



**DEVELOPMENT REVIEW BOARD PANEL B  
MEETING MINUTES**

**Approved**  
June 24 2024

**April 8, 2024 at 6:30 PM**

**City Hall Council Chambers & Remote Video Conferencing**

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**CALL TO ORDER**

A regular meeting of the Development Review Board Panel B was held at City Hall beginning at 6:30 p.m. on Monday, April 8, 2024. Chair Rachelle Barrett called the meeting to order at 6:30 p.m., followed by roll call.

**CHAIR'S REMARKS**

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

**ROLL CALL**

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

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

**CITIZEN INPUT**

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

**CONSENT AGENDA**

**PUBLIC HEARINGS**

1. **Resolution No. 432 - Planning Director's Referral of a Continuation of Non-Conforming Use Determination:** The Planning Director has referred Case File AR23-0031 to the Development Review Board for determination regarding the continuation of an existing Non-Conforming Use.

**Chair Barrett** called the public hearing to order at 6:35 p.m. and read the conduct of hearing format into the record. John Andrews declared for the record that he had visited the site recently. No board member, however, declared a conflict of interest, bias, or conclusion from a site visit. No board member participation was challenged by any member of the audience.

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

The following exhibits were entered into the record:

- Exhibit B3: Applicant's PowerPoint presentation
- Exhibit D1: Comment letter from Garet Prior dated April 5, 2024
- Exhibit D2: Comment from Kristen Roche dated April 8, 2024
- Exhibit D3: Email read into the record from Dave Wortman dated April 8, 2024

**Ms. Luxhoj** presented the Staff report via PowerPoint, briefly noting the subject property's location in the Town Center Zone and its Town Center Comprehensive Plan Designation. The subject property was referred to as the "Location" in her presentation. Her key comments were as follows:

- Background. On October 30, 2023, the City received an application for a Class I Review to confirm the status of the existing non-conforming use and structure at the Location. (Slide 3)
  - On December 28, 2023 the City's Planning Director issued their decision on the Class I Review, and the Applicant submitted a Notice of Appeal of the Planning Director's decision on January 10, 2024.
  - On February 26, 2024, a public hearing on the Notice of Appeal was held before the DRB. At that time, the hearing was closed but the record was left open to allow the Applicant to submit arguments and evidence.
  - DRB held a special meeting on March 14, 2024, and after deliberation, approved Resolution No. 429, which unanimously affirmed the Planning Director's determination of non-conformance. The Notice of Decision was issued on March 15, 2024.
  - DRB Resolution No. 429 was a City decision and could only be overturned on appeal, and an appeal was currently pending before City Council.
- Proper noticing was followed for the application. Public hearing notice was mailed to property owners within 250 ft of the subject property and additional notice was published in the Wilsonville Spokesman and placed on-site. (Slide 4)
  - No public comments were received during the comment period; however, two comments were received after publication of the Staff report and had been entered into the record as Exhibits D1 and D2.
- On December 15, 2023, Application AR23-00031 was submitted for Class II Review by the same Applicant that filed the Class I Review application. The application for Class II Review was stated as, "A Class II Staff Interpretation to confirm that the Home Depot and Fry's Electronics are both warehouse retail uses." (Slide 5)
  - The Applicant also described the application as, "An application for a Staff Interpretation of the Wilsonville Development Code to confirm that the Home Depot proposed for 29400 Town Center Lp West constitutes a warehouse retail use and may operate in the existing structure."
  - The City deemed the Class II Review application complete on January 12, 2024 and was processing the request as a Class II Planning Director Interpretation.
  - Given the public comment on the aforementioned Class I Review Application, and because some interested parties may want to participate in the Class II Review, the Planning Director chose to refer the application to the DRB for public hearing.
- To clarify language used in this and subsequent presentation slides, she noted Fry's Electronics was referred to as Current Occupant and The Home Depot as the Proposed Occupant.

