

VIA: Certified Mail, Return Receipt Requested

March 15, 2024

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

Re: Determination of Non-Conformance  
29400 SW Town Center Loop West

Case File: DB24-0002 Appeal of Administrative Decision  
- Appeal (APPL24-0001)

The Development Review Board's Decision and Resolution No. 429 are attached, affirming the Planning Director Determination in Case File ADMN23-0029 and denying the Appeal in Case File DB24-0002.

Thank you.



Mandi Simmons  
Planning Administrative Assistant

CC: David Fry, Lumberjack LP

CC via e-mail: Kenneth Katzaroff, [KKatzaroff@schwabe.com](mailto:KKatzaroff@schwabe.com)  
Keenan Ordon-Bakalian, [Kordon-bakalian@schwabe.com](mailto:Kordon-bakalian@schwabe.com)  
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Patrick Donaldson, [pfdforbes@aol.com](mailto:pfdforbes@aol.com)

March 15, 2024

**DEVELOPMENT REVIEW BOARD PANEL B**

**NOTICE OF DECISION**

**Application Nos.:** DB24-0002 Appeal of Administrative Decision  
- Appeal (APPL24-0001)

**Appellant/Applicant:** Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)

**Request:** Appeal of Administrative Decision

**Case File Appealed:** ADMN23-0029 Class 1 Review Request

**Decision Appealed:** Planning Director Determination of Non-Conformance

**Owner:** Lumberjack LP (Contact: David Fry)

**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 March 15, 2024, at the meeting of the Development Review Board the following action was granted on the above-referenced subject:

**The Development Review Board affirmed the Planning Director Determination in Case File ADMN23-0029, and denied the Appeal in Case File DB24-0002.**

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 **15<sup>th</sup> day of March 2024** and is available for public inspection. This decision shall become effective on the fifteenth (15<sup>th</sup>) 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.

Attachments: DRB Resolution No. 429

**DEVELOPMENT REVIEW BOARD  
RESOLUTION NO. 429**

**A RESOLUTION AFFIRMING THE PLANNING DIRECTOR'S DETERMINATION OF NON-CONFORMANCE IN CASE FILE ADMN23-0029 AND DENYING THE APPLICANT'S APPEAL DB24-0002.**

WHEREAS, an application for Class 1 Administrative Review (ADMN23-0029), 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 subject of the Class 1 Administrative Review was a Planning Director’s Determination of non-conformance per Subsection 4.030 (.01) A. 7. of the Wilsonville Development Code; and

WHEREAS, the City issued the Planning Director’s Determination, on the above-captioned subject, that Fry’s Electronics is a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions in the Town Center (TC) zone, dated December 28, 2023; and

WHEREAS, within the prescribed appeal period, the Administrative Decision was appealed by Dan Zoldak of Lars Andersen & Associates, Inc. – Appellant/Applicant, dated January 10, 2024; and

WHEREAS, 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”*; and

WHEREAS, per Code Section 4.022 (.01), a decision by the Planning Director on issuance of an Administrative Decision may be appealed, and such appeals shall be heard by the Development Review Board for all quasi-judicial land use matters; and

WHEREAS, the matter at issue will be a determination of the appropriateness of the action or interpretation of the requirements of the Code; and

WHEREAS, the Planning Staff mailed the Notice of Public Hearing for the Appeal on February 6, 2024, in advance of the Public Hearing; and

WHEREAS, the Planning Staff has prepared the staff report on the above-captioned subject dated February 15, 2024, for consideration by the Development Review Board in hearing the appeal; and

WHEREAS, said planning exhibits and staff report were duly considered by the Development Review Board Panel B at a scheduled meeting conducted on February 26, 2024, at which time exhibits, together with findings and public testimony were entered into the public record; and

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

WHEREAS, during the February 26, 2024 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; and

WHEREAS, the Development Review Board Panel B closed the public hearing and unanimously approved the request to keep the record open for Resolution No. 429 until March 4, 2024 at 5:00 pm; and

