

July 14, 2022

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**VIA E-MAIL**

Washington County Hearings Officer  
Department of Land Use and Transportation  
155 N 1st Avenue, #350-13  
Hillsboro, OR 97124

RE: In-N-Out Burger  
Case File L2200066-SU/D/PLA/PLA

Dear Hearings Officer Turner:

This firm represents In-N-Out Burger, Applicant (the “Applicant”) in the above-referenced file. We greatly appreciate County staff’s hard work and review of this Application. The following is the Applicant’s final written argument on this matter. This letter is respectfully submitted prior to the end of the final written argument period at 4:00 p.m. on Thursday July 14, 2022. Please note that it also addresses public comments made available to the Applicant by the close of Open Record Period 1.

**I. INTRODUCTION**

The Application satisfies all applicable criteria. While the Applicant appreciates the issues addressed in public comments, none of the public comments address the approval criteria or offer substantial evidence showing how the Application does not meet the approval criteria. Staff also concurs that the Application meets all approval criteria.<sup>1</sup> Therefore, the Hearings Officer should approve the Application on that basis.

Although the public comments received to date do not address the approval criteria, they do express issues with potential traffic impacts and in particular, the scope of the Traffic Mitigation Plan (the “TMP”). The Applicant is receptive to the public’s issues and has proposed additions to the TMP to address those issues. The additions include a requirement to evaluate SW Western Avenue and the SW 102<sup>nd</sup> Avenue/SW 103<sup>rd</sup> Avenue corridor in the TMP, as these were identified

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<sup>1</sup> In its July 7, 2022 memorandum to the Hearings Officer, County staff found that “[t]he applicant has provided the necessary information in the application materials, including the narrative, for staff to make all required *Findings of Fact* based on the information provided, as well as mitigated through the implementation of Conditions of Approval (Attachment-B) in order to support the recommendation to the Hearings Officer.”

during the June 16, 2022 hearing as areas of concern. The additions were accepted by staff, and are now contained in Section II.F.8 of staff's suggested conditions.

## II. CONDITIONS OF APPROVAL

The Applicant accepts and supports almost all of the conditions of approval in their current form and only requests the modest changes proposed in its June 15, 2022 letter to the Hearings Officer. The Applicant's proposed revisions modify the required timing of performance to be consistent with standard construction practices, but did not request significant changes in the substance of the conditions. In its July 7, 2022 memorandum to the Hearings Officer, staff states that it "is not in support of the suggested changes to the *Timing of Performance of Conditions* as outlined in the applicant's letter." Staff provides no explanation, however, as to why it opposes these suggested changes.

The Applicant's requested changes are reasonable considering the timing of the approval process. The proposed conditions in Section II must be completed "Prior to Final Approval" of the project. These conditions require: recording of the right-of-way dedication and vehicular access restriction, submittal of a "Design Option" form and deposit, obtaining department approval and providing financial assurance to obtain a facility permit, petitioning for service and formation of a Service District for Lighting assessment area, obtaining an ODOT Miscellaneous Permit, submittal of final forms and fees to Planning Services, and obtaining approval of the TMP. However, it is impractical as a matter of sound project management to satisfy many of these conditions before "final approval" is granted, because the final approval will ultimately confirm the final design and the Applicant's ability to develop permit drawings, donate rights-of-way, construct public improvements, and provide the required fees and assurances. For these reasons, the Hearings Officer should approve the Application the Applicant's revisions to the conditions of approval, as proposed in the Applicant's June 15, 2022 letter. **Exhibit A.**

## III. ZONE CROSSING

The issue of zone crossing was raised in public comments and at the June 16th hearing, specifically it was raised that to get to the drive-through cars must cross the OC zone. This is not true for two reasons. First, as shown by the graphical attachment to Kittelson & Associate's June 28, 2022 memorandum to the Hearings Officer (the "Kittelson Memo"), cars do not have to cross the OC zone to get to the drive-through. Staff agreed with this assessment, and in its July 7 memo to the Hearings Officer, staff concurred "that the drive-thru functions occur strictly in the Community Business District (CBD) only and not in the OC zoning district." Second, *Wilson v. Washington County*, 63 Or LUBA 314 (2011), the case that established the principle of zone crossing, is distinguishable from the circumstances here. In that case the proposed use "include[d] the driveway that is *necessary* to connect that [use] with the nearest public right of way." *Wilson*, 63 Or LUBA at 319 (emphasis added). Here, it is not *necessary* for cars to cross the OC zone to get to the drive-through; they can access it solely through the CBD zone. The Hearings Officer can therefore find that there is no zone crossing issue.