- In addition to the application materials submitted with its application for Class II Review, the Proposed Occupant also submitted a letter to the City dated March 29, 2024 inviting the DRB to address or remedy the flaws in Resolution No. 429 on the Class I Review. (Slide 6)
  - The issues resolved in Resolution 429 were beyond the scope of the subject Class II Review application. Further, the Applicant had waived its right to address the issues that were addressed in Resolution No. 429 through this Class II Review application. The City invited the Applicant to withdraw their Class I Review application, in writing, on November 28, 2023. At the DRB hearing on February 26, 2024, and in the days following that hearing, the City offered to void and withdraw the Planning Director's determination in the Class I Review, have the DRB not issue a decision, and made clear that the issues under review in the Class I proceeding would be addressed in the Class II Review.
  - The City's goal was to allow the City to address all issues pertinent to the Class I and Class II Review in one combined proceeding. The Applicant declined the offer.
  - Staff noted that consideration of any future development of the location would be subject to additional land use review that was also beyond the scope of the subject Class II Review application.
- In the current application, the Applicant requested confirmation that the Proposed Occupant and the Current Occupant were both warehouse retail uses and that the Proposed Occupant may continue to operate at the location. Therefore, the DRB's decision in the Class II Review must determine whether the Proposed Occupant's operation at the location constituted a continuation of the non-conforming use, which involved determining (Slide 7):
  - Step 1 the existing non-conforming use
  - Step 2 the proposed use
  - Step 3 if the proposed use was a continuation of the current non-conforming use
- Pursuant to Wilsonville Code 4.189 (.01), a non-conforming use may be continued subject to the requirements of Section 4.189. No other Code provisions regulated the continuation of a non-conforming use. (Slide 8)
  - Key points regarding case law for the DRB to keep in mind when considering the current application were discussed in detail in the Staff report and included:
    - Non-conforming uses and expansion thereof were disfavored.
    - Local government had broad discretion to resist expansion of non-conforming uses.
    - Whether a proposed use was a continuation or change (of non-conforming use) depended on the nature and extent of the recognized non-conforming use.
    - Local government had broad discretion to draw distinctions between various uses and allow some uses to continue but disallow other uses.
- She provided answers to the three questions or steps that related to determining the continuation of the non-conforming use as follows:
  - Step 1. What is the existing non-conforming use? (Slide 9)
    - The DRB decision in Case File No. DB24-0002, Resolution No. 429, determined there was a legally established, non-conforming use at the Location, specifically that the protected use was a 159,400 sq ft electronics-related retail store. The Staff report included additional information to substantiate that determination.
  - Step 2. What is the proposed use? (Slide 10)

- Based on the application materials provided by the Proposed Occupant and an examination of how the Proposed Occupant operated locally, the City concluded the following:
  - The Applicant acknowledged that the Proposed Occupant operated home improvement warehouse stores and that contractors and other professionals, as opposed to private individuals, accounted for close to half of the Proposed Occupant's annual sales.
  - The Applicant acknowledged that the Current Occupant and the Proposed Occupant carried different products and included 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 on-site and off-site install, repair, and remodel services that were not electronics-related or included in the products and services provided by the Current Occupant.
  - On the Site Plan included in its application materials, the Applicant showed activities that occurred outside the structure at the Location, such as the proposed lumber pad at the back of the structure, or described activities likely to occur outside, such as transportation and equipment rentals.
  - As such, the Proposed Occupant was not an electronics-related retail store and contained products and activities t different than those provided by the Current Occupant and had not presented any evidence to prove that the Proposed Occupant's activities existed at the Location as of June 5, 2019 when the Town Center zoning went into effect.
- Step 3. Is the proposed use a continuation of the current non-conforming use? (Slide 11)
  - 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.
  - In the current matter, the reference point was the nature and extent of the Location as of June 5, 2019 as determined by the DRB in Case File No. DB24-0002, Resolution No. 429. The City was entitled to draw distinctions between uses, and once the City drew a distinction between uses, it was entitled to determine that certain uses were beyond the scope of a recognized non-conforming use when there was no evidence of such use at the relevant time, and therefore, determine that there was no continuation with respect to those uses.
    - In other words, the Proposed Occupant's proposed use of the Location (Slide 10) went beyond a mere continuation of the non-conforming use of the Location recognized by the DRB.
  - The Proposed Occupant may engage in those uses at the Location only if a recognition of change of use was obtained, which was beyond the scope of the subject matter before DRB tonight.
- The City's conclusionary findings found that the Proposed Occupant's operation at the Location would not be a mere continuation of the non-conforming use previously approved by the City, and therefore, Staff recommended that DRB deny the Proposed Occupant as a continuation of non-conforming use of the Location. (Slide 12)
- Staff's recommendation was based on the following considerations (Slide 13):
  - The 1991 decision and zoning regulations in effect when the 1991 decision was granted were irrelevant to the subject decision.
  - The Proposed Occupant described itself as a home improvement warehouse store, which was not the same as an electronics-related retail store, the legally established, non-conforming use

at the Location. The Proposed Occupant's characterization of the non-conforming use approved by the City as warehouse retail use was incorrect and not persuasive.

- The Proposed Occupant admitted its proposed use of the Location would include the sale of tools and construction products, the rental of transportation vehicles and equipment, technical expertise for improvement projects, and both on-site and off-site installation, repair, and remodeling services.
- Some of the Proposed Occupant's customers included contractors and professionals, which were uses that extended beyond the scope of the Current Occupant's actual use of the Location as of June 5, 2019 when the Town Center zoning went into effect.
- The Proposed Occupant relied heavily on the 1991 decision to substantiate its argument that the proposed use was a continuation of non-conforming use of the Location. The only relevant point of reference when determining the scope of a non-conforming use was the nature and extent of the use of the subject property at the time the use became non-conforming. However, for the sake of responding to the Applicant's argument only, the City had addressed the 1991 decision; a brief synopsis of the detailed discussion in the Staff report was as follows:
  - Based upon the zoning designation of a location, Stage I plans established "bubble diagram" level uses for development and Stage II plans indicate the specific types and locations of all proposed uses, enabling analysis of the 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 Stage II Site Development Plan for the Location. This action changed the land use overlay classification of the Location to Central Commercial (CC). 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.
  - The proposed development, called Project Thunder, an electronics-related retail store, was considered consistent with the CC use category when 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 of the Location were not listed in the CC use category, but were included in other land use categories such as Service Commercial and Food and Sundries.
  - No reference to warehouse retail use or commercial retail center existed in the 1991 decision, Ordinance No. 55 land use categories, or in the Stage I Master Plan. While the Applicant asserted that warehouse retail or commercial retail center was the approved use and that the Current Occupant and the Proposed Occupant were the same, Project Thunder was never approved as such; therefore, neither the 1991 decision nor the zoning regulations in effect in 1991 were relevant in the matter before the DRB tonight, and the Applicant had not cited any legal authorities that said otherwise.