WHEREAS, on March 4, 2024, the Applicant filed a first written submittal, which has been marked as Exhibit B2, forwarded by Planning Staff to the Development Review Board on March 7, 2024; and

WHEREAS, on March 11, 2024, the Applicant filed a final arguments submittal, which has been marked as Exhibit B3, forwarded by Planning Staff to the Development Review Board on March 12, 2024; and

WHEREAS, on March 14, 2024, commencing at 4:30 pm, the Development Review Board Panel B held a special meeting to consider all evidence timely submitted to, and not rejected by, the Development Review Board regarding Case File No. DB24-0002; and

WHEREAS, the Development Review Board considered all evidence placed before, and not rejected by, the Development Review Board on the record for Resolution No. 429, and, thereafter, deliberated.

NOW, THEREFORE, BE IT RESOLVED that the Development Review Board of the City of Wilsonville does hereby affirm the Planning Director's Determination of Non-Conformance (ADMN23-0029) dated December 28, 2023, attached hereto, with findings and recommendations contained therein, determining that:

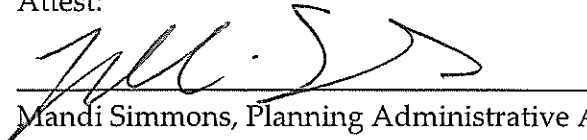
1. There is a legally established non-conforming use at the Location; specifically, that the protected use is "a 159,400 square-foot electronics-related retail store."
2. There is a legally established non-conforming structure at the Location.
3. There are legally established non-conforming site conditions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

ADOPTED by the Development Review Board of the City of Wilsonville this 14<sup>th</sup> day of March 2024, and filed with the Planning Administrative Assistant on 3/14/24. This resolution is final on the 15<sup>th</sup> 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).



Rachelle Barrett, Chair - Panel B  
Wilsonville Development Review Board

Attest:



Mandi Simmons, Planning Administrative Assistant



Exhibit A1  
Staff Report  
Wilsonville Planning Division  
Appeal of Administrative Decision  
29400 SW Town Center Loop West

Development Review Board Panel 'B'  
Quasi-Judicial Public Hearing  
Amended and Adopted March 14, 2024  
Added language ***bold italics underline***  
Removed language ~~struck through~~

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<b>Hearing Date:</b>	February 26, 2024
<b><i>Special Meeting Date:</i></b>	<b><i>March 14, 2024</i></b>
<b>Date of Report:</b>	February 15, 2024
<b>Application Nos.:</b>	DB24-0002 Appeal of Administrative Decision - Appeal (APPL24-0001)
<b>Appellant/Applicant:</b>	Lars Andersen & Associates, Inc. (Contact: Dan Zoldak)
<b>Request:</b>	Appeal of Administrative Decision
<b>Case File Appealed:</b>	ADMN23-0029 Class 1 Review Request
<b>Decision Appealed:</b>	Planning Director Determination of Non-Conformance
<b>Owner:</b>	Lumberjack LP (Contact: David Fry)
<b>Location:</b>	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.
<b>Comprehensive Plan Designation:</b>	Town Center
<b>Zone Map Classification:</b>	Town Center (TC); Sub-districts: Commercial-Mixed Use (C-MU), Mixed Use (MU), Main Street District (MSD)
<b>Staff Reviewers:</b>	Cindy Luxhoj AICP, Associate Planner Miranda Bateschell, Planning Director
<b>Staff Recommendation:</b>	<b><u>Affirm</u></b> the Planning Director Determination of Non-Conformance (ADMN23-0029).

