail activities on the 14.75-acre subject property. At the time, the subject property’s Planned Development Commercial (“**PDC**”) zoning allowed commercial retail uses of the nature and extent that was approved by the 1991 Decision.

The commercial retail use approved by the 1991 Decision was rendered nonconforming on June 5, 2019, when the City adopted its Town Center Plan and rezoned the property Town Center. This is because the property’s present TC zoning prohibits commercial retail uses that exceed 30,000 square feet, unless the commercial retail use is located on more than one story of a multistory building, and the 1991 Decision approved a 159,400 retail commercial building. WDC 4.132.03(A)(1). Although the City’s application of the TC zone to the property rendered the ongoing commercial retail use nonconforming, the commercial retail use approved in the 1991 Decision is essential to determining the use of the subject property as of June 5, 2019 because the 1991 Decision *sets the parameters* for the use that was occurring at the time of nonconformance.

Importantly, the use TC zone adoption does *not limit* the type of retail use, but instead the *size* of that use. Put another way, nothing in the existing and adopted code so limits the character of retail use, the only issue on conformity is the *size* of that retail use. To the extent relevant, the City has already determined in the Class I decision (under appeal before LUBA) that the relevant size of the retail operation can continue. The fact that the WDC provides *no character of retail use* restriction is dispositive of the Class II decision. The only question before the City Council is whether Home Depot is a commercial retail store, which it clearly is.

The operation of a Home Depot at the subject property represents a continuation of the lawfully established commercial retail nonconforming use at the property. Conversely, the City Council’s previous affirmation of the finding in DRB Resolution No. 429 that the nonconforming use allowed to continue at the subject property is “a 159,400 square-foot electronics-related retail store” is contrary to the express language of the 1991 Decision, which is the controlling substantial evidence for the City’s nonconforming use analysis *in this case*. The City will not receive deference for its interpretation of the 1991 Decision on a challenge to

LUBA, even if the City’s interpretation was accurate. *See Gould v. Deschutes County*, ___ Or LUBA ___, ___ (LUBA No. 2020-095). The 1991 Decision established the parameters of the commercial retail use that was occurring at the time of nonconformance, and therefore, the 1991 Decision is relevant substantial evidence in support of the position that Home Depot is entitled to continue the commercial retail nonconforming use pursuant to WDC 4.001.196 and *Morgan*, 290 Or App 111 (2018).

The DRB and City Council’s determination that the nonconforming use at the subject property is a “single-user electronics retail store” violates Oregon’s codification requirement, which requires the approval or denial of an application to be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance. *See e.g.*, ORS 227.173; ORS 227.178(3)(a). In this case, the zoning code in effect at the time of the 1991 Decision did not contain limitations on the nature of a commercial retail use. Instead, the 1991 Decision approved a broad commercial retail use at the property, not a single-user electronics retail store.

City staff’s position – which was adopted by the DRB – that “uses more closely associated with the Proposed Occupant were not listed in the CC use category” of the zoning ordinance (Ordinance No. 55) that was in place for the subject property’s Planned Development Commercial – Central Commercial (“**PDC-CC**”) zoning at the time of the 1991 Decision is misleading and has no determinative bearing on the subject application. Exhibit A, at 26. Although the Applicant disagrees with staff’s characterization of the uses associated with Home Depot’s application, it is important to note that staff concedes, “electronics store was not a use listed specifically in CC” either. *Id.* Instead, Ordinance No. 55 simply provides a list of “typical recommended uses” allowed within the CC – *including retail stores* – of which Home Depot and Fry’s both are. Staff’s backhanded attempt to characterize the “recommended uses” category for the PDC-CC zone as an exclusive list of “allowed uses” conflicts with the plain language of Ordinance No. 55, and inserts what has been omitted from the Ordinance in violation of ORS 174.010. The DRB’s adoption of the Staff Report for AR 23-0031 and the findings contained therein constitute reversible error.

Importantly, the Courts have determined that the codification requirement applies to cities, as well as counties. *Waveseer of Or, LLC v. Deschutes Cnty.*, 308 Or App 494, 501 (2021); *BCT Partnership v. City of Portland*, 130 Or App 271, 276 (1994); ORS 227.173(1). The key is that the standards must be ascertainable from the terms of the local government’s *legislation*. *Zirker v. City of Bend*, 233 Or App 601, 610, 227 P3d 1174, *rev. den.*, 348 Or 415, 233 P3d 818 (2010). In other words, ORS 227.173(1) generally does not permit a city to develop land use approval standards and criteria through quasi-adjudicative decision-making; the standards must be reasonably discernible from provisions of the code itself. Here, the City has arbitrarily limited the scope of the subject property’s nonconforming use rights through a quasi-judicial process. As detailed above, the 1991 Decision established the parameters of the use that was occurring in 2019 at the time of nonconformance and the 1991 Decision was not limited to the approval of only single-user electronic retail stores, but rather approved the subject property

for commercial retail use generally.⁵ The City Council risks violating Oregon’s codification requirement if the City Council affirms the DRB’s finding that Home Depot cannot operate as a continuation of the commercial retail nonconforming use that lawfully exists at the subject property.

The findings, recommendations, and conditions of approval within the 1991 Decision established the scope and extent of the commercial retail use that the 1991 Decision approved at the subject property. The 1991 Decision was made in accordance with the City’s zoning code that was in place at the time when the 1991 Decision was issued, and the zoning code did not limit commercial retail uses to certain subsets based on the products that the applicant intended to sell. The City’s argument that the 1991 Decision is not relevant to Home Depot’s Class II application defies reason, as without the 1991 Decision which established the commercial retail use of the subject property, there is no way to determine the *lawfully established* nonconforming use for the property.

The City Council should find that the 1991 Decision is the controlling substantial evidence in the record for determining the scope and extent of the nonconforming use at the subject property.

v. Home Depot may continue the commercial retail use that was existing at the time of nonconformance on June 5, 2019.

Home Depot’s Class II application proposes to continue the same use that Fry’s Electronics was employing the subject property for – commercial retail. WDC 4.001.344 defines “use” as “the purpose for which land or a building is arranged, designed or intended, or for which either land or a building is or may be occupied.” The “purpose” of the use at the subject property as approved in the 1991 Decision was commercial retail, including the construction and occupancy of the existing structure at the property. As set forth in the 1991 Decision, the existing structure at the property was approved for office, warehouse, manufacturing, service, and retail use. Therefore, the commercial retail purpose of the existing structure and subject property will continue through any change in the characteristic of the owner of the property, i.e., whether it is Home Depot or Fry’s that operates at the property.

This position is consistent with Oregon’s nonconforming use caselaw. In *Vanspeybroeck v. Tillamook County Camden Inns, LLC*, 221 Or App 677 (2008) petitioners challenged a decision of the Tillamook Board of County Commissioners (“Board”) that approved alterations to a second floor residence through a minor nonconforming use review. Petitioners argued that the nonconforming use had been abandoned due to a change in the type of occupancy from an owner-occupied unit to non-owner occupied unit. *Id.* at 684. The court examined the definition

⁵ Any commercial retail use operating at the subject property prior to the 2019 adoption of the Town Center Plan may need to comply with the standards and conditions contained within the 1991 Decision.

of “use” in the Tillamook County Land Use Ordinance, which is defined as the “purpose...for which a unit of land is developed, occupied or maintained” and concluded that “the single-family residential purpose of the second-floor occupancy continued through any change in the characteristic of the occupant as owner or renter, and the nonconforming use was not abandoned or discontinued by that change.” *Id.* at 686.

Similarly, in *Hendgen v. Clackamas County*, 15 Or App 117 (1992), the court considered whether a proposed business warehouse, which would store produce of an off-site business, was a continuation of a nonconforming use that used the same buildings to store supplies and inventory with a business located on the same property. The court concluded that the “common nucleus of both activities is storage.” *Id.* at 120 (emphasis in original). The court went on to state that “LUBA regarded the nature of the businesses that employed the structures to be the decisive inquiry. We think that the more relevant question is whether there is a common use that the various operations share.” *Id.* at 121.

Here, the common nucleus in activities for both Home Depot and Fry’s Electronics is *commercial retail use*. Just like in *Vanspeybroeck* and *Hendgen*, both Fry’s and Home Depot purpose and intent for operating the subject property is the same – commercial retail use. As explained in more detail within Home Depot’s application materials, although Fry’s and Home Depot stores retail different products, the principal purpose and use for both stores is the retail sale of products displayed and stored in a warehouse format. The fact that Fry’s retailed computer and electronics goods and tools and Home Depot retails home improvement and trade goods and tools is not relevant for determining whether Fry’s and Home Depot are commercial retail uses allowed under the 1991 Decision.

As explained during the April 8 DRB hearing, Home Depot and Fry’s share a significant amount of similarities in terms of the scope and extent of their commercial retail operations. *See attached*, Home Depot Slide Deck (Apr. 8, 2024) (**Exhibit C**). Home Depot and Fry’s (when Fry’s was operating) are both organized warehouse style, engage in the retail sale of products to both individuals and professionals, provide technical expertise and service, offer direct-to-door delivery options, and stock a large amount of ancillary and seasonal products that are not directly related to the companies’ primary retail offerings. *Id.* Specifically, both Fry’s and Home Depot retail household-type major appliances, small appliances, tools, component products, accessories, lights, light bulbs, and batteries. *Id.* Fry’s and Home Depot organize and stock merchandise in a traditional warehouse commercial retail style, utilizing large aisle and shelving layouts (including pegboard product hangs), warehouse-style shopping carts, front-end checkout and store pickup stations, endcaps, and service kiosks. Fry’s and Home Depot also sell many identical ancillary products, including chairs and furniture, apparel, and food. *Id.* In sum, Fry’s and Home Depot’s operational characteristics, store layouts, offerings, and activities are extremely similar – even indistinguishable.

There is ample evidence within the record demonstrating the scope and nature of Fry’s operations at the time of nonconformance, including the photographic evidence detailed within

the Applicant's April 8, 2024 PowerPoint, which shows the wide variety of retail goods that Fry's was selling, beyond simply electronics. *Id.* Moreover, the Lumberjack LP Letter submitted during the DRB Open Record period by the owner of the subject property and previous operator of Fry's Electronics details both the similarities between Fry's and Home Depot, as well as the wide variety of retail offerings that were occurring at the time the commercial retail use became nonconforming. The DRB's decision is not supported by substantial evidence in the record and the City Council should find that Home Depot can operate as a continuation of the commercial retail use – approved in the 1991 Decision – that Fry's was previously operating under. A decision otherwise is as absurd as saying a former McDonald's cannot become, for instance, a Taco Bell, simply because they sell two different types of fast food. There is no support for that proposition in either Oregon Law or Wilsonville's Code.

Critically, Fry's Certificate of Occupancy (“**CofO**”) for the existing structure at the subject property makes clear that the *use of the structure is retail*, not a “single-user electronics retail store” or a “Fry's Electronics.” *See attached, Exhibit D.* As such, the existing nonconforming use at the subject property is commercial retail, or simply retail generally. The City's position that the existing nonconforming use at the property is a “single-user electronics retail store” or a “Fry's Electronics” is not supported by any substantial evidence in the record and is unreasonable in light of the CofO – which is a second instance of a City-issued permit that only dictates that the subject property be used for retail use and not a particular character of retail use.

Home Depot's position is further supported by the CofO for the Wilsonville Ace Hardware located at 29029 SW Town Center Loop E. *See attached, Exhibit E.* The CofO for the Wilsonville Ace states that the use of the structure is *retail*, not “hardware retail” or “home improvement retail.” The City's own occupancy approval for an existing hardware store currently operating within the City specifies that the *use* is retail, not a limited subset thereof. In conjunction, the CofO's for both Fry's and Ace Hardware demonstrate that the City Staff's interpretation that the nonconforming use at the property is a single-user electronics retail store is nothing more than a thinly veiled attempt to prevent Home Depot from continuing the lawfully established commercial retail use at the property.

In short, City staff and the DRB may dislike the idea of a Home Depot at the subject property because staff believes that a Home Depot is inconsistent with the adopted City's Town Center Plan. However, staff's position is inconsistent with the legal authorization for Home Depot to continue the lawfully established commercial retail nonconforming use at the property. *See 1991 Decision; Exhibit D; WDC 4.001.196; Morgan, 290 Or App 111 (2018).*

Moreover, staff's position taken before the DRB is also inconsistent and incorrect given that the TC Plan specifically permits retail uses, it merely limits the size, and, the City has already confirmed that the size of retail operation may lawfully continue. Equally important is that the existing CC&Rs that burden the subject property and *many if not most* of the other properties within the TC Plan area are controlling. And, Lumberjack LP and other signatories

have expressed concern regarding the City's TC Plan. The City itself has issued an internal memorandum stating that the goals of the TC Plan cannot come to a fruition without an amendment to the CC&Rs. Home Depot has stated that it will support an amendment to the CC&Rs, and will accept a condition of approval that requires such reasonable amendment.

The City Council should determine that Home Depot may operate at the subject property under a continuation of the property's lawfully established commercial retail nonconforming use rights.

vi. The DRB Decision does not contain adequate findings to justify denial of Home Depot's application.

The DRB's Decision is comprised of DRB Resolution No. 432 and the April 1 Staff Report for AR23-0031. Exhibit A, at 3-35. The only substantive "findings" or justification for the DRB's Decision to deny Home Depot's Class II application are found within the April 1 Staff Report. The DRB Decision fails to adequately explain why Home Depot's Class II application was denied, or the grounds for denial. Moreover, the Decision abjectly fails to address the relevance of the Applicant's Open Record submittals, or the testimony submitted within the Applicant's Final Legal Argument (Apr. 22, 2024). It is quite telling that the "findings and recommendations" contained within the April 1 Staff Report were developed *prior* to the April 8 public hearing and the subsequent Open Record period. Put simply, the Decision does not address the Applicant's argument, testimony, and evidence submitted after April 1st, and is not based on the substantial evidence in the record.

The City Council must appropriately consider the Applicant's argument, testimony, and evidence in the record and reverse the DRB's Decision.

vii. The Decision misconstrues applicable Oregon law regarding nonconforming uses.

The DRB's Decision is based on a flawed legal analysis within the April 1 Staff Report. Within the Staff Report the City cites several cases in support of its position that the continuation of nonconforming uses are disfavored, and that "provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible." The City's continued reliance on this proposition evidences the City's fundamental misunderstanding regarding the law applicable to Home Depot's Class II application, as well as the posture of the application itself.

Foremost, there is no question that the lawfully established nonconforming use at the subject property *can continue*. The Applicant met its burden to demonstrate compliance with continuation standards WDC 4.189.01, and the City has not called the Application's compliance with this standard into question. There is also no question that the nonconforming use that the subject property has *not been abandoned*, as the Applicant's Class I application addresses the abandonment standards within WDC 4.189.03, and the City did not challenged the Application's

compliance with WDC 4.189.03. *See* DRB Resolution No. 429; Order on Appeal – DRB Resolution No. 429 (Apr. 15, 2024). The Staff Report’s argument that provisions for limiting nonconforming uses must be liberally construed to limit nonconforming uses is not relevant for this application, because the application of the City’s continuance and abandonment standards within WDC 4.189 are not being interpreted by the City and are not at issue.

Rather, the City must weigh the evidence and testimony within the record under the substantial evidence standard, and cannot inject a heightened degree of animosity towards Home Depot’s proposal to continue the lawfully established commercial retail nonconforming use at the subject property. *Adler*, 25 Or LUBA 546 (1993) (detailing the substantial evidence standard). Put simply, there is no requirement under law for the City to disfavor Home Depot’s application under the provisions of the WDC, because the City has not applied the provisions of the WDC to the subject application. For this application, the DRB was required to weigh the evidence in the record with an even hand to determine whether Home Depot’s proposed development proposes a commercial retail use of the same (or less intensive) nature and extent as the previous commercial retail nonconforming use that was occurring. The DRB failed to do so, and the Decision must therefore be reversed.

Turning to the City’s additional legal analysis, the City’s reliance on *Fraleley v. Deschutes County*,⁶ is similarly misplaced. First, *Fraleley* addressed ORS 215.130, a County statute relating to the application of ordinances and comprehensive plans for the alteration of nonconforming uses. ORS 215.130 is not applicable to the subject application.⁷ Additionally, *Fraleley*’s facts are inapposite to the facts of the subject application. In *Fraleley*, Deschutes County found that a use proposing to repair diesel engines and tractor trailer trucks could not continue under the nonconforming use rights that flowed from a previous business that was engaged in the structural repair of motorhomes, campers, and RVs. LUBA also found that in *Fraleley*, the storage yard for the property in question was used by the structural repair business *solely* for lumber storage, whereas the diesel engine and truck repair business intended to use the yard to store large trucks in various stages of repair. *Fraleley*, 32 Or LUBA, at 35. LUBA concluded that the nature and scope of use differed between a commercial vehicle repair business replete with engine servicing for eighteen-wheeler trucks, and a business engaged in structural (nonmotorized) repair of recreational vehicles and campers.