**Chair Barrett** called for the Applicant's presentation.

**Ken Katzaroff, Schwabe Williamson & Wyatt, P.C.**, thanked Staff for the detailed report, and the DRB for taking time tonight, noting he had some additional pieces he wanted to highlight.

- The Applicant and Staff clearly disagreed about the relevancy of the 1991 decision, as well as the scope of what the Applicant's request was for; several things were read either out of context or very narrowly, and he wanted to be clear that the proposed use the Applicant was continuing was a retail use writ large, and the 1991 decision specifically approved a commercial retail use.
- He disagreed that the Applicant had not provided any legal authority for why the 1991 decision was relevant, noting the Applicant had provided both evidence and legal analysis.
  - Although not yet briefed, he noted that the Oregon Codification Requirement stated that anything in a land use code had to be codified, including the different types of uses. He referred any attending legal staff to *Waveseer of Or., LLC v. Deschutes Cnty.*, 308 Or. App. 494 or *Nehmzow v. Deschutes County*, 308 Or. App. 533. Although County cases, the statute was essentially the same, with the same language, and required that any particular use had to be specifically codified. For the subject application, the specific codification was for retail use, not a difference between an electronics or a hardware use, which was a burden the City would have to address.
    - In the *Waveseer* case, Deschutes County attempted to invent a new use in its Code, and although rare, ultimately had to pay attorneys' fees, which showed that these issues were real and important.
    - He stated the Applicant would provide [inaudible] in the open record and final legal argument, adding it would be potentially important to the legal analysis provided to the Board.
- He was unclear about Staff's comment about a required future land use review because the Applicant was present for a continuation of an existing use, and the Applicant had neither seen nor heard about an additional land use requirement that would be overlaid to continue an existing use.
- He noted the Applicant had appealed the Class I decision to City Council, which was scheduled to be heard on April 15, 2024. In the Staff report, the authority for positions taking was based largely on that decision, which was still pending. Nevertheless, the Applicant believed the DRB could make a determination that the proposed use of the Location was a valid continuation of the existing use should the DRB choose to do so.
- What the Applicant wanted to do at the Location was relevant to the entire discussion about what the previous or existing use was and how Home Depot fit that exactly.

**Barry Simmons, Real Estate Manager, Home Depot, 2455 Paces Ferry Rd NW, Atlanta, Georgia, 30339** stated that as the Applicant, they were told they bore the burden of proof to show that the Current Occupant and Proposed Occupant had the same commercial retail uses. He gave the Applicant's presentation via PowerPoint as follows (Exhibit B3):

- The Fixture Plan provided by the City showed the interior walls for the Current Occupant (left) and what Home Depot proposed (right). He noted no exterior Garden Center would be at this location, which was alluded to in the Staff report, and that the Applicant would only use the existing building as it exists. (Slide 2)
- He emphasized that no expansion of the existing use would occur. Based on previous documentation that had been referenced, the previous commercial user had approximately 4,100 vehicle trips in its Traffic Study. Home Depot would not generate nearly as much traffic and anticipated that approximately 1,800 daily trips would be taken off the roads. (Slide 3)
  - Home Depot also had a much lower parking requirement than the nearly 840 parking stalls of the current or previous user. Home Depot requested only 400 parking spaces, as was typical of

its stores. The benefit of that reduction would leave about 5 acres of current parking area that could be redeveloped for other uses that aligned with the Town Center Plan.