**Applicable Review Criteria:**

<b>DB24-0002 Appeal of Administrative Decision</b>	
<b><u>Development Code:</u></b>	
Section 4.022	Appeal and Call-up Procedures
<b>ADMN23-0029 Class 1 Review Request</b>	
<b><u>Development Code:</u></b>	
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
Subsection 4.035 (.05)	Complete Submittal Requirement
Section 4.102	Official Zoning Map
Section 4.110	Zones
Section 4.132	Town Center (TC) Zone
Section 4.189	Non-Conforming Uses
Section 4.190	Non-Conforming Structures
Section 4.191	Non-Conforming Site Conditions
<b><u>Other Planning Documents:</u></b>	
Previous Land Use Approvals	

**Site Location:**



## Existing Development:



## Procedural Background:

On October 30, 2023, the City received an application for Class 1 Review (ADMN23-0029) to confirm the status of the existing use and structure at 29400 SW Town Center Loop West (respectively, the “Class 1 Review Application” and the “Location”). The Location was previously occupied by Fry’s Electronics, an electronics retail store and has been vacant since 2021. In their submittal, the Applicant requested a Class 1 Review to confirm the status of the existing non-conforming use at the Location.

On November 28, 2023, City staff contacted the applicant by email providing options for processing the application and requesting that they notify staff of their preference by December 8, 2023 (Exhibit A3). Applicant did not contact the City to withdraw the Class 1 Review Application, so the City deemed the application complete on November 29, 2023 and processed the request as a Class 1 Planning Director Determination per Subsection 4.030 (.01) A. 7. of the Development Code. On December 28, 2023, the City’s Planning Director issued a Notice of Planning Director Determination, which provided the Planning Director’s decision on the Class 1 Review Application that Fry’s Electronics located on the subject property is a legally established Non-Conforming Use in a Non-Conforming Structure with Non-Conforming Site Conditions in the Town Center (TC) zone (Exhibit A4) (the “Planning Director’s Decision”).



The Appellant submitted a notice of appeal of the Planning Director’s Decision on January 10, 2024 (the “Notice of Appeal”).

The City is currently processing a separate but related Class 2 Review application per Subsection 4.030 (.01) B. 3, which was filed by the Applicant on December 15, 2023 (AR23-0031) (the “Class 2 Review Application”).

### **Scope of Review:**

This appeal is a *de novo* review of the Class 1 Review Application under Subsection 4.022 (.01) of the Wilsonville Development Code. “De novo,” is Latin for “from the beginning;” the Development Review Board must review the Class 1 Review Application as if the action had not been previously heard and as if no decision had been rendered by the Planning Director. The Development Review Board should base its decision on the testimony, evidence and other material submitted by Applicant to the City in the Class 1 Review Application, as stated in Subsection 4.022 (.07) B. of the Wilsonville Development Code. Further, it shall, by order, affirm, reverse, or modify, in whole or part, a decision that is under review; in this proceeding the decision under review is the Planning Director’s Decision. Subsection 4.022 (.08) A. of the Wilsonville Development Code.

For the purpose of applying the applicable 120-day time limit, a final decision on the Class 1 Application, including any appeals, must be rendered by March 28, 2024.

The Class 2 Review Application, and any issues that are subject to the Class 2 Review – such as the scope of what non-conforming use may be continued – are beyond the scope of this appeal proceeding.

### **Questions Presented:**

On the cover page of the Class 1 Review Application, Applicant requests “non conforming use confirmation.” See Exhibit B1. Reviewing this document with the portion of the Class 1 Review Application titled, “Applicant’s Narrative and Exhibits Demonstrating Compliance with the Relevant Approval Criteria,” City staff believe that Applicant requests an answer to the following questions:

1. Is the Location a non-conforming use?
2. Does the Location contain a non-conforming structure?
3. Does the Location contain non-conforming site conditions?

Considering that this is a *de novo* review of the Class 1 Review Application, the Development Review Board should address all three questions listed above. However, the Notice of Appeal does not challenge the Planning Director’s Decision on the second and third questions listed above. Accordingly, City staff believe that there is no disagreement between the Applicant and the City with respect to these points. The main point of disagreement between the Applicant and the City is the Planning Director’s Decision regarding the first question listed above.

This staff report addresses each question in order, outlining the legal standard that applies to the question, then highlighting facts that staff believe are relevant to the question, and finally, quoting the determination of the question as stated in the Planning Director's Decision.