LUBA based its decision in *Fraleley* in large part on an interpretation of the “common nucleus test” first set forth in *Hendgen*, finding that the two businesses did not share the same essential nature. *Fraleley*, 32 Or LUBA, at 35. Here, both Fry’s and Home Depot share the same essential nature, as the common nucleus of both businesses is commercial retail, notwithstanding the use of the existing structure by different businesses. Unlike the disparate use of the storage yard in *Fraleley* that entailed the storage of lumber versus the storage of eighteen-wheelers, the evidentiary record in this case reflects that Fry’s and Home Depot operate(d) in an extremely similar fashion as warehouse-style commercial retailers. Exhibit C; Lumberjack LP Letter (Apr.

⁶ 32 Or LUBA 27 (1996).

⁷ The legislature has not adopted a corollary statute related to non-conforming uses within an urban growth boundary or in relation to cities.

11, 2024); Exhibit D (establishing retail as the essential nature of the use for the existing structure).

Critical to LUBA's holding in *Fraleley* and the DRB Decision currently on appeal before the City Council, the common nucleus test established in *Hendgen* remains good law, regardless of City staff's statements to the contrary. As stated above, in the original *Hendgen* Court of Appeals proceeding, the Court set forth the common nucleus test for determining the nature and scope of nonconforming uses. *Hendgen*, 115 Or App, at 120–21 (storage use of property is a common nucleus that prevents loss of nonconforming use status, notwithstanding use by different types of businesses). After establishing the appropriate legal test – the common nucleus test – the Court remanded the decision on appeal to LUBA, who subsequently remanded the decision back to Clackamas County. Property owners petitioned review, and in the second *Hendgen* proceeding, the Court of Appeals simply held that the prior decision setting forth the test to be used in deciding whether proposed use was a continuation of a nonconforming use did not preclude LUBA from remanding to the county for new findings on the issue. *Hendgen v. Clackamas County*, 119 Or App 55 (1993) (herein after “*Hendgen II*”).

Hendgen II did not disturb the original *Hendgen* Court's establishment of the common nucleus test. In fact, the decision for *Hendgen II* does not even mention the common nucleus test, because the appeal in *Hendgen II* was related to factual issues, not the relevant legal standard. Moreover, LUBA applied the common nucleus test in *Fraleley*, which was decided three years after *Hendgen II* in 1996. The City's quixotic theory that *Hendgen II* somehow abolished the *Hendgen* Court's prior establishment of the common nucleus test is entirely unsupported by the plain language of *Hendgen II* and cannot be followed. The common nucleus test remains good law and must be applied to the subject application on appeal.

2. REQUESTED RELIEF

The Applicant requests that the City Council impose the relief requested by the Applicant in the above argument. Specifically, the Applicant respectfully requests that the City Council find that the lawfully established non-conforming use at the subject property is the use approved in the 1991 Decision, a 159,400 square foot (“SF”) retail, office, warehouse, manufacturing, and service store (a commercial retail use); not a 159,400 square-foot electronics-related retail store and to not provide additional restriction as to the type of commercial retail because no such limitation existed in the 1991 zoning code or the 1991 Decision itself. The Applicant also requests that the City Council approve the Class II application and find that Home Depot's proposed development constitutes a continuation of the existing commercial retail nonconforming use at the subject property.

The Applicant reserves the right to submit additional written testimony prior to the public hearing date that will be set for this Appeal, as well as within any open record period.



VIA: Certified Mail, Return Receipt Requested

April 24, 2024


Dan Zoldak
Lars Andersen & Associates, Inc.
4694 W Jacquelyn Avenue
Fresno, CA 93722

Re: Planning Director's Referral of a Continuation of Non-Conforming
Use Determination
29400 SW Town Center Loop West

Case File: DB24-0003 Planning Director's Referral of a Continuation of Non-
Conforming Use Determination

The Development Review Board's Decision and Resolution No. 432 are attached, denying the proposed occupant's (The Home Depot) proposed use at 29400 S Town Center Loop West is a continuation of the existing non-conforming use.

Thank you.



Shelley White
Planning Administrative Assistant

CC: David Fry, Lumberjack LP

BCC via e-mail:

Barry Simmons
Kenneth Katzaroff
Keenan Ordon-Bakalian
Garet Prior
Kristin Roche
Shawn O'Neil
Aaron Lemka
Dave Wortman
Bob LeFeber

CITY OF WILSONVILLE • COMMUNITY DEVELOPMENT DEPT.

Phone 503-682-4960
Fax 503-682-7025

29799 SW Town Center Loop East
Wilsonville, OR 97070

www.ci.wilsonville.or.us
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April 24, 2024

DEVELOPMENT REVIEW BOARD PANEL B

NOTICE OF DECISION

Application Nos.: DB24-0003 Planning Director’s Referral of a Continuation of Non-Conforming Use Determination

Owner: Lumberjack LP (Contact: David Fry)

Applicant/Authorized Representative: Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)

Request/Summary: Confirm or deny that the non-conforming use currently located at 29400 SW Town Center Loop West (the “Current Occupant”) and the “Proposed Occupant’s” (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use.

Location: 29400 SW Town Center Loop West. The property is specifically known as Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon.

On April 24, 2024, at the meeting of the Development Review Board the following action was granted on the above-referenced subject:

The Development Review Board denied 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

Any appeals by anyone who has participated in this hearing, orally or in writing, must be filed with the City Recorder within fourteen (14) calendar days of the mailing of the Notice of Decision. *WC Sec. 4.022 (.02).*

This decision has been finalized in written form and placed on file in the City records at Wilsonville City Hall this **24th day of April 2024** and is available for public inspection. This decision shall become effective on the fifteenth (15th) calendar day after the postmarked date of the written Notice of Decision, unless appealed or called up for review by the Council in accordance with this Section. *WC Sec. 4.022 (.09).*

Written decision is attached

For further information, please contact the Wilsonville Planning Division at Wilsonville City Hall, 29799 SW Town Center Loop E, Wilsonville Oregon 97070 or phone 503-682-4960.

**DEVELOPMENT REVIEW BOARD
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

WHEREAS, an application for Class II Administrative Review (AR23-0031), together with planning exhibits, has been submitted by Dan Zoldak of Lars Andersen & Associates, Inc. – Applicant, on behalf of David Fry of Lumberjack LP – Owner, in accordance with the procedures set forth in Section 4.008 of the Wilsonville Code; and

WHEREAS, the subject property is located at 29400 SW Town Center Loop West on Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon (“the Location”); and

WHEREAS, the Planning Director referred the Class II Administrative Review (AR23-0031) to the Development Review Board as authorized in Section 4.030 of the Wilsonville Development Code; and

WHEREAS, the subject of the Class II Administrative Review is to confirm or deny that the non-conforming use currently located at the Location (the Current Occupant) and the Proposed Occupant’s (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use; and

WHEREAS, the Planning Staff has prepared the staff report on the above-captioned subject dated April 1, 2024; and


WHEREAS, said planning exhibits and staff report were duly considered by the Development Review Board Panel B at a scheduled meeting conducted on April 8, 2024, at which time exhibits, together with findings and public testimony were entered into the public record; and

WHEREAS, the Development Review Board considered the subject and the recommendations contained in the staff report; and

WHEREAS, interested parties, if any, have had an opportunity to be heard on the subject.

NOW, THEREFORE, BE IT RESOLVED that the Development Review Board of the City of Wilsonville does hereby adopt the staff report attached hereto as Exhibit A1, with findings and recommendations contained therein, denying the Proposed Occupant as a continuation of the existing non-conforming use at the Location.

ADOPTED by the Development Review Board of the City of Wilsonville this 24th day of April 2024, and filed with the Planning Administrative Assistant on April 24, 2024. This resolution is final on the 15th calendar day after the postmarked date of the written notice of decision per WC Sec 4.022 (.09) unless appealed per WC Sec 4.022 (.02) or called up for review by the Council in accordance with WC Sec 4.022 (.03).



Alice Galloway, Vice Chair - Panel B
Wilsonville Development Review Board

Attest:


Shelley White, Planning Administrative Assistant



Exhibit A1
Staff Report
Wilsonville Planning Division
Planning Director Referral of Case File No. AR23-0031
29400 SW Town Center Loop West

Development Review Board Panel 'B'
Quasi-Judicial Public Hearing
Amended and Adopted April 24, 2024
Added language **bold italics underline**
Removed language ~~struck through~~

Date of Hearing: April 8, 2024
Special Meeting Date: April 24, 2024
Date of Report: April 1, 2024

Application Nos.: DB24-0003 Planning Director Referral of Case File No. AR23-0031 as Authorized in Section 4.030 of the Wilsonville Development Code

Request/Summary: The request before the Development Review Board is to confirm or deny that the non-conforming use currently located at 29400 SW Town Center Loop West (the "Current Occupant") and the "Proposed Occupant's" (The Home Depot) proposed use at the Location constitutes a continuation of non-conforming use.

Location: 29400 SW Town Center Loop West (the "Location"). The property is specifically known as Tax Lot 220, Section 14D, Township 3 South, Range 1 West, Willamette Meridian, City of Wilsonville, Clackamas County, Oregon.

Owner: Lumberjack LP (Contact: David Fry)

Applicant/Authorized Representative: Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)

Comprehensive Plan Designation: Town Center

Zone Map Classification: Town Center (TC); Sub-districts: Commercial-Mixed Use (C-MU), Mixed Use (MU), Main Street District (MSD)

Staff Reviewers: Cindy Luxhoj AICP, Associate Planner
Miranda Bateschell, Planning Director

Staff Recommendation: **Denial** of Continuation of Non-conforming Use by Proposed Occupant

Applicable Review Criteria:

<u>Development Code:</u>	
Section 4.001	Definitions
Section 4.008	Application Procedures-In General
Section 4.009	Who May Initiate Application
Section 4.010	How to Apply
Section 4.011	How Applications are Processed
Section 4.014	Burden of Proof
Section 4.030	Jurisdiction and Powers of Planning Director and Community Development Director
Section 4.031	Authority of the Development Review Board
Section 4.034	Application Requirements
Subsections 4.035 (.04) A. and 4.035 (.05)	Complete Submittal Requirement
Section 4.102	Official Zoning Map
Section 4.110	Zones
Section 4.132	Town Center (TC) Zone
Subsection 4.140 (.10) C.	Planned Development Regulations – Adherence to Approved Plans and Modifications Thereof
Section 4.189	Non-Conforming Uses
<u>Other Planning Documents:</u>	
Ordinance No. 55 Town Center Plan Previous Land Use Approvals	

Site Location:



Existing Development:



Procedural Background:

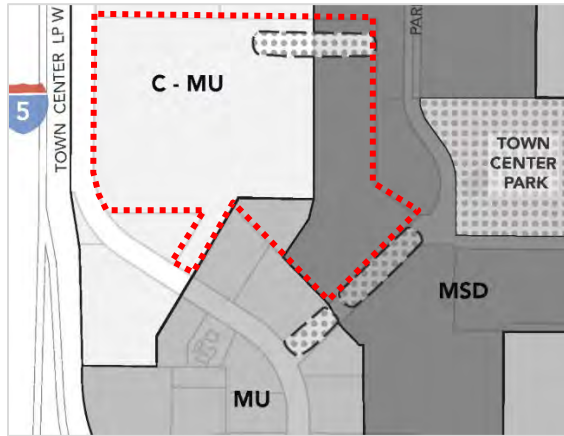
I. Town Center Zone

In 2019 the City adopted the Town Center Plan (Ordinance No. 835), a long-term, community-driven vision to transform Wilsonville's Town Center into a vibrant, walkable destination that inspires people to come together and socialize, shop, live, and work. As part of this work, a new zoning designation, the Town Center (TC) zone, and associated Development Code Section 4.132 were adopted for the entire Town Center Area to implement the Town Center Plan's recommendations. These standards support the creation of a walkable Town Center and main street, with design standards regulating building placement, building height, parking location, and drive through facilities. The plan and associated Zone Map and Development Code amendments went into effect on June 5, 2019.

After communicating with official representatives of the owner of the Location, Lumberjack LP, several times over the two-year planning process for the Town Center Plan, consistent with noticing requirements of ORS 227.186 and Subsection 4.012 (.02) of the Development Code, the City mailed the owner of the Location, notice of the Zone Map and Development Code amendments on February 7, 2019 (Exhibit A3). Lumberjack LP did not provide any testimony on the record raising objection to the Town Center Plan, Development Code Section 4.132, or the

rezoning of the Location from the Planned Development Commercial-Town Center (PDC-TC) zone to the TC zone during the adoption process.

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



The existing structure at the Location has a footprint of 124,215 square feet in a single story (page 174, Exhibit B1) with a partial mezzanine, which exceeds the footprint of 30,000 square feet per retail user and footprint limitation that is allowed in the TC zone. As noted below, the Location also has a structure and site conditions that do not meet the requirements of the TC zone.

II. Class I Planning Director Determination (ADMN23-0029) and Appeal (DB24-0002)

On October 30, 2023, the City received an application for Class I Review (ADMN23-0029) to confirm the status of the existing non-conforming 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 (the “Current Occupant”), 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 I Planning Director Determination per Subsection 4.030 (.01) A. 7. of the Development Code. On December 28, 2023, the City’s Planning Director issued their Decision on the Class I Review Application that *“Fry’s Electronics, on the subject property at 29400 SW Town Center Loop West, is a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions in the TC zone.”*

The Applicant submitted a notice of appeal of the Planning Director’s Decision on January 10, 2024 (the “First Notice of Appeal”). Specifically, the filed appeal grounds were stated: *“An APPEAL of Planning Director Determination ADMN20-0029 [sic] determining that Fry’s Electronics is*

a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions at 29400 SW Town Center Loop West". Per Code Section 4.022 (.01), a decision of the Planning Director on issuance of any Administrative Decision may be appealed, and such appeals must be heard by the Development Review Board (DRB) for all quasi-judicial land use matters. The matter at issue before the DRB, on de novo review, was a determination of the appropriateness of the action or interpretation of the requirements of the Code.

A public hearing before the DRB regarding the First Notice of Appeal was held on February 26, 2024. During the public hearing, the Applicant requested that the record be kept open for seven days 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, the Applicant filed a first written submittal, and on March 11, 2024, filed its final arguments to the record. The DRB held a special meeting on March 14, 2024, to consider all evidence timely submitted regarding Case File No. DB24-0002. Following deliberation on the matter, the DRB approved Resolution No. 429 (Exhibit A2) unanimously 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.

III. Class II Planning Director Interpretation (AR23-0031)

On December 15, 2023, the City received an application for Class II Review (AR23-0031; the "Class II Review Application"). Specifically, the request is stated as: *"A Class II Staff Interpretation to confirm that The Home Depot and Fry's Electronics are both warehouse retail uses"* (page 1 of Exhibit B1). Further, the Applicant describes the application (also on page 1 of Exhibit B1) as *"an application for a staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for 29400 Town Center Loop W, Wilsonville, OR 97070 constitutes a warehouse retail use and may operate in the existing structure"*.¹

The City deemed the Class II Review Application complete on January 12, 2024. The City is processing the request as a Class II Planning Director Interpretation, which is the subject of the current review, per Subsection 4.030 (.01) B. 3. of the Code. Given the public comment on the Class I Review Application and that there may be interested parties who may want to participate in review of the Class II Review Application, the Planning Director chose to refer the application

¹ Proposed Occupant, in its submission to the City dated March 29, 2024 (Exhibit B2), asks the DRB to recognize a non-conforming use for "commercial retail use," which is different than what is requested in its Application (Exhibit B1).

to the Development Review Board for a public hearing per 4.030(.01)B. The Case File No. is DB24-0003, and the public hearing is scheduled for April 8, 2024.

Scope of Review:

Proposed Occupant's application asks DRB to confirm Proposed Occupant's desired scope of non-conforming use (Exhibit B1). Proposed Occupant also submitted a letter to the City dated March 29, 2024 regarding "Applicant's Public Comment for AR23-0031" (Exhibit B2). In this letter Proposed Occupant invites DRB to "address" or "remedy" the flaws in DRB Resolution No. 429.

Resolution No. 429 is a City decision, and may be overturned only on appeal. There is currently an appeal pending before City Council. The issues that were resolved in Resolution No. 429 are beyond the scope of this matter. In particular, the Proposed Occupant's request for DRB to recognize a non-conforming use for "warehouse retail use" or "commercial retail use" ignores Resolution No. 429, which established the scope of the recognized non-conforming use, and is beyond the scope of this matter.