- To demonstrate the continuation of commercial retail use, he noted how the current and proposed occupancy aligned as follows:
  - Both commercial retailers had similar points of sale as both required customers to pick up their merchandise, bring it to the front for purchase, and exit from the front of the building. The last customer interaction within the store for the Proposed Occupant would be located adjacent to the exit, same as the Current Occupant. (Slides 4)
  - Commercial retail also involved the necessary function of processing returns, and Home Depot's return-processing area fell almost within the same side of the store as the Current Occupant. (Slide 5)
    - Home Depot offered a store pickup service similar to that offered by Fry's Electronics wherein customers could buy online and pick up in store (BOPIS). The previous user used cages to protect those purchased products, and Home Depot used lockers.
  - The customer experience and navigation through the store were similar. Both occupants used signage for wayfinding and to assist customers in locating products for purchase, as well as aisle signage with numerical identifiers to indicate what products were on the aisle; both were examples of continuation of commercial retail use. (Slide 6)
  - Products displayed in the aisles were laid out similarly between both the previous Commercial Retail occupant and Home Depot's proposed Commercial Retail occupancy with merchandise organized within aisles by related project. Products were displayed for easier customer access, and both the current and proposed retail users used endcaps to maximize the space in which product was shown to customers. (Slide 7)
  - The Applicant disagreed with Staff's implication that Home Depot offered services that the previous Commercial Retail User did not. He displayed two examples of customer service locations within a Home Depot store, a paint desk and computer work desk. Both the previous and proposed commercial retailers offered technical expertise and customized products. While the previous commercial retailer might sell a software package and install it onto a hardware device in-store, Home Depot offered the technical expertise of a sales associate who could mix custom paint colors for a customer. As such, there was a level of service and a level of technical expertise found in both uses. (Slide 8)
  - Additional Services. Both the current previous user and the proposed user used signage hung from ceiling fixtures to advertise available services, such as product delivery, which both the previous and proposed users provided as an off-site service to their customers; additionally, both had sales associates available for customer assistance. (Slide 9)
  - The continuation of retail use between the two users was also shown by major end items: hardware for desktop computers with monitors offered by the previous occupants and appliances offered by Home Depot as a retailer. Even the layouts were similar within the stores. (Slide 10)
  - Both stores utilized similar merchandizing display techniques. Both the previous commercial retailer and proposed use displayed product examples on a counter for customers to see and touch with inventory for sale available underneath the display. (Slide 11)

- Both the previous and proposed retailers displayed merchandise on similar fixtures, such as a pegboard fixture with hangers, featuring product information and price posted for each individual item. (Slide 12)
- Component Items. Just as game cartridges were components for gaming systems, Home Depot effectively had saw blades as components to circular saws, which was a fair analogy of continuation of retail use as both the previous and proposed occupants sold the end item and its components. (Slide 13)
- Both the previous and proposed users dedicated floor space to seasonal sales areas that featured floor-stacked product with sales signs for easy customer access. Product quantities varied based on seasonal demand and often involved discounts. For the previous user, the holiday season was at the end of the year, while for the proposed user, spring was its holiday season. (Slide 14)
- Both users sold furniture. The previous occupant sold gaming chairs, for example, and Home Depot sold patio furniture, and both users had floor space dedicated to those particular furniture offerings. (Slide 15)
- Both the previous and proposed users had ancillary sales, items that may or may not be directly related to either electronics or home improvement. For example, both stores sold hats, one for winter use and one for summer use. Additionally, both stores displayed the hats in packaging direct from the manufacturer in containers set up and ready to be placed in locations, such as aisles in the customers' path to entice them to buy the items, which was another example of the continuation of commercial use. He added the pricing was almost identical as well. (Slide 16)
- The customer experience upon entering the store was almost identical, right down to the shopping carts both users provided as a service to their customers. Additionally, both users' carts were branded with their respective store logo. (Slide 17)
- A summary of the aforementioned examples was displayed to give Board a sense of why the Applicant believed this was a continuation of use from the previous user to the proposed use and that it was all commercial retail. (Slide 18)
  - Regarding Staff's comment regarding "Marketed to Professionals", the Applicant believed the previous user also marketed to professionals as their slogan was, "From the hobbyist to the Silicon Valley professional." The proposed user's tagline is, "From the do-it-yourselfer to the pro," and he saw no significant difference between those two approaches.
  - He believed reasonable people would agree that both the previous user and the proposed use were both commercial retail uses.
- The proposed Home Depot store was planned as a non-prototypical Home Depot, so any comparisons to other stores was unfair. The Applicant understood they were moving into an existing building, were not able to change the exterior, and were not able to perform other functions. (Slide 19)
  - He noted that not all Home Depot stores carried the same products or services, which was sometimes due to compliance with local requirements, regional differences in products, or the physical arrangement of the store.
  - The Applicant believed the proposed usage represented a sustainable reuse of the existing building. The proposal from others that the Applicant demolish and replace the building did not make sense.