#### **IV. RESPONSE TO PUBLIC COMMENT**

Below is a summary of public comments received before the close of Open Record Period 1, followed by the Applicant's responses. Most comments, if not all, do not address any approval criteria, and for that reason and the reasons below, the Hearings Officer can and should reject opposition arguments and find that the Application satisfies all applicable criteria.

##### **a. Traffic**

The majority of public comments received raise issues regarding increase in traffic along Beaverton Hillsdale Highway and surrounding streets/neighborhoods, as well as other traffic related issues. While the Applicant appreciates these issues, the only traffic analysis submitted into the record by a professional transportation engineer was done by the Applicant's consultant, Kittelson & Associates, and it was reviewed and approved by County and ODOT staff. No other party has offered evidence or analysis of any kind. As such, both the County and ODOT have deemed that traffic-related approval criteria are adequately addressed in the memoranda submitted by Kittelson & Associates on May 21, 2021, January 26, 2022, and June 28, 2022, and will be further addressed in the TMP. Specifically, the memoranda show:

- The project will result in a reduction of traffic generated from the property (Table 1, January 26 memo);
- The trip generation data, which supports the above point, was based upon actual traffic counts at existing In-N-Out Burger restaurants, which are higher than would be estimated using nationally-relied upon fast food restaurant data;
- After the initial opening period, all intersections studied will satisfy ODOT and Washington County mobility targets; and
- The proposed site has been designed to meet peak queuing needs measured at other In-N-Out locations.

Additionally, the project will result in closure of an existing access onto SW Laurel Road and an existing access on Beaverton Hillsdale Highway. These closures are consistent with the designated function of both streets and the agency access guidelines. Based on the above, the Hearings Officer should find that traffic related criteria are adequately addressed.

##### **b. Parking**

Public comments raised issues regarding parking capacity. As explained in its June 15, 2022 letter to the Hearings Officer, the Applicant has provided additional parking on-site to address such issues. These additional parking spaces will prevent any adverse parking impacts.

**c. Impact on Surrounding Businesses**

Public comments raised issues regarding the impact on surrounding businesses. The Washington County Community Development Code (the “CDC”) does not require that there be no impacts on surrounding businesses. All that is required is that the project is arranged “for compatibility with adjacent developments and surrounding land uses.” CDC 406-2.4. In the Staff Report, staff concluded “[t]he proposed restaurant is compatible with existing and surrounding properties.” Therefore, the Applicant has ensured the project is compatible with surrounding uses, and is not required to do more.

**d. Emergency Response Times**

Several public comments raised issues about the effect of increased traffic on emergency response times, and on the nearby Kaiser medical facility. As noted above, the Kittelson analyses clearly documents that the proposed In-N-Out restaurant would result in fewer vehicular trips than could be generated by the re-occupancy of both restaurants on-site (and consistent with prior year when both restaurants were fully operational). Additionally, as part of its TMP, the Applicant is required to address emergency vehicle access routes. The Applicant’s TMP is “carefully crafted . . . specific to the surrounding street network, the adjacent land uses, the number of stores in the market, and collaboration with agency staff and emergency service providers.” Therefore, emergency access routes will be adequately addressed by the TMP.

**e. Noise**

One public comment raised noise issues due to increased traffic. However, when addressing noise adjacent to residential zones the Staff Report states “uses on the subject site are and have been commercial uses since the 1970s, therefore anticipated impacts associated with the commercial use will be similar if not less in nature.” Staff Report at 5. Additionally, as required by CDC 423-6 (Environmental Performance Standards), the project will comply with Chapter 8.24 of the Washington County Code of Ordinances which regulates noise control. However, these standards do not require a noise study as a matter of course, nor is there any evidence that the use will actually increase noise beyond existing conditions.

**V. CONCLUSION**

For the above reasons, the Applicant respectfully requests that the Hearings Officer approve the application with the conditions of approval recommended by staff with the modest changes requested by the Applicant.