Further, Proposed Occupant has waived its right to address the issues that were addressed in Resolution No. 429 through this Class II Review Application proceeding. The City invited Proposed Occupant to withdraw its Class I application, both in writing on November 28, 2023, at the DRB hearing on February 26, 2024, and in the days following the DRB hearing on February 26, 2024 (Exhibit A7). The City offered to void and withdraw the Planning Director's determination in the Class I matter (and have the DRB not issue a decision), and make clear that the issues under review in the Class I proceeding would be addressed in the Class II proceeding. The City's goal in making this offer was to allow the City to address all issues pertinent to both the Class I and Class II proceedings in one combined proceeding. Appellant declined this offer (Exhibit A7).

Questions Presented:

Within the document titled "Applicant's Narrative and Exhibits" (Exhibit B1) Applicant states that it is requesting confirmation that The Home Depot ("Proposed Occupant") and Fry's Electronics ("Current Occupant") are both "warehouse retail uses." See pages 1, 2, and 7. Applicant also states that it is requesting confirmation that the Proposed Occupant may continue to operate at the Location.

Therefore, this decision must answer the following question:

If Proposed Occupant operates at the Location will this constitute a continuation of the non-conforming use?

The following steps will determine the answer to that question:

Step 1: What is the existing non-conforming-use?

Step 2: What is the proposed use?

Step 3: Is the proposed use a continuation of the current non-conforming use?

Based on the applicable legal standard, that the use at the Location is a legally established non-conforming use in the Town Center (TC) zone. On appeal, in Resolution No. 429 approved on March 14, 2024, the DRB determined as follows:

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.”

The determination made by the DRB in the Notice of Decision for Case File No. DB24-0002 provided the answer to Step 1, must be adhered to, and is the basis of this Class II Review.

The applicable legal standard, relevant facts, and Planning Director’s recommendation on the Class II Review Application responding to this question are discussed in detail in the following section of this staff report.

Evidentiary Standard:

The DRB’s decision in this matter must be supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C). This standard disallows LUBA from overturning a local government decision if a reasonable person could draw the same conclusion as the local government – even if a reasonable person could draw a different conclusion from the same evidence. *See Adler v. City of Portland*, 25 Or LUBA 546, 1993 WL 1473299 at *6 (1993); *Fraley*, 32 Or LUBA 27, 31-32 (1996), *aff’d*, 145 Or App 484 (1996).

Burden of Proof:

The proponent of a proposed non-conforming use, or expansion or change to a recognized non-conforming use, has the burden of proof. *See ODOT v. City of Mosier*, 36 Or LUBA 666, 671 (1999) (citing *Lane Cnty. v. Bessett*, 46 Or App 319 (1980)); *Sabin*, 20 Or LUBA 23, 30 (1990) (citing *Webber v. Clackamas Cnty.*, 42 Or App 151, *rev den*, 288 Or 81 (1979)).

In this matter, Applicant has the burden of proof, and the DRB’s decision is subject to the “substantial evidence” standard. *River City Disposal and Recycling v. City of Portland*, also a case regarding non-conforming uses, illustrates how these concepts should be applied together. In *River City Disposal and Recycling*, LUBA found that the City hearings officer’s decision satisfied the “substantial evidence” standard. *See* 35 Or LUBA 360 (1998). It was enough that the hearings officer found that evidence presented in an affidavit (aerial photographs) was not persuasive. *Id.* at 367-71. LUBA also clarified that the City of Portland was not obligated to present contrary evidence to counter the applicant’s evidence, and the “substantial evidence” standard was satisfied because the hearings officer found that the applicant failed to satisfy its burden of proof. *Id.*

Because Proposed Occupant has the burden of proof, the City may decide that not enough evidence has been provided by Proposed Occupant to satisfy its burden of proof. The City is not obligated to produce its own evidence to counter Proposed Occupant’s evidence. Further, the

City may determine the credibility of evidence in the record; in particular, when conflicting evidence exists, the City may decide that some evidence is credible and persuasive, and other evidence is not.

Legal Standard Regarding Continuation of Non-conforming Uses:

1. WC 4.189 (.01)

A non-conforming use may be continued subject to the requirements of WC 4.189. *See* WC 4.189 (.01). There are no other Code provisions regulating a continuation of a non-conforming use.

2. Caselow Regarding Continuation of Non-Conforming Uses

The following sections outline the legal authorities, in Oregon, that govern whether or not a use is deemed a continuation of a non-conforming use.

a. Non-Conforming Use Defined

Generally, a non-conforming use is understood to be “one that is contrary to a land use ordinance but that nonetheless is allowed to continue because the use lawfully existed prior to the enactment of the ordinance.” *Morgan v. Jackson Cnty.*, 290 Or App 111, 114 (2018) (citing *Rogue Advocates v. Board of Comm. Of Jackson Cnty.*, 277 Or App 651, 654 (2016), *rev dismissed*, 362 Or 269, 407 (2017)); *see* Subsection 4.001 (196.) of the Development Code (defining a non-conforming use as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform”).

b. Non-Conforming Uses – and Expansion of Non-Conforming Uses – are Disfavored; Local Government has Broad Discretion to Resist Expansion of Non-Conforming Uses

“Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. . . . Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.” *Parks v. Bd. of Cnty. Comm’rs of Tillamook Cnty.*, 11 Or App 177, 196–97 (1972) (internal citation omitted). “[T]he law of nonconforming uses is based on the concept, logical or not, that uses which contravene zoning requirements may be continued only to the extent of the least intensive variations—both in scope and location—that preexisted and have been continued after the adoption of the restrictions.” *Clackamas Cnty. v. Gay*, 133 Or App 131, 135 (1995), *rev den*, 321 Or 137 (1995), *aff’d*, 146 Or App 706 (1997).

c. Whether a Proposed Use is a Continuation or Change (of Non-Conforming Use) Depends on the Nature and Extent of the Recognized Non-Conforming Use

It is helpful to think of a proposed use to either be within or beyond the scope of a recognized non-conforming use. A use that is within the scope of a recognized non-conforming use is a “continuation” of use. A use that beyond this scope is a “change” of use. A use that is deemed too expansive to be a “continuation” of use is necessarily a “change” of use – a use must be one or the other. The following cases are helpful in illustrating the line between “continuation” and “change” of use.

The nature and extent of the lawful use in existence at the time the use became nonconforming is the reference point for determining the scope of permissible continued use. *Sabin* at 30 (citing *Polk County v. Martin*, 292 Or 69 (1981)) (emphasis added). The focus of a review of whether or not a use is continuous must focus on the actual *use* of a property during relevant times – a change in the property occupant does not, by itself, cause a legally protectable non-conforming use to be abandoned when the use that the various parties made of the property is recognized to be the same. See *Vanspeybroeck v. Tillamook Cnty. Camden Inns, LLC*, 221 Or App 677 (2008) (LUBA did not err in recognizing a continuous residential use of a property when residency changed from tenant to owner, back to tenant).

A local government that is reviewing a proposed alteration of, change to, or expansion of a recognized non-conforming use should review evidence to determine the current actual use or proposed use (as applicable), and determine whether that use is within or beyond the scope of the recognized non-conforming use. In *Larson v. City of Warrenton*, 29 Or LUBA 86, 1995 WL 1773182 (1995), the City of Warrenton determined that a company had impermissibly expanded its operations beyond activities protected in a prior administrative decision. The prior administrative decision protected the following uses on the subject property: “[s]toring and repairing marine construction equipment and [a] base of operations for [the property owner’s] construction company.” *Id.* at *1. In 1994, the property’s neighbors complained to the city about these business operations, arguing that the intensity of the use had increased. *Id.* The city evaluated various forms of evidence (testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs). *Id.* at *2. The city determined that the property owner was impermissibly operating beyond the scope of the non-conforming use recognized in the 1991 administrative decision, and LUBA affirmed this decision. *Id.* As LUBA has stated in another case, “[w]e believe a change in use includes adding a new use to an existing nonconforming use.” *River City Disposal and Recycling* at 373 n. 11.

In this matter, the City may determine that the Proposed Occupant’s proposed use of the Location includes uses that are beyond the scope of the recognized non-conforming use; these uses would only be permissible if the City approved a “change” of non-conforming use. This proceeding is limited to the question of whether certain uses are a “continuation” of use – a potential “change” of non-conforming use is beyond the scope of what may be addressed in this matter.

- d. Local Government has Broad Discretion to Draw Distinctions Between Various Uses, and Allow Some Uses to Continue But Disallow Other Uses

A local government has broad discretion to reject an applicant’s characterization of a use, and to draw distinctions between various uses. For example, in *Fraley*, the applicant sought recognition of a property use involving the repair of diesel engines and tractor trailer trucks. In the local government decision at issue, the county found that a prior property owner “maintained a use significantly different in nature from the commercial vehicle repair business which the applicant seeks to verify.” *Id.* at 34. This prior property owner engaged in the structural repair of motorhomes, campers, RVs and camp trailers. *Id.* Testimony from this prior property owner did not mention vehicular engine repair. *Id.* On appeal, LUBA rejected the applicant’s challenge to the county’s finding and decision on this point, stating, “[w]e do not agree with [applicant] that the use was not interrupted because all of the commercial operations on the subject property since [the date more restrictive zoning regulations were applied] share the same essential nature or common nucleus. . . . [The mobile home repair business] had little in common with the present primary use, the repair of diesel engines and tractor trailer trucks.” *Id.* at 35. LUBA went on to note that these two businesses used the yard in different ways – one stored lumber in the yard, and the other stored large trucks in various states of repair. *Id.*

Further, a local government may specifically allow certain uses as non-conforming, but deny others, even when all such activities are related to the same business venture. In the Clackamas County Hearings Officer’s Findings and Decision, docket no. Z1155-91-E/A², the hearings officer determined that there was a protected non-conforming use for “the storage commercial goods in the two structures in question, including the storage of cedar wood fencing materials.” Findings and Decision of the Hearings Officer at 6, Z1155-91-E/A (Feb. 11, 1994). (attached hereto as Exhibit A5). The applicant in this case had also applied for a “change” (i.e., expansion) of this recognized use for an on-site office facility for this warehousing and repackaging business. *Id.* The reasoning and legal standard used by the hearings officer relates to only counties – and not cities, but the important point is that he declined to expand the recognized non-conforming use. *Id.* The Clackamas County Hearings Officer’s decision in docket no. Z1155-91-E/A is an example of a local government deliberately and selectively recognizing some activity to be within the scope of a recognized non-conforming use – and other activity to be beyond this scope of the recognized non-conforming use – even when both activities relate to the same business venture.

Relevant Facts, Background, and Considerations:

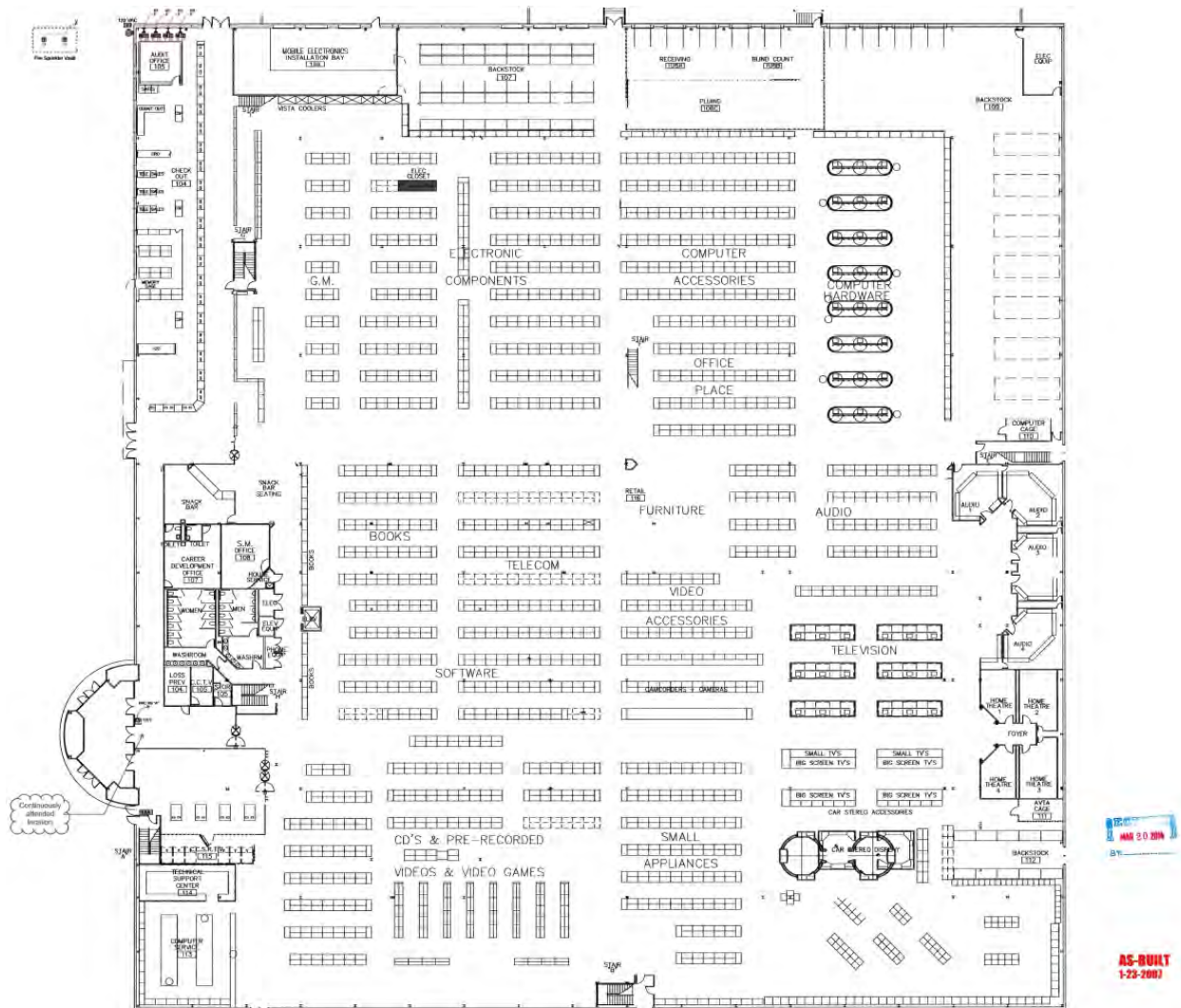
1. What is the non-conforming use?

As determined by the DRB Decision in Case File DB24-0002 (Resolution No. 429), 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” (referred to as the “Current Occupant” in this staff report).

² This Hearings Officer Decision is the remanded determination by Clackamas County following *Hendgen v. Clack. Cty.*, 115 Or App 117 (1992). See also 24 Or LUBA 355 (1992) (LUBA decision remanding the matter to Clackamas County following previously cited Court of Appeals opinion).

When the TC zone regulations went into effect on June 5, 2019, the occupant of the Location was Fry's Electronics. The application (page 3 of Exhibit B1) characterizes the Current Occupant as follows: "Fry's was a large electronics warehouse store that retailed software, consumer electronics, household appliances, cosmetics, tools, toys, accessories, magazines, technical books, snack foods, electronic components, and computer hardware. Fry's also had in-store computer repair and custom computer building services, and offered technical support to customers."

An as-built floor plan submitted by the Current Occupant to the City's Building Division in 2014 (Exhibit A4) illustrates the store's layout and product selection. The floor plan illustrates the sales area of computers, televisions, audio equipment, CDs and videos, computer software and hardware, small appliances and other related office and electronic components. A small snack bar and technical support and service areas were also included in the floor plan. Inventory storage components of the Current Occupant, identified as backstock, were located separate from the retail space. All components of this use were located in the interior of the building.

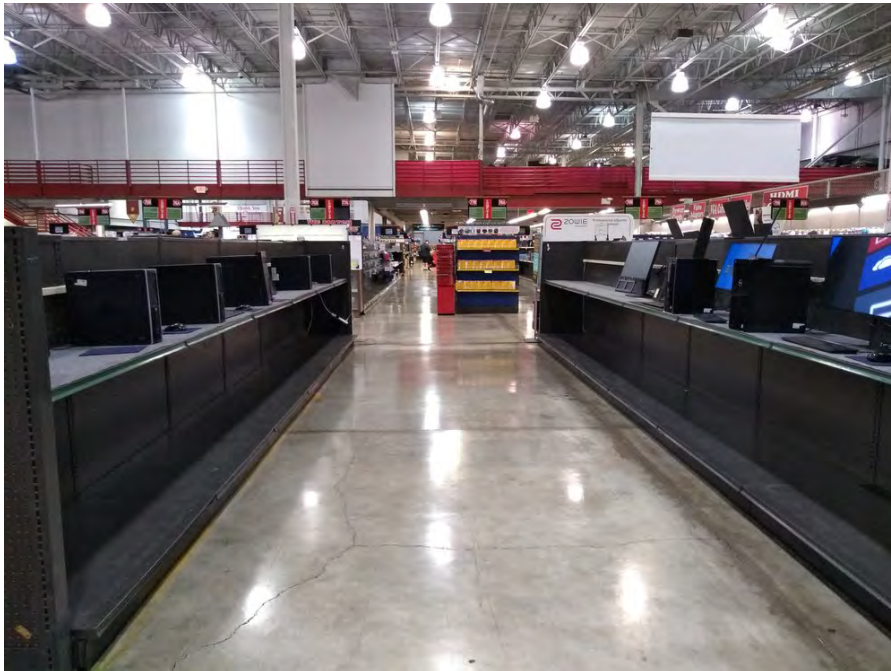


Fry's Electronics As-Built, submitted in 2014. Source: City of Wilsonville Building Division

The following images, posted to the Wilsonville Fry's Electronics *Yelp* page in 2019, illustrate store layout and product selection at the time the TC zone regulations went into effect.