- There was no exterior garden center and one was never proposed. Home Depot's live goods would be inside the existing building.
- The lumber pad referred to by Staff was not exterior storage or part of the customer experience. Lumber pad was an internal term used by Home Depot to refer to product that arrived at the store on a flatbed, as opposed to in a box truck or 53-ft trailer that could back into a loading dock, and was, effectively, a receiving function for the store.
- The Home Depot had not applied for sidewalk sales, outdoor seasonal sales, exterior shed displays or exterior rental staging, so any comparisons to other stores was unfair as none of that had been requested at the subject location.
- The Home Depot direct-to-customer delivery capability reduced the volume through its stores. Home Depot has opened approximately 50 million sq ft of new distribution centers over the past five years, including flatbed distribution centers and market delivery operations.
  - For example, the store likely had enough inventory for a parent to buy enough lumber to build a treehouse; however, if a pro went to a store to buy enough lumber to build a house, a sales associate would have the lumber delivered directly from the distribution center straight to the job site. The sale would be attributed to the store, but the stores did not carry that volume of lumber. This system was more efficient for both Home Depot and the customer and eliminated large orders passing through the stores. The quantity of some of Home Depot's product selections, particularly on the pro side, was much less as well.
  - Items such as large appliances did not leave the store the same way as smaller items. There were market delivery operations, including within the subject market, wherein appliances were ordered and delivered to customers direct from the distribution center without passing through the store. Any preconceived notions regarding the volume of materials that would move customers in and out of the store were likely different today as Home Depot was capitalizing on market forces the previous user was not able to capitalize on.
- He displayed Town Center Plan Figure 3.6, noting the existing buildings shown in white and the new/infill development shown in purple. The existing subject 125,000 sq ft building was anticipated to be a part of the Town Center Plan for at least the next 20 years or more. (Slide 20)
- In furtherance of the Town Center Plan, Home Depot would be able to use the 5 acres of parking lot that Home Depot did not need to develop the multi-family housing, etc. in the Town Center Plan. The Applicant believed about 275 housing units could be added to the market, though no designs had been finalized, and that such a development was fully in alignment with the Town Center Plan. (Slides 21-23)
  - He displayed various renderings of the Applicant's high-level proposal, including a side-by-side with Figure 3.6 to demonstrate the alignment and what the Applicant believed the 15 acres could be for Wilsonville. The Applicant was willing to work with Staff and wanted to be a partner in bringing that vision of the Town Center Plan to reality for the city of Wilsonville.
- There were several existing multi-family mixed-use developments around a Home Depot throughout the country and two were in relatively close proximity:
  - Store No. 4233, opened in Lynnwood, WA in August 2021 was an example of a Home Depot being integrated with a mixed-use multi-family development. (Slide 24)
  - The Home Depot in North Surrey, Canada, opened in April 1994 and architectural renderings were shown of what had been planned and what the space looked like today. (Slides 25-26)

- There were many other examples from across the country, which he believed might be in evidence already, but only two were chosen to highlight in the interest of time.
- As a Commercial Retail User and the benefits Home Depot could offer, he highlighted the following:
  - Home Depot had set a goal that by 2028, 85% of its lawn and outdoor equipment, handheld mowers, etc. would be battery-powered or electric, as the company was trying to eliminate gas equipment. More than 90% of Home Depot's store leaders and managers started as hourly employees. (Slide 27)
    - Since 2011, Home Depot had donated \$450 million and 1.5 million hours of service to veterans' causes. Home Depot also had \$3.4 billion diversity spend.
  - Home Depot was making strides to reduce packing material, including reduced use of packing foam and eliminating 81 million sq ft of PVC film and 940,000 pounds of damaged products that would have ended up in landfills. (Slide 28)
    - Home Depot won the Energy Star Retail Partner of the Year Award and constantly discussed how to constantly look at sustainable functions to save water and energy, such as the sourcing of materials and packaging, waste management, the products they offered, and even responsible chemistry from its cleaning products to garden products.
  - Home Depot's economic impact specifically within Oregon was detailed on Slide 29.
- He concluded stating it was reasonable to believe that the previous user and proposed user were both retail uses, and that Home Depot would be a benefit to the community, both economically and for sustainable reasons.

**Mr. Katzaroff** reiterated that the Applicant really believed the proposed use was a continuation of the commercial retail. The Applicant also understood that Wilsonville had spent a large amount of community hours, Staff time, etc. designing the Town Center Plan. The Location was already planned to be part of the Town Center Plan for at least the first 20 years, and the Applicant's proposal was not inconsistent with that Plan.

- He noted an existing set of CC&Rs overlaid the Town Center that were currently problematic to effectuate the Town Center Plan, such as residential uses that were not allowed. In order to implement the Plan at all, property owners like Home Depot would need to work together to amend those CC&Rs so the Town Center Plan could be effectuated, and the Applicant was committed to doing that.
  - The Applicant would submit a memorandum from City Staff to the record during the open comment period that specifically addressed the issue and how the Town Center Plan could not come into fruition without an amendment to the CC&Rs. The Applicant would likely also submit portions, or all, of the CC&Rs as well.
  - Because the Applicant was a partner in this project and wanted to partner with the City, he wanted to ensure the DRB was aware that had to be figured out to effectuate the Town Center Plan.

**John Andrews** asked if the rendering showing the Home Depot store surrounded by the mixed-use residential buildings was committed or if the Applicant could change it and use the property differently after approval.

**Mr. Katzaroff** replied the Applicant wanted to develop the property in conjunction with the City, so whether the City wanted 5-over-1 retail, mixed-use, or something else, the Applicant was trying to

create an opportunity to effectuate the Town Center Plan. In many other jurisdictions, the Applicant had worked with cities in the form of a development agreement or other conditions of approval to make that happen. So, the Applicant had the ability to change the site to free up about 5 acres of property for another use.

**Mr. Simmons** added that the proposed rendering was a vision the Applicant had that they believed aligned with the Town Center Plan. The Applicant was open to a development agreement with the City and working with Staff on what the out parcels would be used for.

**Mr. Kataroff** replied Home Depot spent a lot of money on infrastructure improvements when redeveloping these sorts of sites.

**Mr. Simmons** stated Home Depot would normally spend about \$20 million on site work and infrastructure associated with a store.

**Mr. Andrews** asked how the \$20 million would be used.

**Mr. Kataroff** responded it would be spent on upgrades to roads, water systems, sewers, and everything else necessary to service the site and every use that would be out there. As the first major redevelopment in the area, potentially, Home Depot had to set the stage and was prepared to do so.