Washington County Hearings Officer

July 14, 2022

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Best regards,



Garrett H. Stephenson

GST:jmhi

Enclosure

cc: Ms. Cassie Ruiz (*via email w/enclosure*)  
Ms. Emily Bateman (*via email w/enclosure*)  
Ms. Julia Kuhn (*via email w/enclosure*)  
Ms. Chris Brehmer (*via email w/enclosure*)  
Ms. Sandra Freund (*via email w/enclosure*)

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June 15, 2022

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Department of Land Use and Transportation  
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RE: In-N-Out Burger  
Case File L2200066-SU/D/PLA/PLA

Dear Hearings Officer Turner:

This firm represents In-N-Out Burger, the Applicant in the above-referenced file. We greatly appreciate City staff's hard work and review of this Application. This letter addresses some of the proposed conditions of approval and addresses the Applicant's request to exceed the maximum permitted parking standards. The Applicant accepts and supports almost all of the conditions in their current form. However, at this time the Applicant respectfully requests some minor changes to the conditions to modify the required timing of performance, but not the substance of these conditions.

**1. Conditions of Approval**

**a. Timing of Performance of Conditions**

As stated in Attachment B to the Staff Report, the proposed conditions outlined in Section II must be completed "Prior to Final Approval" of the project. However, the Applicant is unable to satisfy these conditions until after final approval for the project is granted because the final approval will ultimately dictate design and the Applicant's ability to develop permit drawings, donate rights-of-way, and provide the required fees and assurances to satisfy these conditions. As a result, the Applicant respectfully requests the following revisions to the timing of performance of the conditions contained in Section II, as follows:

- Condition II(B) "Record the Following Documents...": The Applicant requests that this condition be satisfied prior to building occupancy and/or final building inspection approval. This condition would be moved to Condition VI.
- Condition II(C) "Submit to Current Planning Services...": The Applicant requests that this condition be satisfied prior to the issuance of any building permit for the project. This condition would be moved to Condition IV.

- Condition II(D) “Obtain Department approval...”: The Applicant requests that this condition be satisfied prior to the issuance of any building permits for the project. This condition would be moved to Condition IV.
- Condition II(E) “If applicable, ensure maintenance and power costs...”: The Applicant requests that this condition be satisfied prior to building occupancy and/or final building inspection approval. This condition would be moved to Condition VI.
- Condition II(F) “Obtain Oregon Department of Transportation Permit...”: The Applicant requests that this condition be satisfied prior to the issuance of a building permit for the project. This condition would be moved to Condition IV.
- Condition II(G) “Submit to Current Planning Services...”: The Applicant requests that this condition be satisfied prior to building occupancy and/or final building inspection approval. This condition would be moved to Condition VI.
- Condition III: The Applicant respectfully requests striking this condition in its entirety since it is no longer required if the timing of conditions outlined above is approved.
- Condition V: The Applicant requests that this condition be satisfied prior to the issuance of a building permit for the project. This condition would be moved to Condition IV.

**b. Condition II(F) –Traffic Management Plan**

The Applicant respectfully requests revisions to the below sections of Condition II(F) to accurately tie the Traffic Management Plan (“TMP”) to performance based measures, as agreed to by the Applicant, ODOT, and the County’s transportation staff. Additions are shown in **bold** and deletions are shown in ~~striketrough~~.

Condition II(F)9.

The TMP shall reflect Performance Based Measures for the "opening period" and "normal period" scenarios of traffic flow for the restaurant operations. The applicant shall provide documentation to ODOT, Washington County Sheriff, Washington County Department of Land Use & Transportation, and Beaverton Planning/Transportation Department **recommended performance metrics for establishing “normal” and “opening” conditions for use in monitoring success of TMP.** ~~showing that average traffic volumes and queue lengths under both scenarios resemble those stated in Table 8 (pg. 21) of the Access Alternative Memorandum of the Traffic Study, prepared by Kittleson and Associates, dated January 26, 2022 (Exhibit J of application materials). The average traffic volumes and queue lengths shall resemble Table 8 for five (5) consecutive weeks. At that time, if all applicant provided metrics are consistent with Table 8, ODOT will consider the "opening period" as complete and provide written notice to the applicant that the TMP's second phase can be implemented.~~

Condition II(F)11.