Fry's Electronics Retail Space. Source: *Yelp – Fry's Electronics, Photos* (June 9, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: *Yelp – Fry's Electronics, Photos* (June 9, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Retail Space. Source: Yelp – Fry's Electronics, Photos (November 21, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 20, 2024).



Fry's Electronics Backstock Area. Source: Yelp – Fry's Electronics, Photos (October 26, 2019), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (last visited March 27, 2024).

These images are generally consistent with the 2014 floor plan, illustrating that items available for sale at the Current Occupant were consistent with an electronics-related retail use, including computers, monitors, small electronics, and related accessories. Taken together, this information confirms that the store was operating in the same manner as what is shown on the 2014 floor plan at the time the TC zone regulations went into effect.

Based on the 2014 floor plan, the City concludes that the Current Occupant sold the following goods: Electronic components, computer accessories, computer hardware, computer software, office goods, telecom equipment, video accessories, audio equipment, televisions, small appliances, CD's, videos, and video games. This is consistent with the DRB Decision in Case File DB24-0002 (Resolution No. 429), that the legally established non-conforming use at the Location is "a 159,400 square-foot electronics-related retail store" (referred to as the "Current Occupant" in this staff report).

2. What is the proposed use?

The application (pages 5-6 of Exhibit B1) characterizes the Proposed Occupant at the Location as follows: *"The Home Depot, Inc. ("HD") intends to operate a store within the existing structure that was previously occupied by Fry's, and therefore seeks confirmation from the City that a warehouse retail store can continue operating at the property... HD operates home improvement warehouse stores that retail tools, construction products, appliances, and services, including transportation and equipment rentals. HD's Home Services division also offers technical expertise for home improvement projects, and both onsite and offsite install, repair, and remodel services. Although the vast majority of HD customers are private individuals, contractors and other professionals account for close to half of HD's annual sales."*⁴

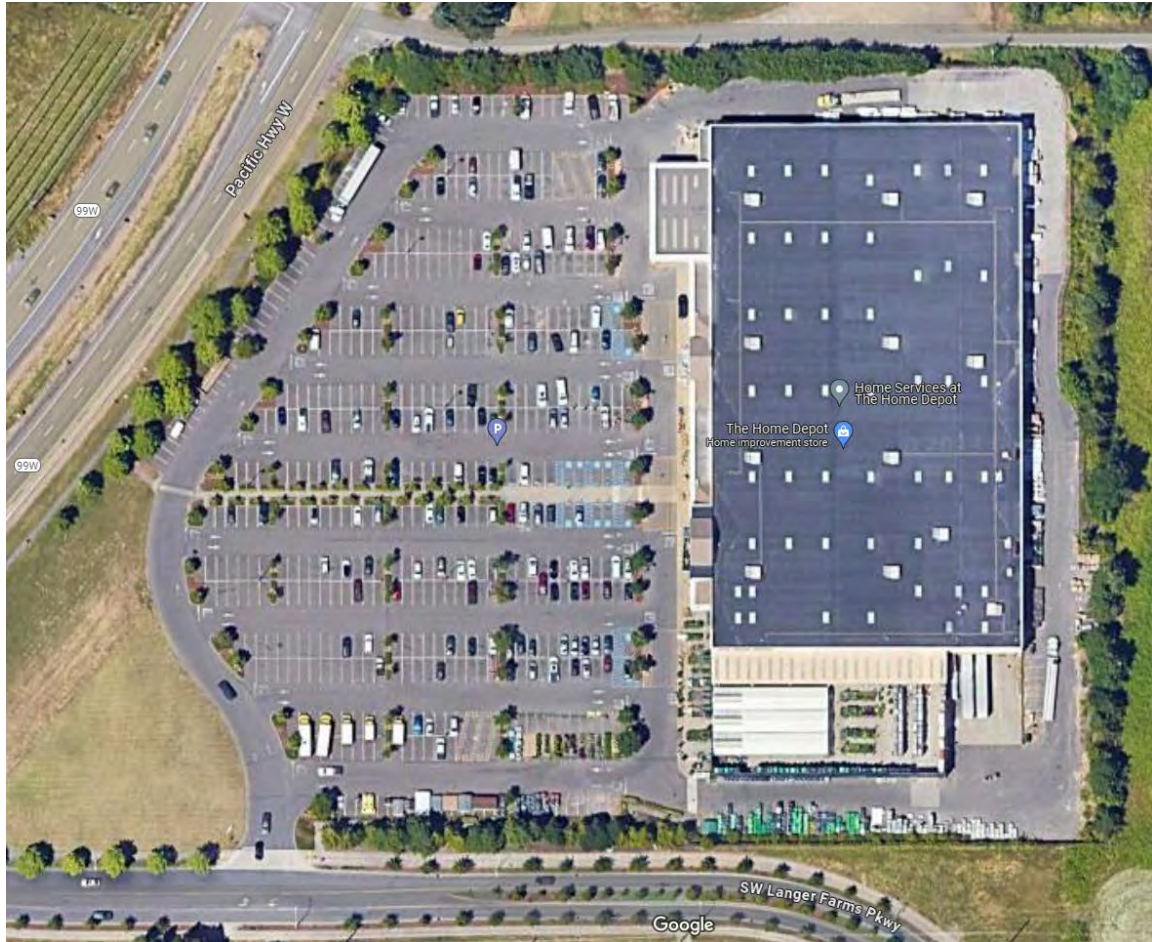
While the Applicant's materials do not provide detail on how all of these activities would occur at the Location, an examination of other area Home Depot locations reveals that components of the activities, including the garden center and transportation and equipment rentals, occur on the exterior of the building. See discussion responding to the question, Is the proposed use a continuation of the current non-conforming use?, under 3. below, for additional characterization of the Proposed Occupant's activities at the Location.



Home Depot – Tigard, OR (Source: Google Maps – 3/25/2024)



Home Depot – Tigard, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)



Home Depot – Sherwood, OR (Source: Google Maps – 3/25/2024)

3. Is the proposed use a continuation of the current non-conforming use?

For a use to be deemed a continuation of a legally established non-conforming use, it must have the same nature and extent as the recognized non-conforming use. See *Sabin v. Clackamas Cnty.* In this matter, the reference point is the nature and extent of the Location as of June 5, 2019, as determined by the DRB in Case File DB24-0002 (Resolution No. 429).

The City is entitled to draw distinctions between uses. In *Fraley*, Deschutes County drew a distinction between the repair of motorhomes, campers, RV’s and camp trailers, and storage of lumber, on one hand, and the repair of diesel engines and tractor trailer trucks, on the other hand. The County took the position that not all motor vehicle repair activities are the same. In this matter the City may draw distinctions between the uses carried out by Fry’s Electronics and Applicant, just as the County did in *Fraley*.

Further, once the City draws distinctions between uses, it is entitled to determine that certain uses are beyond the scope of a recognized non-conforming use when there is no evidence of them at the relevant time – and therefore determine that there is no “continuation” with respect to those uses – just as the County did in *Hendgen*. Just as LUBA stated in *River City Disposal and Recycling v. City of Portland*, a new or additional use is a change of use rather than a continuation of use.

Based on the application materials provided by the Proposed Occupant, and an examination of how the Proposed Occupant operates locally, the City has concluded the following:

- Applicant acknowledges that the Proposed Occupant operates “home improvement warehouse stores” (page 5 of Exhibit B1).
- Applicant acknowledges that contractors and other professionals, not private individuals, account for close to half of the Proposed Occupant’s annual sales (page 6 of Exhibit B1).
- Applicant acknowledges that the Current Occupant and Proposed Occupant “carry different products” (page 6 of Exhibit B1) and includes a list of products and services provided by the Proposed Occupant, such as “tools, construction products, appliances, and services, including transportation and equipment rentals”, and “both onsite and offsite install, repair, and remodel services” (page 5 of Exhibit B1), that are not

electronics-related or included in the products and services provided by the Current Occupant.

- Applicant shows on the site plan included in its application materials activities that occur outside the structure at the Location, such as the proposed lumber pad at the back of the structure (see page 174 of Exhibit B1), or describes activities that are likely to occur outside, such as transportation and equipment rentals (see page 5 of Exhibit B1).
- Thus, Proposed Occupant is not an electronics-related retail store and contains products and activities that are different than those provided by the Current Occupant.
- Applicant has not presented any evidence to prove that Proposed Occupant's activities existed at the Location as of June 5, 2019.

In other words, the Proposed Occupant's proposed use of the Location, as described above, goes beyond a mere continuation of the non-conforming use of the Location that was recognized by the DRB. Proposed Occupant may engage in these uses at the Location only if it obtains a recognition of change of use, which is beyond the scope of what may be addressed in this matter.

Conclusory Findings:

1. Proposed Occupant's operation at the Location would not be a mere continuation of the non-conforming use previously approved by the City. Therefore, Staff recommends the DRB deny the Proposed Occupant as a continuation of non-conforming use of the Location. Staff recommendation is based on the following considerations:
 - a. The 1991 Decision and the zoning regulations in effect when the 1991 Decision was granted are irrelevant to this decision.
 - b. Proposed Occupant describes itself as a "home improvement warehouse store" (page 5 of Exhibit B1). This is not the same as an "electronics-related retail store," which is the legally established non-conforming use at the Location. Proposed Occupant's characterization of the non-conforming use approved by the City as "warehouse retail use" is incorrect and is not persuasive.
 - c. Proposed Occupant admits that its proposed use of the Location would include the sale of tools and construction products, the rental of transportation and equipment, technical expertise for home improvement projects, and both onsite and offsite installation, repair, and remodeling services (pages 5-6 of Exhibit B1). Some of Proposed Occupant's customers include contractors and professionals. These uses extend beyond the scope of the Current Occupant's actual use of the Location as of June 5, 2019.

Additional Discussion Regarding Proposed Occupant's Reliance on 1991 Decision; Planning Director's Interpretation of Ordinance No. 55:

Proposed Occupant's argument appears to rely heavily on the original land use approval in this matter, what they refer to as the "1991 Decision." Proposed Occupant states on page 6 of Exhibit B1 that it would be a use of the Location that falls within the approved 1991 Decision, and based

on its own characterization of its proposed use of the Location, it would have been allowed to operate at the Location under zoning regulations that were in effect in 1991. Proposed Occupant's understanding of the scope of the original land use approvals for the Location is incomplete.

As explained above, the only relevant point of reference when determining the scope of a non-conforming use is the nature and extent of the use of the subject property at the time the use became nonconforming. *Sabin* at 30 (emphasis added). It is clear from relevant Oregon cases that local governments, when determining the scope of a non-conforming use, consider evidence such as testimony from the property owner or neighbors. See *Larson* (considered evidence included testimony that log trucking began in 1993, the fact that the petitioner advertised for truck drivers in 1993, and the fact that the petitioner obtained a state license in 1992 that allowed the hauling of logs); *Fraley* (considered evidence included tax records, affidavits and interviews of previous site occupants, and photographic evidence); *Crook v. Curry County*, 38 Or LUBA 677 (2000) (considered evidence included photogrammetric evidence, testimony from site visitors, the age of certain building materials, and the fact that the county's assessor's office had no record of a structure on the subject site). Not one of the local jurisdictions in the many cases reviewed by the City in this matter considered either (1) what would have been allowed under a property's original zoning, or even (2) what was written in the subject property's original land use approvals when evaluating an application for recognition of a non-conforming use. Further, LUBA does not consider these factors when reviewing local jurisdictions' decisions regarding non-conforming uses. Applicant also has not cited any cases where original land use approvals served as the basis for determining a legally non-conforming use.

In summary, neither the 1991 Decision, nor the zoning regulations that were in effect in 1991, are relevant in this matter. However, for the sake of responding to Applicant's argument only, the City addresses the 1991 Decision.

Much of Wilsonville's development, including at the Location, was approved using a Planned Development review process. Planned Development generally consists of four phases of project approval – Rezoning, Stage I—Preliminary Plan, Stage II—Final Plan, and Site Design Review. Some of these phases may be combined during the land use review process, but generally the approvals move from the conceptual stage through to detailed architectural, landscape and site plan review in stages. Based upon the zoning designation of a location, Stage I plans establish “bubble diagram” level uses for development, and Stage II plans indicate the specific types and locations of all proposed uses enabling analysis of impacts of those uses for the purpose of traffic and other infrastructure impacts and concurrency evaluation.

In 1991, Capital Realty Corporation submitted an application for approval of a Stage I Master Plan Modification and Phase II Stage II Site Development Plan for the Wilsonville Town Center Master Plan area (File No. 91PC43). The application was submitted on behalf of a retail business with the anonymous name “Project Thunder”. The retail business desired to develop 14.75 acres (Phase II of the Wilsonville Town Center Master Plan) for “a 159,400 square foot electronics-related retail store”. The proposed Project Thunder Stage II Site Development Plans necessitated the requested application by Capital Realty Corporation to modify and resubmit the Stage I

Wilsonville Town Center Master Plan to reflect the expanded master plan area, reclassify overlay zones associated with Ordinance No. 55 (adopted February 9, 1976, and incorporated into the Planned Development Commercial (PDC) zone), redesign the phasing sequence, and establish approximately 5.4 acres for open space.

Specifically with regard to the Location, action in 91PC43 adjusted the Phase II area and changed the land use classification of the site to Central Commercial (CC) replacing the previous classifications of Motor Home (MH), Office Professional (OP), Service Commercial (SC), and Residential (R). As the CC use designation is the basis of the Stage I approval, approved uses for the Location were those identified as CC in the Stage I Wilsonville Town Center Master Plan as defined by Ordinance No. 55.

Description of the proposed development, Project Thunder, in the application is “a 159,400 square foot electronics-related retail store” or a “commercial retail store,” and there is no reference to “warehouse retail” use or “commercial retail center.” There is also no reference to “warehouse retail” or “commercial retail center” in the Ordinance No. 55 land use categories, also referred to as overlay zones, or in the Stage I Master Plan. While the Applicant asserts that “warehouse retail” or “commercial retail center” is the approved use and that the Current Occupant and the Proposed Occupant are the same, Project Thunder was never approved as such. The Planning Commission had the authority to make changes to the application of approved overlays consistent with Ordinance No. 55. This was done via a land use application and action, and is what was done in 91PC43 to classify the site as Central Commercial.

The Stage II Plan evaluates, among other development requirements, minimum parking space needs, which were evaluated for the Location as the sum of individual uses within the development. In the case of Project Thunder, the primary use was evaluated along with accessory components of that use, which included service, office, restaurant, and storage. Evaluation of these components of use for the purpose of determining minimum parking requirements did not change the overall Stage I Master Plan for this Location, which was Central Commercial.

Project Thunder, a commercial retail store (electronics store), was considered consistent with the CC use category when it was approved in 1991. While electronics store was not a use listed specifically in CC, modification to the Stage I Master Plan for the development was approved by the Planning Commission under the authority granted to them in Ordinance No. 55. Conversely, uses more closely associated with the Proposed Occupant were not listed in the CC use category but included in other land use categories, as follows:

- Under the Service Commercial (SC) category - Building materials, retail outlet only, and Cabinet or carpenter shop
- Under the Food and Sundries (FS) category - Hardware store

It is a well-established rule of statutory interpretation that one must not insert language that has been omitted – or omit language that has been inserted. *See* ORS 174.010.

Hypothetically speaking, before a tenant like the Proposed Occupant could have engaged in uses listed in the SC and FS categories at the Location, prior to the 2019 Town Center rezone, a Stage I Master Plan modification for the Location, approved by the Planning Commission, would have been required. Therefore, the argument that Proposed Occupant should be deemed a continuation of use of the Location not only ignores applicable case law, but also ignores the zoning in place at the time of the original land use approval as well as the scope of the land use approval itself.