**Chair Barrett** called for public testimony regarding the application and confirmed with Staff that no one on Zoom indicated they wanted to testify. She called for public testimony from anyone present at the meeting.

**Shawn O'Neil** stated he was a Wilsonville community member and former of DRB Panel B member, and that he was against the Applicant's proposal. He asked Board members to support the City's plan to oppose the development, and outlined why with the following comments:

- His law firm was down the street from the proposed development, in the vicinity of Citizens Dr and Town Center Lp West, and the current traffic level was a challenge. He believed the Applicant's suggestion that traffic for Fry's was similar or less than Home Depot's was a misstatement, and the volume of traffic with a Home Depot there would be far greater.
  - While customers could frequently buy electronics from online retailers, Home Depot customers, both contractors and the general public, would have to physically drive to the location more often, which would impact traffic on Citizens Dr trying to get on Town Center Lp. Traffic was already problematic given the redesign from one lane to two lanes at that location, so he believed the proposal was not a good fit from a traffic viewpoint.
- The whole concept was inconsistent with the Town Center Plan. He heard promises from the Applicant that they would invest a lot of money, which sounded like a car salesman pitch. He did not view that offering as something to be relied on unless it was written in stone.
- A Home Depot would impact small businesses in the area that would struggle to get their customers to see their businesses. Additionally, small businesses employed a lot of people in the community and had given a lot to local schools. Home Depot was not as connected to the community as those small business owners.

- He understood the decision was not a planning issue. He had been a DRB Board member, he looked at this community that they all lived in, and the people coming in from Home Depot did not live there.
- The Applicant had brought their attorney, who threatened legal fees. As a fellow lawyer, he wondered why Home Depot would come in and present their proposal to the DRB like a bully, effectively stating that if the decision did not go their way, they would sue the City. He had a problem with that.
- He loved Home Depot. He liked them in Sherwood and in Tigard, but he noted the road design was different at those locations and not the loop design at the subject location. The loop road in Wilsonville encompassed a great deal of entities such as City Hall, small mom-and-pop stores and food stores, and a Home Depot would not fit into that concept as the Applicant would like the City to believe.
  - He was really concerned that Wilsonville would allow this conglomerate into the community and allow them to dictate how the City was designed, as the Applicant had done tonight in their presentation.
- It really ticked him off that Home Depot had brought their lawyer in from downtown and increased the time and effort put in by Wilsonville's good city planners for tonight's presentation.
- In his experience, City Staff usually endorsed projects, and when he had wondered why Staff had not, he realized Staff was honoring the Plan that was designed for Wilsonville and its community, and he asked the DRB to support Staff's recommendation tonight.

**Aaron Lemka, Manager, Ace Hardware, 29029 Town Center Lp, Wilsonville, OR, 97070** stated he was a 25-year resident of Wilsonville, and he opposed the proposed Home Depot because it would dramatically impact Ace Hardware and could, quite possibly, kill the store.

- He agreed the traffic on both Wilsonville Rd and Town Center Lp was already problematic and having a Home Depot come in would further that, especially with the large delivery trucks and Town Center Lp narrowed to one lane to incorporate a bike lane. The subject site was not ideally set up for large delivery trucks. A Home Depot in Town Center was not a great fit.

**Chair Barrett** asked if Ace Hardware was an electronics store.

**Mr. Lemka** replied it was not.

**Daniel Pauly, Planning Manager**, read into the record an email received from Dave Wortman just prior to the meeting, "I am opposed to Home Depot locating in the Town Center. This runs completely counter to the City's Town Center Master Plan. What's more, Oregon is in a housing crisis. The City has climate-friendly equitable community obligations that both strongly point to this being a mixed-use development. Wilsonville has enough chain big boxes. What we really need is a vibrant walkable city center. Respectfully, David Wortman, Wilsonville." He noted the email from Mr. Wortman would be entered into the record as Exhibit D3.

**Chair Barrett** confirmed there was no further testimony and called for the Applicant's rebuttal.

**Mr. Katzaroff** stated the Applicant had submitted evidence from a traffic engineer, which was controlling on this issue and was the only evidence in the record, but the Applicant was happy to do additional analysis and provide the results if relevant. He again requested that the record be left open.

- He clarified that he had not threatened attorney fees but had pointed out a real issue in Oregon law. The way the Land Use Board of Appeals (LUBA) had decided the Waveseer case in particular was because paying attorney's fees was required under statute and very rare. He was merely noting that the codification requirement was real and had not been addressed by either the Applicant or City Staff as of yet.

**Stephanie Davidson, Assistant City Attorney**, acknowledged that the Applicant's request to leave the record open had been heard.

**Chair Barrett** noted the Staff report addressed the *Fralely v. Deschutes County* case, which addressed the scope of uses being narrow in nonconformance cases; however, the Applicant was asking the DRB to consider a use that was broader than what the City Planner designated. She asked if there was case law that supported that ask.