## **Non-Conforming Use Inquiry:**

### **1. Applicable Legal Standard**

Before a use can be deemed "non-conforming" it must be impermissible under a current land use ordinance. Generally, a non-conforming use is understood to be "one that is contrary to a land use ordinance but that nonetheless is allowed to continue because the use lawfully existed prior to the enactment of the ordinance." *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"). As is outlined in greater detail below, the Location's existing use would not be permitted by the City due to the Town Center Plan, which was adopted effective June 5, 2019.

"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).

Once a use is determined to be impermissible under a current land use ordinance, the question becomes: may the use continue because it is legally protectable as "non-conforming"? "The purpose of a local government proceeding to determine the existence of a 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).

Appellant has the burden of establishing that a non-conforming use exists by substantial evidence in the whole record. ORS 197.835(9)(a)(C); *see also* Subsection 4.014 of the Development Code (stating that the burden of proof is on the Appellant in an appeal); *ODOT v. City of Mosier*, 36 Or LUBA 666, 671 (1999) (citing *Lane Cnty. v. Bessett*, 46 Or App 319 (1980)); *Sabin v. Clackamas Cnty.*, 20 Or LUBA 23, 30 (1990) (citing *Webber v. Clackamas Cnty.*, 42 Or App 151, *rev. den.*, 288 Or 81 (1979)). In other words, the Development Review Board must be sure that its decision – in favor of or against the Applicant's position – is supported by substantial evidence.

The only portion of the City's code that is relevant to this inquiry is Subsection 4.189(.01)A., which states that "[a] non-conforming use may be continued subject to the requirements of this Section." The balance of this code Subsection is irrelevant to the questions before the Development Review Board.

The identity of the party that engaged in the use is irrelevant to this inquiry. *See City of Mosier* at 678 (stating that focus of the inquiry is the nonconforming activities themselves, not whether the entity performing the activity is a landowner, permittee, or licensee). In other words, it is not relevant that the party that engaged in the use at issue was Fry’s Electronics – rather than Applicant.

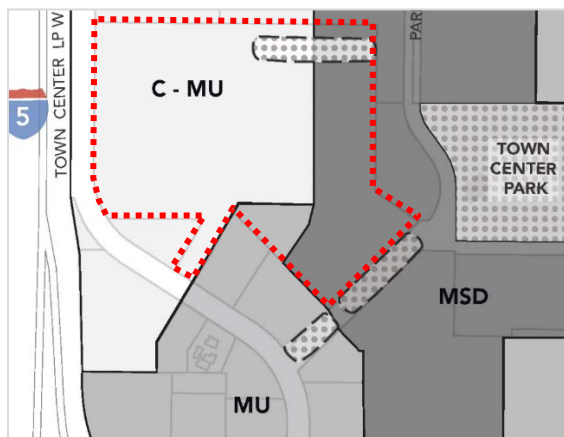
To summarize the legal standard articulated above, the Development Review Board should answer the following questions:

- A. Is the current use of the Location impermissible under a current land use ordinance?
- B. If the answer to the first question is “yes,” what was the actual use of the Location as of the date the ordinance became effective (i.e., June 5, 2019)?

2. Relevant Facts

- A. Is the current use of the Location impermissible under a current land use ordinance?

The Location is currently in the TC Zone, and more specifically, the following three (3) TC sub-districts, as shown in the map below: Commercial-Mixed Use (C-MU), Main Street District (MSD), and Mixed Use (MU).



The C-MU sub-district 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 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.

Applicant appears to concede that use of the Location is impermissible under the City's current Code provisions. *See* Exhibit B1, pages 4-5 and page 15 (referring to the use of the Location as non-conforming).

B. What was the actual use of the Location as of the date the ordinance became effective (i.e., June 5, 2019)?

As of June 5, 2019, the actual use of the Location was a Fry's Electronics store, an electronics retail store with a total interior square-footage of 159,400 square feet and a footprint of 124,215 square feet.

To the extent that the Development Review Board finds it is relevant to this review, the original approval for development of the subject property in 1991 (Case File Nos. 91PC43 and 91DR29) characterized the use as "a retail business with the anonymous name "Project Thunder" "a 159,400 square foot electronics-related retail store." *See* Exhibit B1, page 31.