In summary, neither the 1991 Decision, nor the zoning regulations that were in effect in 1991, are relevant in this matter. Applicant has not cited any legal authorities that say otherwise. Therefore, Proposed Occupant's reliance on the 1991 Decision is inappropriate and misleading. Further, to the extent that the DRB considers Proposed Occupant's argument, it should be cautious: Proposed Occupant has an incomplete understanding of the scope of the 1991 Decision, and what uses would have been allowed at the Location under the City's zoning regulations.

Additional Discussion Regarding Points Beyond the Scope of this Class II Review Application

Applicant, in both Exhibit B1 and Exhibit B2, invites DRB to revisit points that were addressed in the DRB approved Resolution No. 429 (Exhibit A2). As a reminder, the determinations made by the DRB in Resolution No. 429 must be adhered to and are the basis of this Class II Review. This Class II Review process is not an opportunity for Proposed Occupant to relitigate these determinations. However, to fully inform the DRB and respond to Proposed Occupant's written materials, the City explains below why Proposed Occupant's arguments are baseless.

Proposed Occupant's Unsubstantiated Retail Warehouse Use Characterization

Proposed Occupant characterizes the Location as an "electronics warehouse store" and "warehouse retail use" in the application materials. The City rejects this characterization for the following reasons:

- Applicant has not provided any evidence to support its characterization of the Location as of June 5, 2019.
- The 2014 floor plan and 2019 *Yelp* images confirm that the Current Occupant sold electronics, and do not support the assertion that this was a warehouse store.
- As illustrated in the 2019 *Yelp* images of Current Occupant, there was no warehouse shelving present except in the portions of the building designated as "backstock." Additionally, nothing in the images indicates that merchandise was being stocked and sold at a high volume or in bulk to the public. Furthermore, the above descriptions generally do not discuss the type of retail use or user; rather, they focus on the manner in which a retail product is displayed and sold.
- The City's Development Code does not define "warehouse retail use" or "warehouse store," nor do these terms appear in any prior land use approvals for the Location.
- Likewise, there is not a clear, commonly accepted term for "warehouse retail" or "warehouse store."

- *Cambridge Dictionary* defines “warehouse store” as “a large store that sells large quantities of products at low prices to the public.”
- *Wikipedia* defines “warehouse store” as “a food and grocery retailer that operates stores geared toward offering deeper discounted prices than a traditional supermarket. These stores offer a no-frills experience and warehouse shelving stocked well with merchandise intended to move at higher volumes.”
- *SPC Retail* defines “warehouse retail” in the following manner: “Warehouse retailers, such as Costco or Sam’s Club, are food and product retailers that offer large quantities of items at attractive discounts. These stores create a no-frills experience and instead focus on moving products in higher volumes.”
- The *Institute of Transportation Engineers (ITE) Trip Generation Manual, 11th Edition*, which assesses trip generation rates specific to different categories of uses, including retail uses, does not specify “warehouse store” or “warehouse retail” as a specific type of retail use.

But as stated above, the scope of the non-conforming use recognized at the Location as of June 5, 2019 was stated in Resolution No. 429, and is beyond the scope of this Class II Review Application.

Hendgen Clarified: There is no “Common Nucleus” Test

Proposed Occupant attempts to use the Court of Appeals’ opinion in *Hendgen v. Clackamas County*, 115 Or App 117 (1992), to argue that “the common nucleus in activities for both [Proposed Occupant] and [Current Occupant] is commercial retail use” (pages 4-5 of Exhibit B2). This reflects a gross misreading of the Court of Appeals’ opinion in *Hendgen*.

After the Court of Appeals issued the opinion referenced above (115 Or App 117), but before the county could address the issues that were remanded, the appellant in *Hendgen* again appealed to the Court of Appeals, arguing that it was error to remand this case to the county for further proceedings because – in its reading of the Court of Appeals’ opinion – the Court of Appeals held that storage was a valid non-conforming use. *See Hendgen v. Clackamas Cnty.*, 119 Or App 55, 57 (1993). The Court of Appeals wrote:

“[Appellants] are mistaken in their understanding of what we held. We concluded that the legal *test* that the county and LUBA applied in determining whether a nonconforming use existed was too restrictive; we did not-and could not-resolve the factual question of whether the nonconforming use does exist. . . . Like us, LUBA cannot make that factual determination; it may only review the county's findings.” *Id.* at 57-58.

Under the Court of Appeals’ opinion, the City of Wilsonville is the only party that may determine whether a non-conforming use exists, and the scope of that use. Further, the Court of Appeals’ opinion cannot properly be read to announce a “common nucleus” test that binds local

governments when they determine whether a non-conforming use exists, its scope. Finally, it is important to note that *Hendgen* was based in part on an interpretation of Clackamas County's code, and using a statute that applies to only counties and not cities. Therefore, it is irrelevant to these proceedings that Clackamas County recognized a non-conforming use in *Hendgen*.

But as stated above, the scope of the non-conforming use recognized at the Location as of June 5, 2019 was stated in Resolution No. 429, and is beyond the scope of this Class II Review Application.

The City and Proposed Occupant Agree That the Identity of the Party that Engaged in the Use is Irrelevant

Proposed Occupant cites *Vanspeybroeck v. Tillamook Cnty. Camden Inns, LLC*, 221 Or App 677 (2008), to argue that a change in characteristic of a tenant – whether owner or renter – does not result in the abandonment of a non-conforming use (page 4 of Exhibit B2). The City agrees that the identity of the party that engaged in the use is irrelevant to this matter.

The City's position in this matter, which is stated in Resolution No. 429, and which is beyond the scope of this Class II Review Application, was based on an examination of the use of the subject property at the time the more restrictive zoning regulation became effective.

Neighborhood and Public Comments:

No public comments were received during the public comment period for this application. However, comments were received after publication of the staff report and are included in Exhibits D1 through D4. In addition, the applicant submitted additional information and evidence related to their application, which is included as Exhibits B2 through B5 of this staff report.

Master Exhibit List:

The following exhibits are hereby entered into the public record as confirmation of consideration of the application as submitted. The exhibit list includes exhibits for Case File No. AR23-0031 (referred by the Planning Director to the DRB as Case File No. DB24-0003).

Planning Staff Materials

- A1. Staff report and Findings (this document)
- A2. Development Review Board Resolution No. 429
- A3. Town Center Plan Adoption Notice
- A4. Fry's Electronics As-Built, submitted in 2014 (Source: City of Wilsonville Building Division)
- A5. Decision of the Hearings Officer, Z1155-91-E/A (Feb. 11, 1994)
- A6. Ordinance No. 55
- A7. Email Correspondence with Applicant regarding DRB Resolution No. 429, dated February 28, 2024
- A8. Staff's Presentation Slides for Public Hearing (to be presented at Public Hearing)

Materials from Applicant

- B1. **Applicant's Materials – Available Under Separate Cover**
Signed Application Form
Applicant's Narrative and Exhibits Documents
- B2. Applicant's Additional Submittal dated March 29, 2024 – *Available Under Separate Cover*
- B3. Applicant's Presentation Slides for Public Hearing
- B4. Applicant's First Open Record Submittal Dated April 15, 2024
- B5. Applicant's Final Arguments Dated April 22, 2024

Public Comments

- D1. G.Prior Comment Dated April 5, 2024
- D2. K.Roche Comment Dated April 8, 2024
- D3. D.Wortman Comment Dated April 8, 2024
- D4. Lumberjack, LP/D.Fry Comment Dated April 11, 2024

Procedural Statements and Background Information:

1. The statutory 120-day time limit applies to this application. The City received the application on December 15, 2023, and deemed it complete on January 12, 2024. The City must render a final decision for the request, including any appeals, by May 11, 2024.

2. Surrounding land uses are as follows:

Compass Direction	Zone:	Existing Use:
North:	TC	Commercial
East:	TC	Commercial
South:	TC	Commercial
West:	Not zoned	Interstate 5 Right-of-Way

3. Land use actions regarding the Location:

- 91PC43 Modified Stage I Master Plan, Phase II Stage II Site Development Plans, Amending Condition of Approval 8 of 90PC5
- 91DR29 Site Design (Architectural, Landscaping) and Signage
- 92DR21 Revise Condition of Approval 15 of 91DR29 regarding placement of containerized dumpsters
- 01AR01 Minor Architectural Revisions
- AR09-0053 Zoning Verification
- ADMN23-0029 Class I Review of Use and Structure Conformance Status (per Section 4.030 (.01) A. 7. of Wilsonville Development Code)
- DB24-0002 Appeal of Administrative Decision ADMN23-0029 (currently in process)

4. The Applicant has complied with Sections 4.008 through 4.035 pertaining to review procedures and submittal requirements. The required public notices have been sent and all proper notification procedures have been satisfied.

Findings:

NOTE: Pursuant to Section 4.014 the burden of proving that the necessary findings of fact can be made for approval of any land use or development application rests with the Applicant in the case.

General Information

Application Procedures - In General Section 4.008

The application is being processed in accordance with the applicable general procedures of this Section.

Initiating Application Section 4.009

The Class II Review Application has the signatures of David Fry of Lumberjack LP, owner, and Dan Zoldak of Lars Andersen & Associates, Inc., Applicant and authorized representative, has the owner's permission to submit the application on their behalf.

Pre-Application Conference Subsection 4.010 (.02)

A pre-application conference (PA22-0004) for the subject property was held on March 24, 2022.

Lien Payment before Approval Subsection 4.011 (.02) B.

No applicable liens exist for the subject property. The application can thus move forward.

General Submission Requirements Subsections 4.035 (.04) A. and 4.035 (.05)

The Applicant has provided all of the applicable general submission requirements contained in this subsection.

Zoning - Generally Section 4.110

The subject property is located in the Town Center (TC) zone, in three (3) TC sub-districts: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU). Applicable zoning district and general development regulations, as appropriate, have been applied in accordance with this Section, as discussed in more detail in the Findings in this staff report.

Request A: Class II Review Request (AR23-0031)

Planned Development Regulations

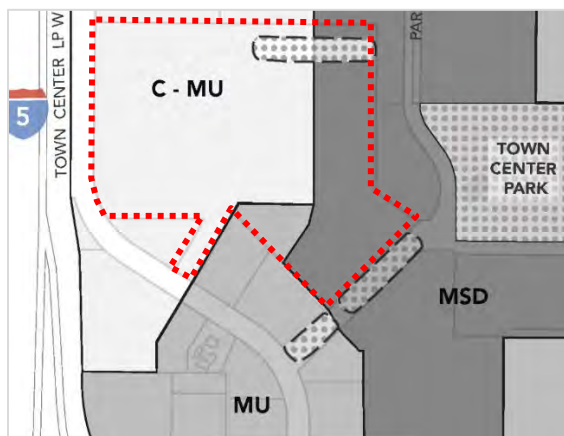
Adherence to Approved Plan and Modification Thereof
Subsections 4.140 (.10) C. and 4.030 (.01) B. 3.

- A1.** Per Subsection 4.140 (.10) C., when the zoning of land within a planned development area changes subsequent to the planned development approval, development that is consistent with the approved plans (in this case, the Stage I Master Plan approval, which applies the CC designation) is considered legal non-conforming subject to the standards of Sections 4.189 through 4.192. The zoning changed with adoption of the Town Center Plan, effective June 5, 2019, and subsequent to the approval of Case File 91PC43. Thus, development that is consistent with the approved plan, but not complying with current zoning standards (Current Occupant), shall be considered legal non-conforming and subject to the standards of Sections 4.189 thru 4.192. The Proposed Occupant is not consistent with the established non-conforming use and, therefore, is not a continuation of non-conforming use as noted in Section 4.189 (.01).

Town Center (TC) Zone

Purpose of Town Center Zone
Subsection 4.132 (.01)

- A2.** The TC Zone in which the Location is located is divided into four sub-districts that contain recommendations for building form and use to achieve the vision set forth in the Town Center Plan. The Location is located in three (3) TC sub-districts, as shown in the map below: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU). There are two (2) proposed open space areas within or adjacent to the property. All adjacent property is also zoned TC.



Allowed Uses in TC Zone

Subsection 4.132 (.02) F.

- A3.** With regard to use, per Subsection 4.132 (.02) F., “retail sales and service of retail products, under a footprint of 30,000 square feet per use” is an outright allowed use in the TC zone. Although the Current Occupant at the Location is a retail store and, thus, consistent with allowed use in the TC zone, its footprint of 124,215 square feet exceeds the 30,000 square feet per use limitation of the TC zone.

Permitted and Prohibited Uses in Specific Sub-districts in TC Zone

Subsection 4.132 (.03) A. 1.

- A4.** Per Subsection 4.132 (.03) A. 1., single-user commercial or retail (e.g. grocery store or retail establishment) that exceeds 30,000 square feet if located on more than one story of a multi-story building is an additional permitted use allowed in the C-MU sub-district. The Current Occupant at the Location does not meet this additional permitted use standard due to its large format footprint of 124,215 square feet square feet in a single story, exceeding the maximum footprint of 30,000 square feet.

Other Development Standards

Non-Conforming Uses in General

Subsection 4.001 (196.) and Section 4.189

- A5.** A Non-Conforming Use is defined as “a legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform” (Subsection 4.001 (196.)). The Current Occupant at the Location has a footprint of 124,215 square feet in a single story with a partial mezzanine, which exceeds the footprint of 30,000 square feet per retail user and footprint limitation that is allowed in the TC Zone. The Current Occupant is a legally established non-conforming use in the TC zone.

Non-Conforming Uses – Continuation of Use

Subsection 4.189 (.01) A.

- A6.** Per Subsection 4.189 (.01) A. of the Code, “A non-conforming use may be continued subject to the requirements of this Section”. Therefore, if another “159,400 square-foot electronics-related retail store” were to occupy the Location, this would be considered a continuation of non-conforming use at the Location. Conversely, were any other use than the protected use to occupy the Location, this would not be considered a continuation of non-conforming use. As demonstrated elsewhere in this staff report, the Proposed Occupant is not the same use as the Current Occupant at the Location. Therefore, operation of the proposed occupant at the Location is not a continuation of non-conforming use.

Non-Conforming Uses – Change of Use
Subsection 4.189 (.02) A.

- A7.** Per Subsection 4.189 (.02) A. of the Code, “A non-conforming use may not be changed unless the change or replacement is to a use that is determined by the Planning Director to be no less conforming to the regulations for the zone district in which the use is located than the existing use.” This determination is outside the scope of review of the current application.

Non-Conforming Uses – Abandoned Use
Subsection 4.189 (.03)

- A8.** Per Subsection 4.189 (.03) of the Code, “If a non-conforming use is abandoned for a period of 18 consecutive months, the use shall not be re-established without fully complying with the use requirements of the 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 to be considered abandoned, a site must not be receiving City utilities and must not actively be marketed for rent, lease, or sale.” The Location has not been abandoned, as the owner has continued to pay utilities and market the site.

Non-Conforming Uses – Damage or Destruction
Subsection 4.189 (.04)

- A9.** Per Subsection 4.189 (.04) of the Code, “When a structure that is a non-conforming use or a building containing a non-conforming use is damaged by any cause, exceeding 75 percent of its replacement cost, as determined by the Building Official, the structure shall not be re-established unless the owners of that structure promptly and diligently pursue its repair or replacement. If all required building permits have not been received within 18 months of the damage or destruction, the non-conforming use shall not be re-established without meeting all of the requirements of Chapter 4.” The Location has not been damaged or destroyed.

Non-Conforming Uses – Enlargements and Moving
Subsection 4.189 (.05)

- A10.** Per Subsection 4.189 (.05) of the Code, “A non-conforming use, may be permitted to enlarge up to 20 percent in floor area on approval of a conditional use permit by the Development Review Board.” The Current Occupant/protected non-conforming use is not seeking this, and determination is outside the scope of review of the current application.

Non-Conforming Uses – Repairs
Subsection 4.189 (.06)

- A11.** Per Subsection 4.189 (.06) of the Code, “Normal maintenance of a structure containing a non-conforming use is permitted provided that any exterior additions meet the requirements of this Section.” Current Occupant may maintain and repair the structure as needed to operate its non-conforming use and is not relevant to the scope of review of the current application.

BEFORE THE PLANNING DIRECTOR FOR THE CITY OF WILSONVILLE

In the Matter of an application for a staff interpretation of the Wilsonville Development Code to confirm that The Home Depot store proposed for 29400 Town Center Loop W, Wilsonville, OR 97070 constitutes a warehouse retail use and may operate in the existing structure

APPLICANT’S NARRATIVE AND EXHIBITS DEMONSTRATING COMPLIANCE WITH THE RELEVANT APPROVAL CRITERIA

SUBJECT PROPERTY: 29400 Town Center Loop W.
Wilsonville, OR 97070
TL ID: 31W14D 00220

APPLICANT: Lars Andersen & Associates, Inc.
4694 W. Jacquelyn Ave.,
Fresno, CA 93722
Attn: Dan Zoldak
Phone: 559-276-0850
E-Mail: dzoldak@larsandersen.com

APPLICANT REPRESENTATIVE: J. Kenneth Katzaroff
Keenan Ordon-Bakalian
Schwabe, Williamson & Wyatt, P.C.
1211 SW 5th Avenue, Suite 1900
Portland, Oregon 97204
Phone: 206-405-1985
E-Mail: KKatzaroff@SCHWABE.com
E-Mail: Kordon-bakalian@schwabe.com

PROPERTY OWNER: Lumberjack LP
600 E Brokaw Rd.
San Jose, CA 95112

REQUEST: A Class II Staff Interpretation to confirm that The Home Depot and Fry’s Electronics are both warehouse retail uses.