Eastern site access shall be restricted to right-in entry only during the "opening period". ~~Until "normalized" operating conditions occur (per Table 8 of submitted Traffic Study/Memorandum dated January 26, 2022), ODOT will restrict full turning movements onto SW Beaverton Hillsdale Highway (OR 10) with the installation of temporary traffic implements, to be placed within the middle lane(s) of SW Beaverton Hillsdale Highway (OR 10). Said traffic implements shall extend eastward from SW 107th Avenue to SW 103rd Avenue as necessary to maintain safe traffic flow. A portion of the traffic implements will be removed when the restaurant reaches "normalized" operating conditions and ODOT considers the "opening period" complete.~~

~~If, as a result of the applicant's proposed fast food restaurant with drive thru, traffic patterns within its functional area deteriorate, which may include, but not be limited to, blocking through access west and eastbound on SW Beaverton Hillsdale Highway (OR 10), it is likely that ODOT will require additional permanent approach turn movement restrictions to the project site onto OR 10.~~

**c. Right-of-Way Donation**

The Applicant respectfully requests revisions to two conditions regarding the proposed right of way donation to reflect ODOT's design requirements contained in the Oregon Highway Design Manual. Additions are shown in **bold** and deletions are shown in ~~strikethrough~~.

Condition II(F)3.

Right-of-Way donation to ODOT to provide ~~fifty-one (51)~~ **forty-eight and one-half (48.5)** feet from legal centerline to accommodate the planned cross section, shall be provided by the applicant. The deed must be to the State of Oregon, Oregon Department of Transportation. The ODOT District contact will assist in coordinating the transfer. ODOT will provide verification to the local jurisdiction that this requirement has been fulfilled. The property owner must be the signatory for the deed and will be responsible for a certified environmental assessment of the site prior to transfer of property to the Department. (Note: It may take up to 3-months to transfer ownership of property to ODOT)

Condition II(G)7.

Copy of ODOT approvals for the improvements listed in 11. F above and verification from ODOT that a total of ~~51~~ **48.5** feet of right-of-way from legal centerline has been donated to ODOT.

**2. Community Development Code ("CDC") 413-6.6: Exceed the Maximum Parking Standards**

The Staff Report states that the Applicant must comply with CDC 413-6.6 and submit for Type II Development Review to exceed the maximum parking standards. As outlined below, the project meets the standards of CDC 413-6.6 and the Applicant has voluntarily agreed to a Type III Development Review for the project. As a result, no additional Type II Development Review is required to exceed the maximum parking standards.

EXHIBIT A

CDC 413-6.6 states as follows:

*In either Zone A or B, the Review Authority may approve through a Type II procedure off-street parking in excess of the maximum parking standards based on findings that:*

- A. The nature of the development will result in a higher off-street parking demand relative to similar uses in the same parking zone; and*
- B. To the greatest degree practicable, the development includes the implementation of opportunities for shared parking, parking structures, utilization of public parking spaces and other appropriate demand management programs. Demand management programs may include, but are not limited to, subsidized transit passes, shuttle service, and carpool programs.*

With respect to Subsection A, the project will result in a higher off-street parking demand relative to similar uses in the same parking zone. The property is located within Zone A and thus a maximum of 48 parking spaces are permitted based on 3,885 square feet proposed for the project. As stated by ODOT, County staff, and the general public, there is a concern that the In-N-Out has a higher demand for parking than similar uses in Zone-A. As a result, the Applicant has provided additional parking on-site to address these concerns raised by various stakeholders. This additional parking will alleviate the adverse impacts of the project because potential customers will park on-site instead of on local residential roads and is also an available alternative for drive through customers to park and walk in the establishment during peak periods.

With respect to Subsection B, there are no opportunities for shared parking, there are no parking structures located in the vicinity of the project, nor are there any opportunities for potential customers to utilize public parking. Subsidized transit, shuttle services, and carpool programs are not appropriate demand management measures since the increased demand largely stems from the customer demand of the proposed use. Thus, the development includes the implementation of demand management programs to the greatest extent practicable.

As a result, the Hearings Officer can find that the standards of CDC 413-6.6 are met.

### **3. Conclusion**

For the above reasons, the Applicant respectfully requests that the Hearings Officer approve the application with the conditions of approval recommended by staff with the modest changes requested by the Applicant.

Best regards,



Garrett H. Stephenson

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Washington County Hearings Officer

June 15, 2022

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cc: Ms. Cassie Ruiz (*via email*)  
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