3. Planning Director's Decision

The Planning Director's Decision addressed this question as follows (see page 3 of Exhibit A4):

"[T]he use is a legally established Non-Conforming Use in the TC zone."

**Non-Conforming Structure Inquiry:**

The Notice of Appeal does not challenge the Planning Director's Decision on this point. Accordingly, City staff believe that there is no disagreement between the Applicant and the City with respect to these point. City staff are providing a complete analysis for the Development Review Board because this is a *de novo* appeal.

1. Applicable Legal Standard

Appellant has the burden of establishing that a non-conforming structure exists by substantial evidence in the whole record. ORS 197.835(9)(a)(C); *see also* Subsection 4.014 of the Development Code (stating that the burden of proof is on the Appellant in an appeal). In other words, the Development Review Board must be sure that its decision – in favor of or against the Applicant's position – is supported by substantial evidence.

Subsection 4.001 (195.) defines a Non-Conforming Structure as "a legally established building or other structure that does not conform with the height, setback, area, lot coverage, or other standards for structures of the zone in which it is located." The definition further states that "a structure may be rendered non-conforming through a change in zoning requirements[.]" Subsection 4.190 (.01) further states that "[a] non-conforming structure that is in use may continue to be used." The balance of this code Subsection is irrelevant to the questions before the Development Review Board.

To summarize the legal standard articulated above, the Development Review Board should answer the following questions:

- A. Is the Location's structure impermissible under a current land use ordinance?
- B. If the answer to the first question is "yes," was the structure legally established and may it continue to be used?

2. Relevant Facts

- A. Is the Location's structure impermissible under a current land use ordinance?

The structure as it currently exists does not conform to many of the design and development standards in Subsection 4.132 (.06), such as building placement and frontage requirements, location of parking in relation to the building, building setbacks, height and number of stories, façade design, and architectural materials and treatments. A waiver to these standards for the existing structure has not been applied for, nor has a waiver been granted.

- B. Was the structure legally established and may it continue to be used?

The Planning Director has conceded that the structure was legally established and complied with the applicable ordinances and standards when it was approved in 1991, and therefore may continue to be used in its current state.

3. Planning Director's Decision

The Planning Director's Decision addressed this question as follows (see page 3 of Exhibit A4):

"[T]he structure is a legally established Non-Conforming Structure in the TC zone."

**Non-Conforming Site Condition Inquiry:**

The Notice of Appeal does not challenge the Planning Director's Decision on this point. Accordingly, City staff believe that there is no disagreement between the Applicant and the City with respect to these point. City staff are providing a complete analysis for the Development Review Board because this is a *de novo* appeal.

1. Applicable Legal Standard

Appellant has the burden of establishing that non-conforming site conditions exists by substantial evidence in the whole record. ORS 197.835(9)(a)(C); *see also* Subsection 4.014 of the Development Code (stating that the burden of proof is on the Appellant in an appeal). In other words, the Development Review Board must be sure that its decision – in favor of or against the Applicant's position – is supported by substantial evidence.

Non-Conforming Site Conditions are defined in Subsection 4.001 (194.) as "a legally established site that does not conform with the landscaping, parking or other site development standards of

the zone in which it is located.” The definition further states that “a site may be rendered non-conforming to development standards through a change in zoning requirements[.]” Subsection 4.191 (.01) further states that “[a] property with non-conforming site conditions that is in use may continue to be used.” The balance of this code Subsection is irrelevant to the questions before the Development Review Board.

To summarize the legal standard articulated above, the Development Review Board should answer the following questions:

- A. Are the Location’s site conditions impermissible under a current land use ordinance?
  - B. If the answer to the first question is “yes,” were the site conditions legally established, and may the Location continue to be used?
2. Relevant Facts

- A. Are the Location’s site conditions impermissible under a current land use ordinance?