I. APPLICABLE STANDARDS AND CRITERIA

The applicant has identified the following code provisions that the City of Wilsonville (hereinafter, the “City”) may apply to its review of this application:

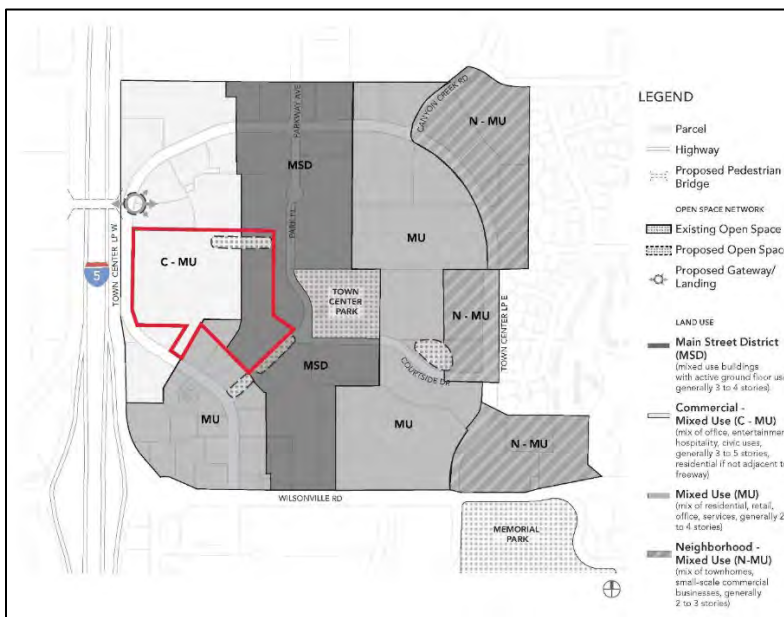
Title 4 – the Wilsonville Development Code (“WDC”)

Section 4.000-4.035 – Administration
 Section 4.001 – Definitions
 Section 4.030 – Jurisdiction and Powers of Planning Director and Community Development Director
 Section 4.132 – Town Center Zone
 Section 4.189-4.192 – Non-Conforming Uses, Structures, Site Conditions, and Lots

II. INTRODUCTION AND BACKGROUND

Lars Andersen & Associates, Inc. (the “**applicant**”) is seeking a Class II Staff Interpretation to confirm that The Home Depot and Fry’s Electronics are both warehouse retail uses. This application is submitted in conjunction with the applicant’s application for a Class I review (the “**NCU Application**”)¹ to confirm the status of the existing non-conforming office, warehouse, manufacturing, service and retail use (the “**subject use**”) at 29400 SW Town Center Loop W, Wilsonville, OR 97070² (the “**property**”).

On November 28, 2023, the City of Wilsonville (the “**City**”) interpreted the applicant’s NCU Application to include a request for the City to determine that Fry’s Electronics and The Home Depot both constitute warehouse retail uses. City of Wilsonville E-mail (Nov. 28, 2023) (attached hereto as **Exhibit A**). As such, the City has asked the applicant to apply for a Class II Staff Interpretation review pursuant to WDC 4.030.01(B)(3). Therefore, the applicant is seeking the subject Staff Interpretation for the 15.01-acre property, located within the City. The property is zoned Planned Development Commercial – Town Center (“**TC**”) and designated with three Town Center Sub-Districts – Commercial-Mixed Use (“**C-MU**”), Mixed Use (“**MU**”), and Main Street District (“**MSD**”).



¹ Case File No. ADMN23-0029.

² TL 31W14D 00220.

As pictured below, the property is located in a relatively flat, developed commercial area within the City's Town Center District. There is an existing structure at the property that was operated as a Fry's Electronics ("Fry's") from 1991 to 2021.



In 1991 the City approved a Modification to the Stage I Wilsonville Town Center Master Plan and Stage II Phase II Site Development Plan (the "**1991 Decision**") to allow the development of a 159,400 square foot ("**SF**") retail, office, warehouse, manufacturing, and service store at the property. *See attached, Exhibit B.* The property was zoned Planned Development Commercial ("**PDC**") and designated commercial in the City's Comprehensive Plan when the City approved the subject use of the property. *Id.*, at 14. Subsequent to the City's land use approval, Fry's began operating a retail, office, warehouse, manufacturing, and service store at the property.

Fry's was a large electronics warehouse store that retailed software, consumer electronics, household appliances, cosmetics, tools, toys, accessories, magazines, technical books, snack foods, electronic components, and computer hardware. Fry's also had in-store computer repair and custom computer building services, and offered technical support to customers. The Fry's model was unique for electronics retail outlets of the time, in that Fry's was an electronics warehouse that offered customers a variety of retail, manufacturing and service offerings that exceeded the offerings of Fry's competitors. Because Fry's stocked a wide range of electronics products, they were popular with electronics and computer hobbyists, as well as IT professionals and contractors.



Image Credit: Alamy, <https://www.alamy.com/las-vegas-sep-7-2020-interior-view-of-the-frys-electronics-image375519870.html?imageid=595679EA-E5D6-4FAA-8BDE-4437A0B5DF19&p=283543&pn=1&searchId=9fd62e6ba47e6193d28e3b42e316bc4e&searchty pe=0> (last accessed Oct. 20, 2023).



Image Credit: PC Magazine, <https://www.pcmag.com/opinions/to-all-the-frys-i-loved-before-an-elegy-for-the-best-electronics-chain> (last accessed Oct. 20, 2023).

In February 2021, Fry's suddenly went out of business, closing all 31 stores across the United States including the Wilsonville Fry's that was operating at the property.³ Since the closure of the Fry's in 2021, the owner of the property has been actively marketing the site and making other plans for its use. The owner has also continued to make utility payments for city services. *See attached, Exhibit C.*

The Home Depot, Inc. ("HD") intends to operate a store within the existing structure that was previously occupied by Fry's, and therefore seeks confirmation from the City that a warehouse retail store can continue operating at the property. *See attached, Exhibit D.* HD operates home improvement warehouse stores that retail tools, construction products, appliances, and services, including transportation and equipment rentals. HD's Home Services division also offers technical expertise for home improvement projects, and both onsite and offsite install, repair, and

³ *Fry's Electronics suddenly went out of business*, CNN, <https://www.cnn.com/2021/02/24/business/frys-electronics-closure/index.html> (last accessed Oct. 9, 2023); *Fry's Electronics closes, leaving Wilsonville store barren*, Portland Tribune, https://www.portlandtribune.com/news/frys-electronics-closes-leaving-wilsonville-store-barren/article_cde50d46-de09-5ce3-a647-9f54ce7d4bb1.html (last accessed Oct. 9, 2023).

remodel services. Although the vast majority of HD customers are private individuals, contractors and other professionals account for close to half of HD's annual sales.⁴

III. APPROVAL CRITERIA

WDC 4.030.01 – Authority of Planning Director

- B. *A Class II application shall be processed as an administrative action, with or without a public hearing, shall require public notice, and shall be subject to appeal or call-up, as noted below. Pursuant to Class II procedures set forth in Section 4.035, the Director shall approve, approve with conditions, deny, or refer the application to the Development Review Board for a hearing:*
- (B)(3) *Written interpretations of the text or maps of this Code, the Comprehensive Plan or sub-elements of the Comprehensive Plan, subject to appeal as provided in Section 4.022. The Planning Director may review and interpret the provisions and standards of Chapter 4 (Planning) of the Wilsonville Code upon receiving the required filing fee along with a specific written request. The Director shall publish and mail notice to affected parties and shall inform the Planning Commission and City Attorney prior to making a final written decision. The Director's letter and notice of decision shall be provided to the applicant, the Planning Commission, the City Council, and City Attorney and the notice shall clearly state that the decision may be appealed in accordance with Section 4.022 (Appeal Procedures). A log of such interpretations shall be kept in the office of the Planning Department for public review.*

RESPONSE: This is an application for a Staff Interpretation to confirm that Fry's Electronics and The Home Depot both constitute warehouse retail uses. Preliminarily, the applicant notes that WDC 4.001 does not define "warehouse retail" use. However, as set forth above, Fry's and HD stores are retail, office, warehouse, manufacturing, and service uses allowed at the subject property pursuant to the 1991 Decision and the property's historic PDC zoning. Both Fry's and HD stores are [were] organized warehouse-style, stock a large range of supplies available for retail, cater to retail consumers and professionals, and offer onsite services and technical support. As such, the applicant asserts that both Fry's and HD are warehouse-style retailers that fall within the subject use approved in the 1991 Decision.

Although Fry's and HD stores carry different products, the principal purpose and use for both stores is the retail sale of products displayed and stored in a warehouse format. The fact that Fry's retailed computer and electronics goods and HD retails home improvement and trade goods is not relevant for determining whether Fry's and HD constitute "warehouse-retailer" uses allowed under the 1991 Decision. Rather, the City must determine whether the *underlying use* for the proposed HD is consistent with the 1991 Decision, which approved the Fry's at the

⁴ *Home Depot CEO Says Contractor Spend Remains Strongest Business Line, PYMNTS, <https://www.pymnts.com/earnings/2023/home-depot-ceo-says-contractor-spend-remains-strongest-business-line/> (last accessed Oct. 25, 2023).*

property. Because the 1991 Decision approved retail, office, warehouse, manufacturing, and service uses at the property – which encompasses the character and scope of use for both Fry’s and HD – the applicant requests that the Planning Director make a written determination that HD is a warehouse retail use that can continue operating at the property.

Moreover, the difference in impacts or character of the Fry’s and HD retail use is the same: selling hammers, lightbulbs, power tools and home improvement appliances are not appreciably different than sales of televisions, computers, server equipment and the same home improvement appliances that are retailed in both warehouse stores. In short, the character of retail sales is the same – as are the impacts of operating the store. There is no plausible interpretation that can distinguish the retail offerings of the two warehouse stores.

This request for a Staff Interpretation will be accompanied by the required filing fee. This application meets the requirements for initiating review by the Planning Director pursuant to this criterion.

IV. CONCLUSION

For the reasons stated above, the Planning Director can find that all applicable criteria are met and approve the subject application for a written determination confirming that HD is a warehouse retail use that can continue operating at the property.

Enclosed with this application are the following exhibits:

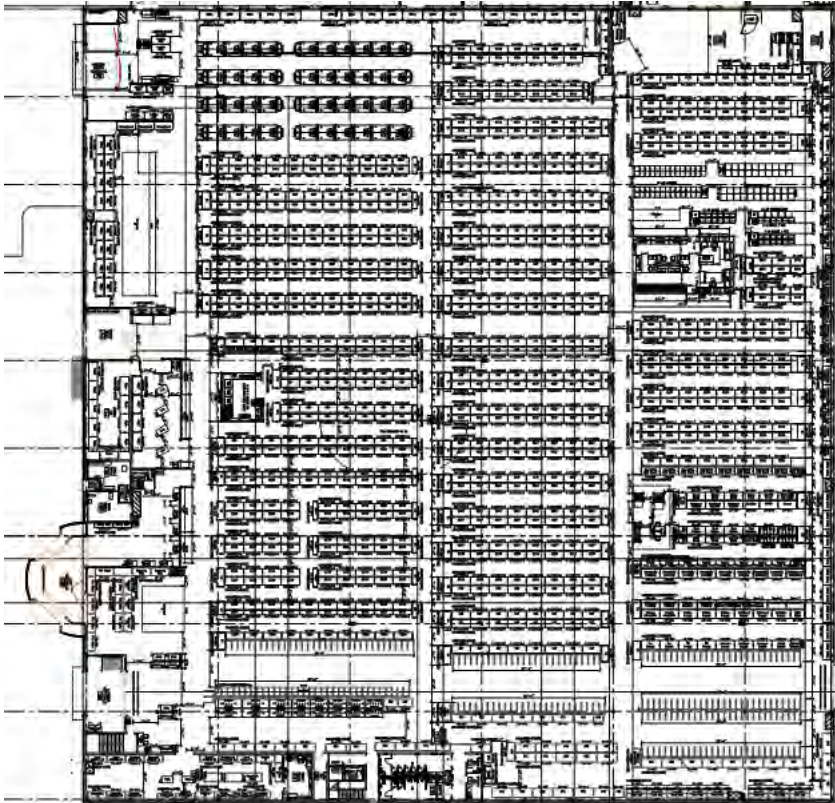
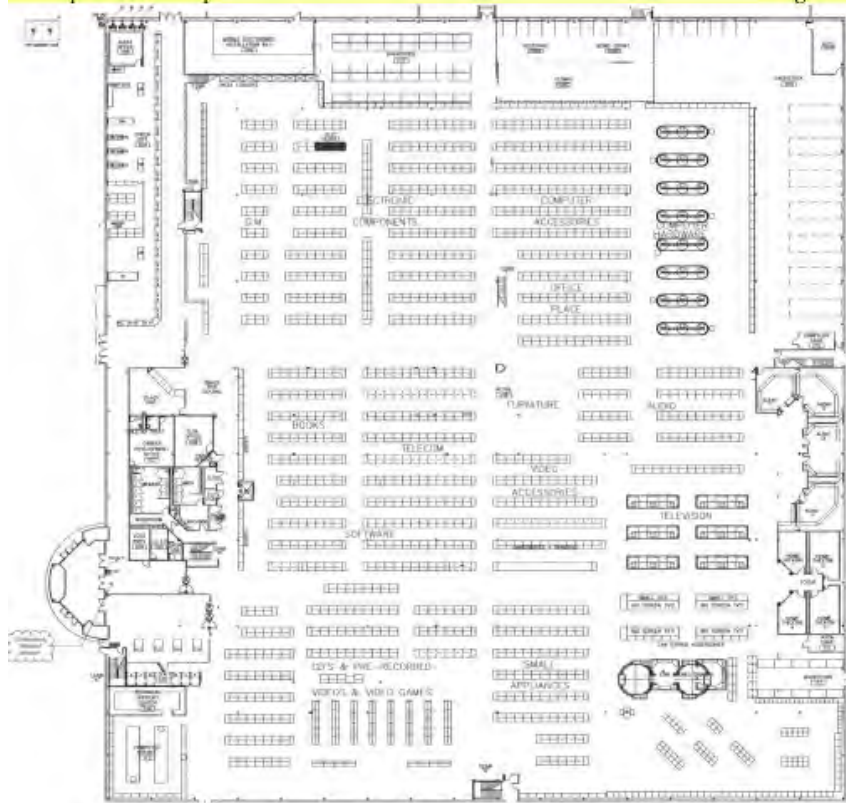
- A. November 28, 2023 E-mail
- B. 1991 Decision
- C. Proof of Utility Payments
- D. Concept Plan



Resolution No. 432-Continuation of Non-Conforming Use



Continuation of Use - Commercial Retail



Left: Previous Commercial Retail As-Built, 2014. Source: City of Wilsonville Building Division
Right: Proposed Future Commercial Retail Interior Fixture Plan, 2024. Non-prototype layout. No exterior garden center.



Continuation of Use – Commercial Retail



Less Traffic Impacts

- Existing Commercial Retail generated 4,101 trips daily
- Future Commercial Retail Use will generate 2,302 trips daily
- **Future Commercial Retail will have a reduction of 1,799 daily trips**



Less Parking Impacts

- Existing Commercial Retail Use provided 839 stalls
- Future Commercial Retail Use requires 400 stalls



Opportunity to redevelop 5+ acres

- The future Commercial Retail Use's reduced parking demand will result in approximately 5 acres of area to redevelop.

Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Yelp – Fry's Electronics, Photos (9/23/2017), https://www.yelp.com/biz_photos/frys-electronics-wilsonville, (visited 4/3/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Yelp – Fry's Electronics, Photos (11/21/2019), https://www.yelp.com/biz_photos/frys-electronics-Wilsonville, (visited 4/3/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Foursquare – Fry's Electronics, Photos (6/12/2017), <https://foursquare.com/v/frys-electronics> (visited 4/6/2024)

Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Foursquare – Fry's Electronics, Photos (3/9/2013), <https://foursquare.com/v/frys-electronics> (visited 4/6/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



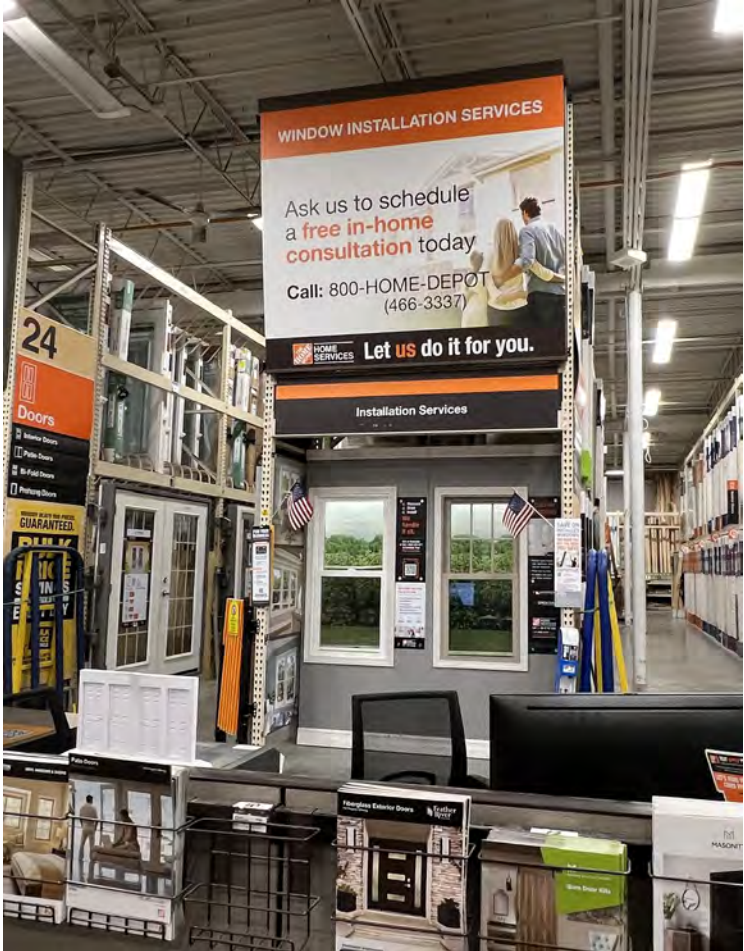
Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Yelp – Fry's Electronics, Photos (6/9/2019), https://www.yelp.com/biz_photos/frys-electronics-Wilsonville, (visited 4/3/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Yelp – Fry's Electronics, Photos (10/28/2018), https://www.yelp.com/biz_photos/frys-electronics-Wilsonville, (visited 4/3/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Yelp – Fry's Electronics, Photos (6/9/2019), https://www.yelp.com/biz_photos/frys-electronics-Wilsonville, (visited 4/3/2024)
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Continuation of Use - Commercial Retail



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Continuation of Use - Commercial Retail



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Continuation of Use - Commercial Retail



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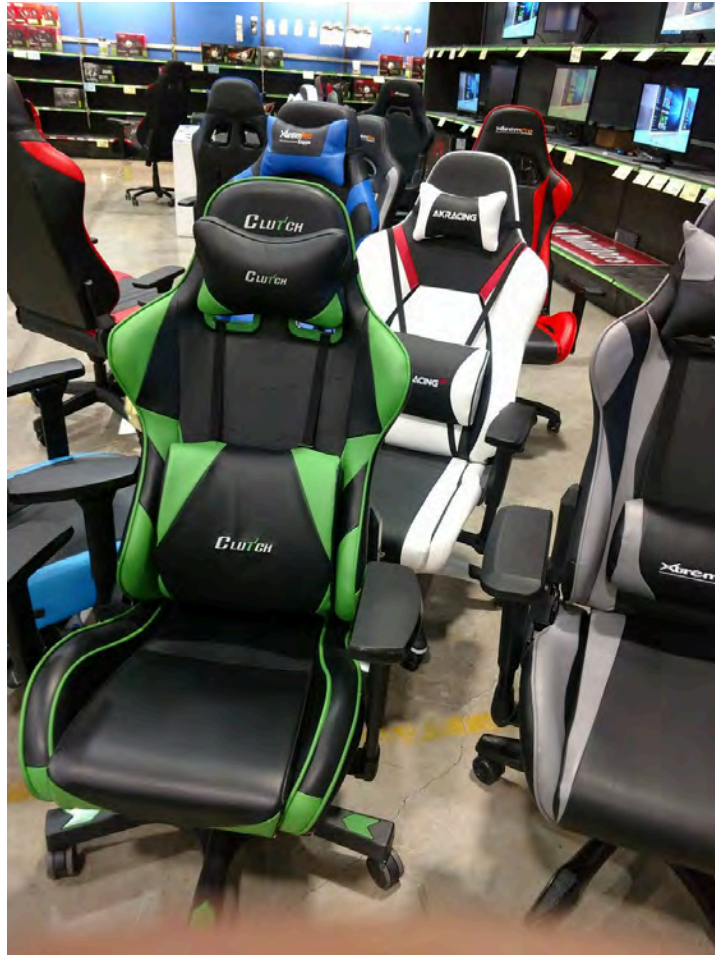
Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Foursquare – Fry's Electronics, Photos (12/24/2016), <https://foursquare.com/v/frys-electronics> (visited 4/6/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



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Continuation of Use - Commercial Retail



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Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use - Commercial Retail



Left: Previous Occupant in Commercial Retail Space. Source: Foursquare – Fry's Electronics, Photos (11/23/2012), <https://foursquare.com/v/frys-electronics> (visited 4/6/2024)
Right: Proposed Occupant in Commercial Retail Space. Typical Store.



Continuation of Use – Commercial Retail

Consumer Products Offered

Previous Retail Use

Proposed Retail Use

- Appliances
- Tools
- Measurement Equipment
- Technical Expertise
- Service
- Delivery Options
- Ancillary Sales (Snacks, etc.)
- Marketed to Professionals



Continuation of Use – Commercial Retail

- Planned as a non-prototypical Home Depot store

- Home Depot plans to occupy existing structure
 - Sustainable reuse of the existing building
 - Exterior modifications primarily maintenance-related
 - No exterior garden center
 - Lumber pad is an operational area for safe receiving / unloading for heavier merchandise, **NOT** for exterior storage

- Home Depot has **NOT** applied for:
 - Sidewalk sales
 - Outdoor seasonal sales
 - Exterior shed displays
 - Exterior rental equipment staging

- Home Depot direct-to-customer delivery capability reduces pro volume through stores



Town Center Plan



**TOWN CENTER FUTURE SCENARIO
PHASE 1 (INFILL)**

FIGURE 3.6 



Proposed Development



The Home Depot - Wilsonville Town Center
29400 Town Center Loop W
Wilsonville, Oregon



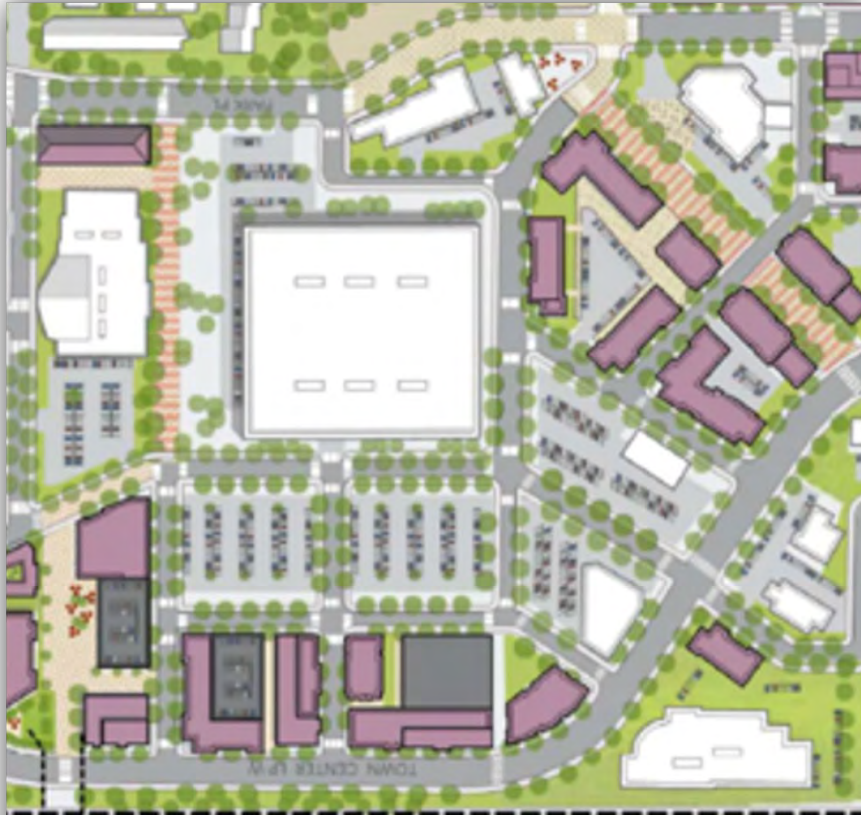
Proposed Development



The Home Depot - Wilsonville Town Center
29400 Town Center Loop W
Wilsonville, Oregon



Alignment With Plan



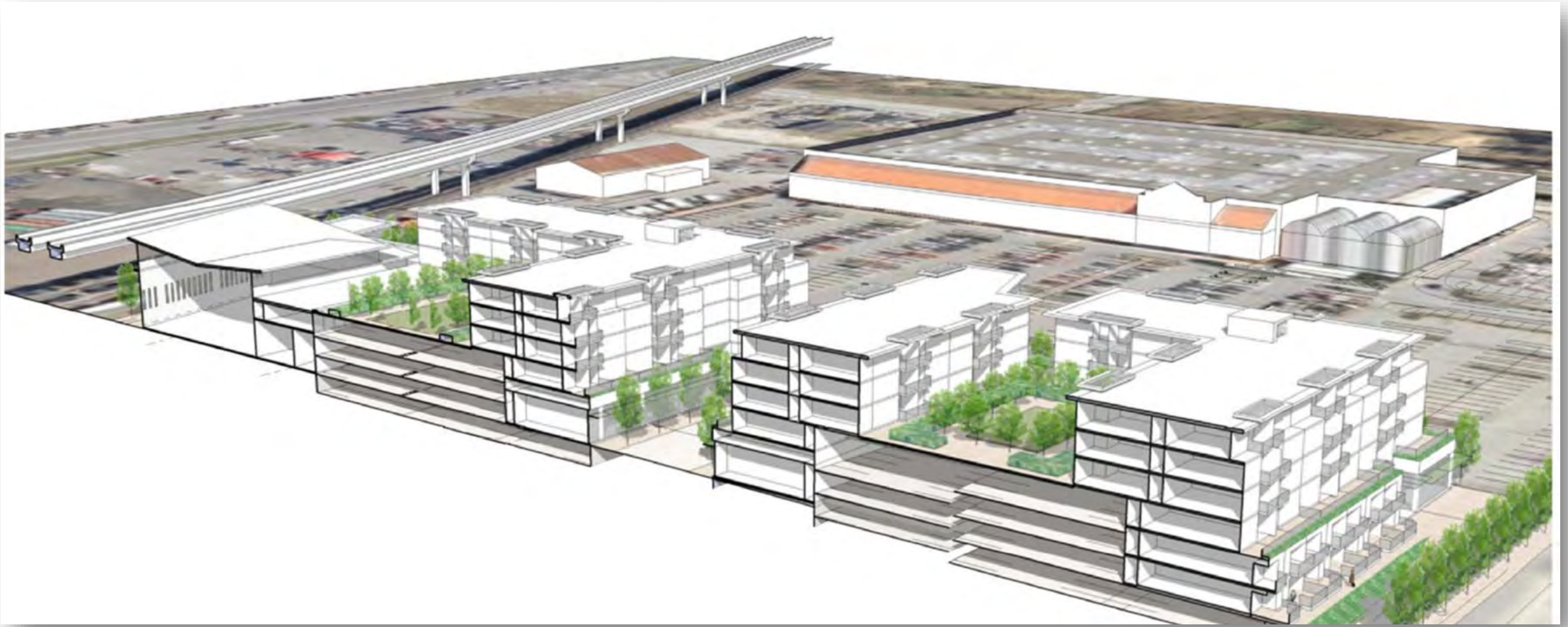
Left: Inset from Figure 3.6, Town Center Future Scenario Phase 1 (Infill), City of Wilsonville Town Center Plan
Right: Proposed Occupant rendering of existing structure with multi-family housing units



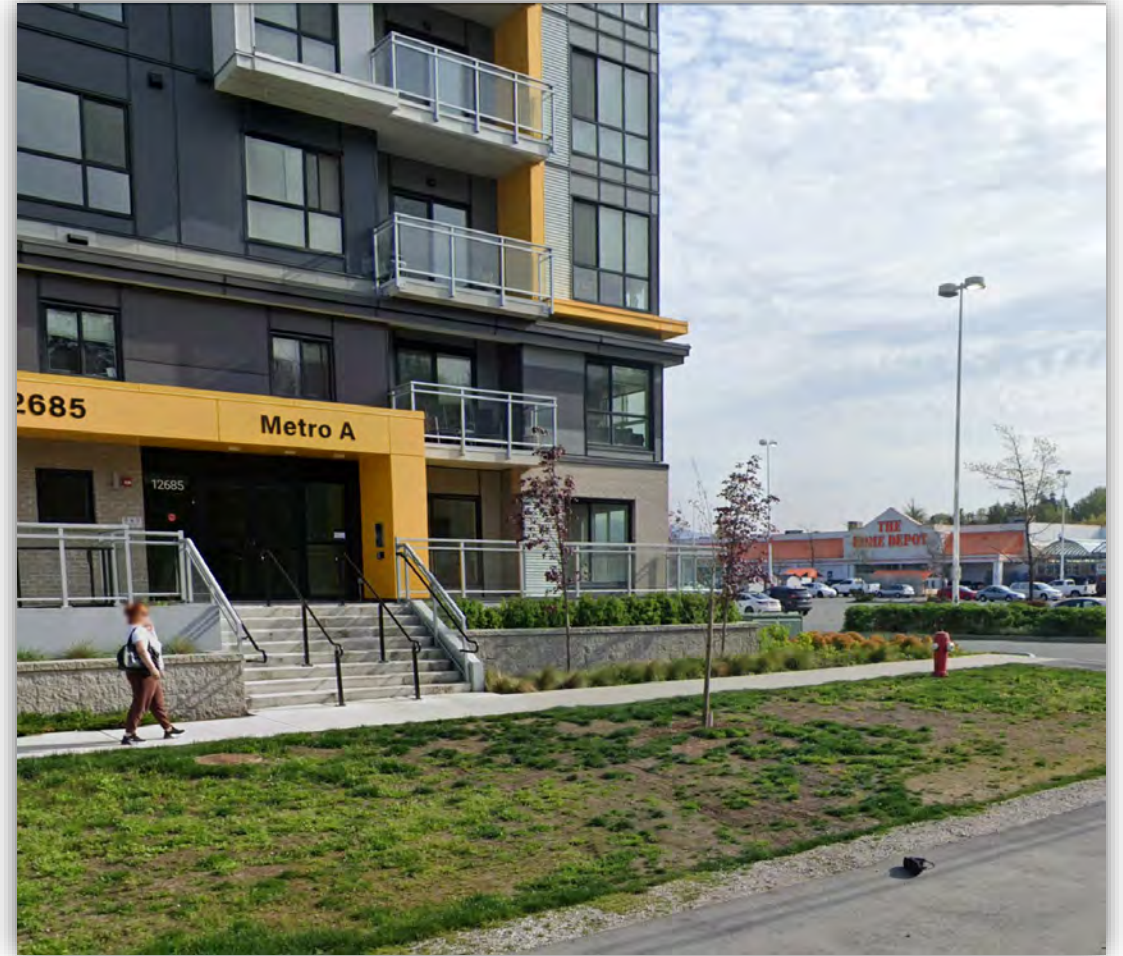
Lynnwood, Washington



N. Surrey, Canada



N. Surrey, Canada



ESG Highlights

2023 The Home Depot ESG Report
www.ecoactions.homedepot.com

The Home Depot

Focus On Our People



More than **90%** of our U.S. store leaders started as hourly associates

Achieved our goal to invest **>1 million hours per year** over five years in training and development to help our front-line associates grow their careers



Approximately **36%** of our U.S. new hires were women and **58%** were ethnically/racially diverse

Named to Forbes' 2022 List of **Best American Companies for Veterans**

Operate Sustainably

We reduced our Scope 1 and 2 carbon emissions by approximately **92,000 metric tons**, equivalent to taking more than **20,000 cars** off the road for a year

We decreased electricity consumption **>52%** in our U.S. stores since 2010



We set science-based targets to **reduce our emissions** across Scopes 1, 2 & 3 (category 11) by the end of 2030

We redesigned **350+ private-brand packages** to reduce size and materials. This helped us eliminate **>81M square feet** of PVC film – enough to cover Central Park twice

We set a goal that **85%** of our U.S. & Canadian sales in push mowers and handheld outdoor lawn equipment will be **battery powered** by the end of 2028

Strengthen Our Communities



The Home Depot Foundation granted **\$82 million** in total during 2022

As of the end of 2022, The Home Depot Foundation had contributed more than **\$450 million** towards veteran causes since 2011

Since 2009, our **Retool Your School** grant program has helped fund over **180+ projects** benefiting 70% of HBCUs

In 2022, we drove **~\$3.4 billion** of spend with diverse suppliers

Since 2011, Team Depot has volunteered **1.4+ million service hours** to veteran causes



Sustainability

2023 The Home Depot ESG Report
www.ecoactions.homedepot.com

- Responsible Sourcing
- Sustainable Packaging
- Responsible Waste Management
- Water / Energy Saving Products
- Responsible Chemistry (from cleaning to gardening)

2022 BY THE NUMBERS

>7.3 million cubic feet
of EPS foam was removed from our private-label packaging — equal to >4,700 Boeing 737s

>81 million square feet
of PVC film was eliminated — enough to cover Central Park twice

~940 thousand
pounds
of damaged product avoided landfills due to private-branded packaging projects aimed at creating packaging to better protect products

>40 million
packaging units
were rightsized from projects covering 350+ private-brand SKUs.