**Keenan Ordon-Bakalian, Schwabe, Williamson & Wyatt**, stated he was also counsel for Home Depot and that the Applicant would follow-up with citations, but there was nonconforming use case law in Oregon that did address the scope of nonconforming uses and continuations of use even if the distinction was necessarily different between the occupants and the activities they were conducting. He believed those case law citations had been put into the record for the final legal argument the DRB reviewed for the Class I application. They were happy to elaborate on the case law citations and apply them to the subject application specifically. Additionally, he believed that case law was controlling in this instance.

**Mr. Katzaroff** added the case law had to be looked at through the lens of the codification requirement, meaning that the allowed or permitted use still had to be something that was articulated in the Code.

**Chair Barrett** asked who decided that and if that was within the scope of the Board's decision.

**Ms. Davidson** stated she believed that this issue had already been decided by the DRB in the Class I proceeding which was currently on appeal to City Council. As stated in the Staff report, the scope of the nonconforming use was Step 1.

**Mr. Katzaroff** responded he was not sure the Applicant agreed with Ms. Davidson, but that could be addressed further in writing.

**Chair Barrett** noted the Applicant kept saying CC&Rs and she did not think the DRB could make a decision on that in this proceeding.

**Mr. Katzaroff** clarified he had mentioned the CC&Rs once at the end of his testimony. The CC&Rs were not relevant to the question about continuation of use. His point in raising the issue of CC&Rs was to inform the Board that there was an additional item to consider when looking at the Town Center Plan as a whole.

- The City had gone through a monumental planning effort that should be applauded, and everybody attempting to develop in Town Center should do so in a way that was consistent with the Plan. Currently, the Town Center Plan could not be effectuated, period, based upon the CC&Rs, which had to be amended before a multi-family development, or any other use planned for the Town Center, could be developed.
- As a prospective tenant of a continuing use in Town Center, the Applicant wanted to be a part of making those amendments occur and be partner in that. As the CC&Rs were currently drafted, any particular user with more than 30,000 sq ft, i.e. a Fry's Electronics, Home Depot or Safeway, could deny an amendment to those CC&Rs.
  - Rather than being a party that stood in the way via denying an amendment, the Applicant wanted to be a partner with the City and have both the Home Depot store continue its use and effectuate the remainder of the Plan, which the Applicant could help bring to the table.

**Mr. Ordon-Bakalian** reminded the subject discussion regarded a nonconforming use analysis, but future development applications had also been mentioned, as well as an application of the Town Center Plan and the existing zoning of the subject property, and those CC&Rs were directly relevant to that, which was why the CC&Rs were raised here.

**Mr. Katzaroff** agreed, noted the CC&Rs were different than the continuation of use but certainly relevant to the consideration of whether or not it was consistent with the Plan.

**Chair Barrett** understood the Applicant was considering a continuation of use currently, but if they were to develop the property, it would no longer be a continuation of use, and they would have to submit proposals and requests.

**Mr. Katzaroff** responded that was not what the Applicant was saying, rather, there were other uses in the Town Center Plan, and other uses on the properties covered by the CC&Rs, including the subject location, but in order to effectuate development on them, the CC&Rs would have to be amended.

**Chair Barrett** stated there were a lot procedures in place to develop in Wilsonville, and asked why the Applicant was going about their proposal in this way when they could have submitted a Master Plan on a place that would have fit the Home Depot.

**Mr. Simmons** asked if Chair Barrett was asking why Home Depot wanted to be in Wilsonville.

**Chair Barrett** said she was trying to figure out why the Applicant had chosen this difficult process.

**Mr. Simmons** replied he was not sure it was the Applicant making it difficult. Home Depot had identified an empty box that would fit their store, and the procedures to get its business into that box required that they first apply for a Class I Review for the nonconforming use of that existing structure, and then a Class II Review to ensure continuance of the same commercial retail use. The process of Home Depot going into the empty box was being driven by the City of Wilsonville, not Home Depot.

**Chair Barrett** confirmed no further questions for the Applicant.

**Mr. Andrews** asked Staff if there was any acceptable use for the large building sitting in the middle of town according to current regulations.

**Ms. Luxhoj** replied a continuation of use would be another electronics-related retail store locating there, like a Best Buy which would be consistent with what had been determined to be the legally established nonconforming use at the property.

**Kimberly Rybold, Senior Planner**, added that the Town Center Zone now regulated permitted uses within the Town Center. The footprint limitation applied only to retail uses in the Town Center Zone. Other uses were allowed under the Town Center Zone that did not have a footprint limitation. Conceivably, permitted uses within that zone that were larger than a footprint 30,000 sq ft could potentially also locate into the subject building.

- As the Board had discussed and been provided information on previously, other considerations were at play beyond the use, such as site conditions and the structures, and that was where the Applicant had chosen to pursue this process that fell under the nonconforming standards.
- Alternatively, an applicant could apply through the Town Center Zone to get a new planned development approval for the site, but the Applicant had not elected to do that. There was a provision built into the Town Center Zone that contemplated the possibility of a waiver process specifically for retail users that had a footprint greater than 30,000 sq ft, and that option was another, separate, land use approval process than what the Applicant had elected to apply for at this time. The Applicant had chosen to go through the nonconforming process in terms of this particular use and user.
  - While there was a continuation of use under the nonconforming standards, there was also a process whereby a nonconforming use could go through a change-of-use process, which the Applicant did not apply for, but another option was available if one sought to change a currently existing, non-conforming use.
  - She noted those options were outside the scope of this particular proceeding, as indicated earlier by Ms. Luxhoj.