The existing site conditions do not comply with at least two City code sections:

- Subsection 4.132 (.04) A. requires that “all development [in the TC zone] will be consistent with the Street Network and Multi-modal Network”. Existing site conditions do not conform with this requirement as they do not include the proposed streets, a multi-use path, and bicycle facilities shown in the Network within or immediately adjacent to the subject property.
- Subsection 4.132 (.05) A. requires that “all development will be consistent with the Open Space Network, shown in Figure 4”. The existing site conditions do not include the proposed open spaces shown in the northeast corner and along the southeast boundary of the subject property and, therefore, are non-conforming with this requirement.

Other site improvement standards of the TC zone address such features as walkway connection to building entrances, parking location, landscape design, and plaza areas.

Existing site conditions do not comply with these applicable standards.

- B. Were the site conditions legally established, and may the Location continue to be used?

The Planning Director has conceded that the site conditions at the Location were legally established and complied with the applicable ordinances and standards when it was approved in 1991, and therefore the Location may continue to be used.

### 3. Planning Director's Decision

The Planning Director's Decision addressed this question as follows (see page 3 of Exhibit A4):

"[T]he existing site conditions are legally established Non-Conforming Site Conditions in the TC zone."

#### **Neighborhood and Public Comments:**

No public comments were received during the public comment period for the appeal.

#### **Conclusion:**

Staff recommends that the Development Review Board affirm the Planning Director Determination of Non-Conformance (ADMN23-0029) 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.

## Master Exhibit List:

Entry of the following exhibits into the public record by the Development Review Board confirms its consideration of the application as submitted. The list below includes exhibits for Planning Case File No. DB24-0002 and reflects the electronic record posted on the City's website and retained as part of the City's permanent electronic record. Any inconsistencies between printed or other electronic versions of the same exhibits are inadvertent and the version on the City's website and retained as part of the City's permanent electronic record shall be controlling for all purposes.

### Planning Staff Materials

- A1. Staff report and Findings (this document)
- A2. Staff's Presentation Slides for Public Hearing (to be presented at Public Hearing)
- A3. Staff Email Correspondence with Applicant regarding ADMN23-0029, Dated November 28, 2023
- A4. ADMN23-0029 Class 1 Planning Director Determination of Non-Conformance, Issued December 28, 2023

### Materials from Applicant

- B1. **Applicant's Materials** – *Available Under Separate Cover*  
Signed Application Form  
Applicant's Notice of Appeal
- B2.** **Applicant's First Open Record Submittal Dated March 4, 2024**
- B3.** **Applicant's Final Arguments Dated March 11, 2024**

### Public Comments

- C1.** **Homebuilding Association of Greater Portland Comment Dated February 26, 2024**



## **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 application for Class 1 Review (ADMN23-0029) has the signatures of David Fry of Lumberjack LP, owner, and Dan Zoldak of Lars Andersen & Associates, Inc., applicant and authorized representative.

#### **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. The following documents/testimony within Exhibit B1 are hereby deemed rejected and are excluded from the record as being beyond the scope of this Class I Review and/or not relevant to the Class I Review:

- Page 6 of 184: 3rd Paragraph – entire paragraph (parking calculations are irrelevant)
- Pages 18-19 of 184: Photographs (not Wilsonville, irrelevant)
- Page 19 of 184: 2nd Paragraph – 1st, 2nd, and 3rd sentences (continuing on page 20) (relates to Class II)
- Page 20 of 184: 1st Full paragraph – entire paragraph (relates to Class II)
- Page 20 of 184: Response to WDC 4.189.02 Change of Use – 2nd sentence (relates to Class II)
- Page 21 of 184: Response to WDC 4.190.05 Non-Conforming Structures – entire paragraph (relates to Class II)

- Page 184 of 184: Proposed site plan for Home Depot – entire page (irrelevant, relates to Class II)

**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). There are two (2) proposed open space areas within or adjacent to the property. 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.