 <p>Identifies products that use safer chemical ingredients without sacrificing performance</p>	 <p>Identifies products that meet emissions standards for helping reduce indoor air pollution and risk of chemical exposure</p>	 <p>Leaping Bunny label certifies no animal testing in manufacturing</p>
 <p>Certifies manufacturer's commitment to improving what products are made of and how they're made</p>	 <p>Assures a USDA-verified amount of renewable biological ingredients</p>	 <p>Suite of eco-labels that certifies environmental stewardship, social responsibility and quality</p>




Economic Impact

Oregon



OUR ECONOMIC IMPACT: OREGON

Our Core Values guide everything we do at The Home Depot, like working to grow the state's economy.

\$3.2B TOTAL IMPACT

Our **entrepreneurial spirit** drives the economy via:

- Job creation in stores, distribution centers and offices
- Vendor purchases and partner offerings
- **\$348.8M** direct contribution to GDP
- **\$285M** in total tax impact

35.6K JOBS SUPPORTED

Taking care of our people means:

- Investing in the safety, well-being and development of our **5.7K** associates
- Promoting **65K** associates, nationwide
- Each THD job supports 4+ additional jobs across the US



\$2.3B ENABLED IMPACT

...created by THD Home Services and the Pros that rely on our best-in-class interconnected retail offerings and **excellent customer service**

- **33.2K** projects provided to local Pros via THD Home Services



3.5M+ SQUARE FEET

...across **30+** brick-and-mortar stores, warehouses and/or offices help us **build strong relationships** within the community

- **27** stores

90+ LOCAL SUPPLIERS

We foster shared success and **create shareholder value** for both THD and our vendor partners – we do so by cultivating a supplier base that includes small and diverse businesses like local manufacturers and plant nurseries

28K VOLUNTEER HOURS

We **give back** to our communities and those who served our country through Team Depot service projects and THD Foundation initiatives

- Supported **210+** non-profits
- Contributed **\$1.7M** to veterans' causes



All numbers are rounded approximations and reflect FY2022 data unless otherwise indicated. Calculated impact figures were determined using PwC's IMPLAN modeling system. HD Supply included in all calculations except Pro project count and Supplier count. Vendor count includes all suppliers. Foundation figures are cumulative from 2011 through FY2022.



CITY OF



P.O. Box 220 / Wilsonville, Oregon 97070
503/682-1011

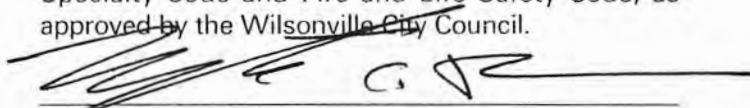
BUILDING DEPARTMENT

CERTIFICATE OF OCCUPANCY

Address: 29400 S.W. Town Center Loop West
 Name: Incredible Universe
 Owner: Tandy Name Brand
 Address: 1400 Two Tandy Center Fort Worth, Texas 76102
 Contractor: S.D. Deacon
 Address: P.O. Box 25392
 Use of Structure Retail
 Permit No. B92081 Zone: PDC

Certificate is hereby given this 29th day of September, 19 93

that said building may be occupied and that it complies with all requirements of the State of Oregon Structural Specialty Code and Fire and Life Safety Code, as approved by the Wilsonville City Council.



 Building Official

CITY OF



30000 SW Town Center Loop East
Wilsonville, Oregon 97070
503-682-4960

BUILDING DEPARTMENT

CERTIFICATE OF OCCUPANCY

Address: 29029 S.W. Town Center Loop East

Name: Ace Hardware

Owner: Chris Dunn

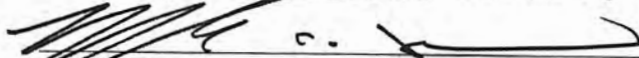
Address: 16200 SW Pacific Hwy #276 Tigard, OR 97224

Use of Structure: Retail Group M & S.1

Permit Number: B0093

Certificate is hereby given this 16th day of August, 2000

that said building may be occupied and that it complies with all requirements of the State of Oregon Structural Specialty Codes and Fire/Life Safety Code, as adopted by the Wilsonville City Council.



 Building Official

Handwritten notes:
 Approved
 CCE

City of
WILSONVILLE

799 SW Town Center Loop East
Wilsonville, Oregon 97070
503-682-4960
BUILDING DEPARTMENT

CERTIFICATE OF OCCUPANCY

Use:	Mercantile	Bldg. Permit No.:	BB11-0079
Business Name:	ACE HARDWARE	Group:	M/S-1
Building Address:	29029 SW TOWN CENTER LOOP E WILSONVILLE OR 97070-9409	Type of Construction:	Type VB
Owner:	DARYL SOLI	Fire Sprinkler:	No
Owner Address:	29029 SW TOWN CENTER LOOP E WILSONVILLE OR 97070-9409	Occupant Load:	333
		Code Edition:	1998
		Date of Issuance:	03/07/2011

That said building may be occupied and that it complies with all requirements of the State of Oregon Structural Specialty Codes and Fire/Life Safety Code, as adopted by the Wilsonville City Council.


Building Official
Exhibit E

DETOXIFICATION FACILITIES. Facilities that serve patients who are provided treatment for substance abuse on a 24-hour basis and who are incapable of self-preservation or who are harmful to themselves or others.

HOSPITALS AND MENTAL HOSPITALS. Buildings or portions thereof used on a 24-hour basis for the medical, psychiatric, obstetrical or surgical treatment of inpatients who are incapable of self-preservation.

NURSING HOMES. Nursing homes are long-term care facilities on a 24-hour basis, including both intermediate care facilities and skilled nursing facilities, serving more than five persons and any of the persons are incapable of self-preservation.

308.4 Group 1-3. This occupancy shall include buildings and structures that are inhabited by more than five persons who are under restraint or security. An 1-3 facility is occupied by persons who are generally incapable of self-preservation due to security measures not under the occupants' control. This group shall include, but not be limited to, the following:

- Correctional centers
- Detention centers
- Jails
- Prerelease centers
- Prisons
- Reformatories

Buildings of Group 1-3 shall be classified as one of the occupancy conditions indicated in Sections 308.4.1 through 308.4.5 (see Section 408.1).

308.4.1 Condition 1. This occupancy condition shall include buildings in which free movement is allowed from sleeping areas, and other spaces where access or occupancy is permitted, to the exterior via *means of egress* without restraint. A Condition 1 facility is permitted to be constructed as Group R.

308.4.2 Condition 2. This occupancy condition shall include buildings in which free movement is allowed from sleeping areas and any other occupied smoke compartment to one or more other smoke compartments. Egress to the exterior is impeded by locked *exits*.

308.4.3 Condition 3. This occupancy condition shall include buildings in which free movement is allowed within individual smoke compartments, such as within a residential unit comprised of individual *sleeping units* and group activity spaces, where egress is impeded by remote-controlled release of *means of egress* from such a smoke compartment to another smoke compartment.

308.4.4 Condition 4. This occupancy condition shall include buildings in which free movement is restricted from an occupied space. Remote-controlled release is provided to permit movement from *sleeping units*, activity spaces and other occupied areas within the smoke compartment to other smoke compartments.

308.4.5 Condition 5. This occupancy condition shall include buildings in which free movement is restricted from an occupied space. Staff-controlled manual release is provided to permit movement from *sleeping units*, activity spaces and other occupied areas within the smoke compartment to other smoke compartments.

308.5 Group 1-4, day care facilities. This group shall include buildings and structures occupied by persons of any age who receive custodial care for less than 24 hours by individuals other than parents or guardians, relatives by blood, marriage or adoption, and in a place other than the home of the person cared for. A facility such as the above with five or fewer persons shall be classified as a Group R-3 or shall comply with the *International Residential Code* in accordance with Section 101.2. Places of worship during religious functions are not included.

308.5.1 Adult care facility. A facility that provides accommodations for less than 24 hours for more than five unrelated adults and provides supervision and *personal care services* shall be classified as Group 1-4.

Exception: A facility where occupants are capable of responding to an emergency situation without physical assistance from the staff shall be classified as Group R-3.

308.5.2 Child care facility. A facility that provides supervision and personal care on less than a 24-hour basis for more than five children 2½ years of age or less shall be classified as Group 1-4.

Exception: A child day care facility that provides care for more than five but no more than 100 children 2½ years or less of age, where the rooms in which the children are cared for are located on a *level of exit discharge* serving such rooms and each of these child care rooms has an *exit door* directly to the exterior, shall be classified as Group E.

SECTION 309 MERCANTILE GROUP M

309.1 Mercantile Group M. Mercantile Group M occupancy includes, among others, the use of a building or structure or a portion thereof, for the display and sale of merchandise and involves stocks of goods, wares or merchandise incidental to such purposes and accessible to the public. Mercantile occupancies shall include, but not be limited to, the following:

- Department stores
- Drug stores
- Markets
- Motor fuel-dispensing facilities
- Retail or wholesale stores
- Sales rooms

309.2 Quantity of hazardous materials. The aggregate quantity of nonflammable solid and nonflammable or noncombustible liquid hazardous materials stored or displayed in a single *control area* of a Group M occupancy shall not exceed the quantities in Table 414.2.5(1).

SECTION 310 RESIDENTIAL GROUP R

310.1 Residential Group R. Residential Group R includes, among others, the use of a building or structure, or a portion thereof, for sleeping purposes when not classified as an Institutional Group I or when not regulated by the *International Residential Code* in accordance with Section 101.2. Residential occupancies shall include the following:

R-1 Residential occupancies containing *sleeping units* where the occupants are primarily transient in nature, including:

- Boarding houses* (transient)
- Hotels (transient)
- Motels (transient)

Congregate living facilities (transient) with 10 or fewer occupants are permitted to comply with the construction requirements for Group R-3.

R-2 Residential occupancies containing *sleeping units* or more than two *dwelling units* where the occupants are primarily permanent in nature, including:

- Apartment houses
- Boarding houses* (nontransient)
- Convents
- Dormitories
- Fraternities and sororities
- Hotels (nontransient)
- Live/work units
- Monasteries
- Motels (nontransient)
- Vacation timeshare properties

Congregate living facilities with 16 or fewer occupants are permitted to comply with the construction requirements for Group R-3.

R-3 Residential occupancies where the occupants are primarily permanent in nature and not classified as Group R-1, R-2, R-4 or I, including:

- Buildings that do not contain more than two *dwelling units*.
- Adult care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours.
- Child care facilities that provide accommodations for five or fewer persons of any age for less than 24 hours.
- Congregate living facilities* with 16 or fewer persons.

Adult care and child care facilities that are within a single-family home are permitted to comply with the *International Residential Code*.

R-4 Residential occupancies shall include buildings arranged for occupancy as residential care/assisted living facilities including more than five but not more than 16 occupants, excluding staff.

Group R-4 occupancies shall meet the requirements for construction as defined for Group R-3, except as otherwise provided for in this code or shall comply with the *International Residential Code* provided the building is protected by an *automatic sprinkler system* installed in accordance with Section 903.2.7.

310.2 Definitions. The following words and terms shall, for the purposes of this section and as used elsewhere in this code, have the meanings shown herein.

BOARDING HOUSE. A building arranged or used for lodging for compensation, with or without meals, and not occupied as a single-family unit.

CONGREGATE LIVING FACILITIES. A building or part thereof that contains sleeping units where residents share bathroom and/or kitchen facilities.

DORMITORY. A space in a building where group sleeping accommodations are provided in one room, or in a series of closely associated rooms, for persons not members of the same family group, under joint occupancy and single management, as in college dormitories or fraternity houses.

PERSONAL CARE SERVICE. The care of residents who do not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the resident while inside the building.

RESIDENTIAL CARE/ASSISTED LIVING FACILITIES. A building or part thereof housing persons, on a 24-hour basis, who because of age, mental disability or other reasons, live in a supervised residential environment which provides *personal care services*. The occupants are capable of responding to an emergency situation without physical assistance from staff. This classification shall include, but not be limited to, the following: residential board and care facilities, assisted living facilities, halfway houses, group homes, congregate care facilities, social rehabilitation facilities, alcohol and drug abuse centers and convalescent facilities.

TRANSIENT. Occupancy of a *dwelling unit* or *sleeping unit* for not more than 30 days.

SECTION 311 STORAGE GROUP S

311.1 Storage Group S. Storage Group S occupancy includes, among others, the use of a building or structure, or a portion thereof, for storage that is not classified as a hazardous occupancy.

311.2 Moderate-hazard storage, Group S-I. Buildings occupied for storage uses that are not classified as Group S-2, including, but not limited to, storage of the following:

- Aerosols, Levels 2 and 3
- Aircraft hangar (storage and repair)
- Bags: cloth, burlap and paper
- Bamboos and rattan
- Baskets
- Belting: canvas and leather
- Books and paper in rolls or packs
- Boots and shoes
- Buttons, including cloth covered, pearl or bone
- Cardboard and cardboard boxes
- Clothing, woolen wearing apparel
- Cordage
- Dry boat storage (indoor)
- Furniture

Furs
 Glues, mucilage, pastes and size
 Grains
 Horns and combs, other than celluloid
 Leather
 Linoleum
 Lumber
 Motor vehicle repair garages complying with the maximum allowable quantities of hazardous materials listed in Table 307.1 (1) (see Section 406.6)
 Photo engravings
 Resilient flooring
 Silks
 Soaps
 Sugar
 Tires, bulk storage of
 Tobacco, cigars, cigarettes and snuff
 Upholstery and mattresses
 Wax candles

311.3 Low-hazard storage, Group S-2. Includes, among others, buildings used for the storage of noncombustible materials such as products on wood pallets or in paper cartons with or without single thickness divisions; or in paper wrappings. Such products are permitted to have a negligible amount of plastic *trim*, such as knobs, handles or film wrapping. Group S-2 storage uses shall include, but not be limited to, storage of the following:

I Asbestos
 Beverages up to and including 16-percent alcohol in metal, glass or ceramic containers
 Cement in bags
 Chalk and crayons
 Dairy products in nonwaxed coated paper containers
 Dry cell batteries
 Electrical coils
 Electrical motors
 Empty cans
 Food products
 Foods in noncombustible containers
 Fresh fruits and vegetables in nonplastic trays or containers
 Frozen foods
 Glass
 Glass bottles, empty or filled with noncombustible liquids
 Gypsum board
 Inert pigments
 Ivory
 Meats
 Metal cabinets
 Metal desks with plastic tops and *trim*
 Metal parts
 Metals
 Mirrors
 Oil-filled and other types of distribution transformers
 Parking garages, open or enclosed
 Porcelain and pottery
 Stoves
 Talc and soapstones
 Washers and dryers

SECTION 312

UTILITY AND MISCELLANEOUS GROUP U

312.1 General. Buildings and structures of an accessory character and miscellaneous structures not classified in any specific occupancy shall be constructed, equipped and maintained to conform to the requirements of this code commensurate with the fire and life hazard incidental to their occupancy. Group U shall include, but not be limited to, the following:

Agricultural buildings
 Aircraft hangars, accessory to a one- or two-family residence (see Section 412.5)
 Barns
 Carports
 Fences more than 6 feet (1829 mm) high
 Grain silos, accessory to a residential occupancy
 Greenhouses
 Livestock shelters
 Private garages
 Retaining walls
 Sheds
 Stables
 Tanks
 Towers