**Kamran Mesbah** asked if Staff had any additional information or responses to the Applicant for the record.

**Ms. Rybold** replied she would like to clarify a statement in Ms. Luxhoj's presentation about an additional land use application process, which Ms. Luxhoj noted was for any additional proposed development, such as future residential development, not what the Applicant had currently applied for. Based on the application materials received by Staff and what the Applicant had applied for, Staff was processing the request purely as a request for a continuation of use.

- She clarified that Figure 3.6 in the Town Center Plan was an illustrative image, and there were a series of illustrative images in the Town Center Plan that illustrated concepts of how the Town Center could build out over time. Figure 3.6 should not be construed to imply that because the existing building footprint was there in that image that it had status in the Plan or that it was planned to be there. It was merely a conceptual drawing.
- To be clear, no proposed development was in the current development application. Anything that would conceive of how to use the site in line with the Town Center Zone would go through a planned development process before the DRB and would apply the standards of Section 4.132.

- The CC&Rs were not a development criterion used by the City to determine whether or not development applications should be approved, so CC&Rs were not under the DRB's purview. Any decisions made by DRB should not consider the presence or absence of CC&Rs and how they may or may not have standards for use.
- Any implications that the City was looking at changes in parking usage or trip generation inherently imply a change of use as opposed to a continuation of use.
- She noted the image comparisons presented in the Applicant's materials were looked at by Staff as a Ven diagram wherein some components of the electronics-related retail store and some components of the home improvement warehouse might look or function the same. Staff's recommendation highlighted that it was the differences that had been presented within the Applicant's materials, including statements within their narrative about the types of functions that they had, that did vary from what the Current Occupant had and functioned as on June 5, 2019.

**Ms. Davidson** noted for the record that Staff looked up the case citations provided by Ken Katzaroff, and in Staff's opinion, the statute at issue in those cases applied to only counties. There were some other distinctions Staff would draw and Staff disagreed with the statement made about those cases earlier.

- Staff still supported what was written in the Staff report in terms of what the analysis was, the fact that the Applicant had the burden of proof, the City was not obligated to produce evidence to support its position in this case, and the scope was pretty narrow; the only thing before the DRB tonight was whether or not Home Depot constituted a continuation of use.

**Mr. Andrews** understood the proposed use was not permitted by the original 1991 agreement.

**Ms. Davidson** replied that in Staff's opinion, based on their analysis of the case law, the 1991 land use approvals were irrelevant to the subject decision.

**Mr. Andrews** asked if there was a later time period in which the City had made specific use decisions.

**Mr. Pauly** explained the original decision was made in 1991, and then the City changed the zoning in 2019. When the zoning changed, the original approval was essentially irrelevant because the Location had become a legal, nonconforming use. The use that existed on that day in 2019 could continue, but the Board was not looking back at 1991.

**Ms. Rybold** clarified that DRB was not looking back at 1991, and anything that was legally nonconforming then fell under the requirements of Sections 4.189 to 4.192 of the Development Code.

**Ms. Davidson** emphasized that any discussion regarding 1991 or 2019 was beyond the scope of DRB's decision tonight. The starting point for tonight's decision was the existing DRB decision, which was on appeal to City Council and currently a City decision. The scope of the nonconforming use in this case was a 159,400 sq ft electronics-related retail store was the starting point for tonight's DRB decision.

**Chair Barrett** noted she wanted to respect the 120-day period of time available to get this filed and asked how to close out the meeting in such a way as to respect the evidence she knew wanted to be submitted.



**Ms. Davidson** replied that Chair Barrett should close the public hearing tonight but leave the record open until 5 pm on Monday, April 15th.

**Chair Barrett** asked if that was acceptable to the Applicant.

**Mr. Katzaroff** replied that was acceptable in terms of new evidence, but he wanted to be mindful that the Applicant still got final legal argument which technically was not counted on the clock, according to ORS 197.797.

**Ms. Davidson** confirmed the Applicant got final legal argument and that DRB Panel B would need to reconvene after the record was closed to review the matter again. Everyone would have 7 days to submit additional evidence and then ultimately the Applicant would have 7 additional days to submit final legal argument. Staff would work with all parties to schedule that additional meeting once a decision was made.

**Chair Barrett** closed the public hearing at 8:06 pm.

**Mr. Pauly** confirmed that adding Exhibit D3 to the record would be done as part of the adoption.

**Chair Barrett moved to keep the public record open for seven (7) days until 5 pm on April 15, 2024. John Andrews seconded the motion, which passed unanimously.**

## **BOARD MEMBER COMMUNICATIONS**

### 2. Recent City Council Action Minutes

There were no comments.

## **STAFF COMMUNICATIONS**

There were none.

## **ADJOURNMENT**

The meeting adjourned at 8:09 p.m.

Respectfully submitted,

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