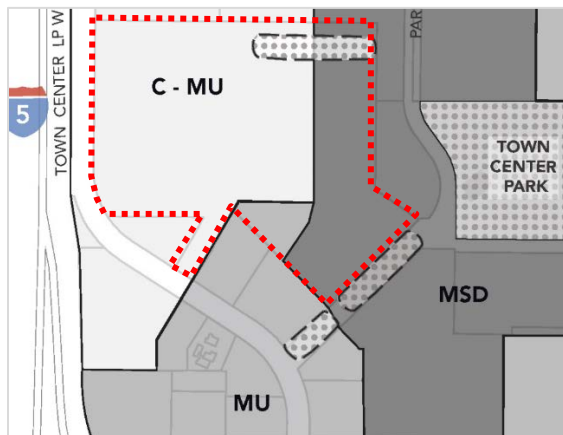
**Request: ADMN23-0029 Class 1 Review Request**

**Town Center (TC) Zone**

**Purpose of Town Center Zone**

Subsection 4.132 (.01)

- A1.** The TC Zone in which the subject property 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 subject property 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.

- A2.** 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 existing use on the subject property 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.

- A3.** 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 use on the subject property 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.

## Consistency with Street Network and Multi-modal Network

### Subsection 4.132 (.04) A.

- A4.** With regard to site conditions, per Subsection 4.132 (.04) A., “all development [in the TC zone] will be consistent with the Street Network and Multi-modal Network”. The purpose of the network plans (Figures 2 and 3) is to support creation of a highly connected and walkable Town Center where there are options for travel. Several proposed streets, a multi-use path, and bicycle facilities are shown within or immediately adjacent to the subject property. Site conditions as they currently exist on the subject property do not comply with these applicable standards.

## Consistency with Open Space Network

### Subsection 4.132 (.05) A.

- A5.** Per Subsection 4.132 (.05) A., “all development [in the TC zone] will be consistent with the Open Space Network, shown in Figure 4”. Proposed open spaces are shown in the northeast corner and along the southeast boundary of the subject property; however, these are not included in the existing development. Therefore, existing site conditions do not comply with these applicable standards

## Consistency with Design and Development Standards of TC Zone

### Subsection 4.132 (.06)

- A6.** With regard to structures and site design, per Subsection 4.132 (.06), all developments must follow the design and development standards unless a waiver is granted by the Development Review Board per Subsection 4.132 (.06) D. The existing building, as it currently exists on the subject property, does not conform to many of the design and development standards in Subsection 4.132 (.06), such as building placement and frontage requirements, building setbacks, height and number of stories, façade design, and architectural materials and treatments. A waiver to these standards for the existing structure has not been applied for, nor has a waiver been granted. Therefore, the existing structure does not comply with these applicable standards.

## **Other Development Standards**

### **Non-Conforming Uses**

Subsection 4.001 (196.) and 4.189

- A7. 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.)). As noted elsewhere in this report, the existing use 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 use is a legally established Non-Conforming Use in the TC zone.

### **Non-Conforming Structures**

Subsection 4.001 (195.) and Section 4.190

- A8. Subsection 4.001 (195.) defines a Non-Conforming Structure as “a legally established building or other structure that does not conform with the height, setback, area, lot coverage, or other standards for structures of the zone in which it is located”. The definition further states that “a structure may be rendered non-conforming through a change in zoning requirements or through the acquisition of some portion of the property by a public agency.” As noted elsewhere in this report, the structure as it currently exists does not conform to many of the design and development standards in Subsection 4.132 (.06), such as building placement and frontage requirements, location of parking in relation to the building, building setbacks, height and number of stories, façade design, and architectural materials and treatments. The structure is a legally established Non-Conforming Structure in the TC zone.

### **Non-Conforming Site Conditions**

Subsection 4.001 (194.) and Section 4.191

- A9. Non-Conforming Site Conditions are defined in Subsection 4.001 (194.) as “a legally established site that does not conform with the landscaping, parking or other site development standards of the zone in which it is located”. The definition further states that “a site may be rendered non-conforming to development standards through a change in zoning requirements or through the acquisition of some portion of the property by a public agency.” As noted elsewhere in this report, existing site conditions do not conform TC zone requirements including planned streets, a multi-use path, bicycle facilities, open spaces, parking location, landscape design, and plaza areas. The existing site conditions are legally established Non-Conforming Site Conditions in the TC zone.