



LAND USE & TRANSPORTATION MEMORANDUM

Planning and Development Services | Current Planning

To: Joe Turner, Hearings Officer

From: Stephen Shane, Principal Planner

Date: March 19, 2024

Subject: Staff Comment on Remand of Final Order and Opinion 2022-083 (In-N-Out Application)

Mr. Turner:

As you are aware, the First and Second Assignments of Error were denied in the above-referenced remand released October 27, 2023 from the Land Use Board of Appeals (LUBA). Below please include into the record Staff comment specific to the Fourth and Third Assignments of Error.

Fourth Assignment of Error:

LUBA's Fourth Error of Assignment (listed third of the four errors of assignment in the Decision) addressed the Hearing's Officer (HO) finding of the applicant's assertion¹ that "*CDC 430-135.1.C can be plausibly interpreted to allow incidental queuing for up to one year within the OC zone...*". The applicant's argument and LUBA's address thereof addresses two components of this section specific to Temporary Uses, namely the continuation of an (expired) allowed use and a specific discretionary section of code (below) that may apply in the context of the requested proposal. See pages 21-23 of the remand for a full discussion of the temporary use component.

Section 430-135 in the Community Development Code (CDC) addresses temporary use allowances, with Section 430-135.1.C. specifying uses of a temporary nature for up to one year:

The following temporary permits may be issued through a Type I procedure for a period not to exceed 1 year:

The section subsequently denotes numerous permitted temporary uses, the entirety of which are objectively inapplicable to the requested development and are not contested by the applicant, but for the allowance found at CDC Section 430-135.1.C.(8), which reads:

(8) Other similar uses of a temporary nature when approved by the Director.

LUBA on page 21 of the Decision noted:

"Petitioner's fourth assignment of error is that the hearings officer's finding "that the temporary use of the OC-zoned portion of the Property cannot be approved by the Director is not supported by an adequate interpretation of the CDC, is not supported by evidence, and such a finding is plainly inadequate." Petition for Review 47.

At issue in the discussion was whether an allowed temporary use could be renewed and whether the sub (8) standard might be applicable for "excess drive-through vehicle storage" The HO was correct in his literal reading of the language in 430.135.1.C that permits are limited to one year. However, Staff

¹ Page 11 of remand material submitted by Applicant, February 13, 2024.



LAND USE & TRANSPORTATION MEMORANDUM

Planning and Development Services | Current Planning

notes here that there is precedent at the county to allow a *new* temporary use permit to be issued for a prior temporary use that has expired when that use remains the same and has exceeded the one-year period. Prior renewal examples under this section include construction trailer placement, classroom modular buildings, and residential sales office within new, unbuilt subdivisions. The HO may not have realized this given these are Type I uses not heard by a Hearings Officer and the question of renewal was not clarified in the record below. Given this precedent, this issue as it pertains to whether a temporary use renewal is possible under the CDC can hence be resolved by subsequent HO findings to the point.

The more difficult issue to resolve is potential applicability of the language at sub (8) in the parent section, given the inherent ambiguity of the language. For example, what constitutes a ‘similar use’ and at what point does a ‘similar use’ become a dissimilar use? Staff notes that the analysis of any given situation under the rubric of this code language could, depending on context, easily veer into a discretionary analysis, which would be in conflict with the listed ministerial standards under Section 430-135 1. C., which require clear and objective standards. Staff therefore maintains that any utility of this fairly broad code allowance must unequivocally be clear and objective in its comparative analysis.

The HO determined in his Decision of August 29, 2022 that there was no evidence in the record to support that excess drive through vehicle storage is similar to those uses that qualify for temporary permits. LUBA has remanded this point (and the above-noted renewal issue) back to the HO to provide additional findings on his determination(s). To assist in this regard, Staff believes the standard at sub (8) cannot be utilized for this proposal for the following reasons.

First, approval of a temporary use for excess vehicle storage for a restaurant use would be an unusual request relative to prior Type I approvals. Temporary uses have been approved for parking of vehicles, but it’s debatable the extent to which parking is a ‘similar’ use to drive-through queuing, and staff does note the vehicular components of this proposal (parking, queuing for drive throughs, vehicular movement on the site) have been parsed out as separate elements in the record. Staff agrees with the HO determination, recited at page 22 of the LUBA Decision, that there is no evidence that the proposed use of a portion of the site (within the Office Commercial District – see below) is ‘similar’ to any of the uses listed elsewhere in the section.

Second, the fundamental issue in this case turns on the plan designation and what is permissible under the development code within the two land use districts that comprise the site. The proposed restaurant, associated drive-thru window and queuing, and some parking are to occur on property designated as Community Business District (CBD), as allowed, and additional parking, possible queuing and vehicular maneuvering occurring on the Office Commercial District (OC) area of the site. Restaurants and “eating and drinking establishments” are permitted in the OC designation, as noted in the record, only as accessory uses to an office commercial center (CDC Section 312-3.2). An office commercial center is not defined in the code but there is no office commercial center present on site or nearby. Staff concurs with the Hearings Officer’s contention that uses accessory to or part of petitioner’s proposed restaurant and drive-thru use are not permitted in the OC District under current standards.



LAND USE & TRANSPORTATION MEMORANDUM

Planning and Development Services | Current Planning

Third Assignment of Error

The third Error Assignment is specific to the consideration of the applicant's request and associated uses of the site under a lawful non-conformance determination. LUBA's findings on this issue include extensive citations from the Hearings Officer's report and are found at pages 23-27 of the LUBA Decision. Petitioner's Third Assignment of Error is that the hearings officer made inadequate and inconsistent findings concerning whether there was a legal nonconforming use right to conduct petitioner's operations in the OC plan designation.

The applicant has submitted material to the record they believe substantiates their contention that joint access and parking throughout the two zones on the site are legally established non-conforming uses, due to a history of shared access and vehicular use of parking lot area (stalls and drive aisles) between two buildings that have supported restaurant use over the last two-plus decades. With that in mind, the applicant also noted in their submitted material dated February 13, 2024 (page 3) that "...the Hearings Officer appeared to parse the scope of the prohibited use extremely finely." As cited from page 25 of the LUBA Decision, the Hearings Officer found the following:

However, ...some uses - parking maneuvering, and excess drive-thru vehicle storage - are proposed in the OC zoned portions of the site. If the existing restaurant uses were not discontinued for one year or more and the hours of operation of those uses were consistent with the proposed use, the parking and maneuvering uses may continue as a nonconforming use. However, the use of the OC zone for excess drive-thru vehicle storage is prohibited."

In the broader context of the non-conforming discussion, LUBA notes (page 25) that

"The hearings officer found that they were not deciding whether any nonconforming use rights existed, but assuming they did, those rights did not include the proposed storage of vehicle overflow from the drive-thru."

In the assignment of error, the Board remanded back to the Hearings Officer to provide additional findings on petitioner's overall non-conforming use contention and specifically, if an alteration of a non-conforming use is permissible.

To the degree to which it is informative, staff agrees with the Hearings Officer that excess vehicle storage for the drive-through is a unique component of the general parking area for the site. Vehicles in the act of queuing for a restaurant drive-thru are not engaged either in parking or in continuous vehicular movement through a drive aisle, as is typical in a parking area for a commercial/retail use. If that is an accepted conclusion, staff believes a position of whether or not there was historic queuing/vehicle storage on the OC portion of the site for a drive thru located on the CBD portion of the site is speculative without additional submitted evidence. Relatedly, the applicant has noted that a drive-thru was created and may still exist at the rear of the restaurant building located on the OC District, and hence had OC-District queuing available for that use. However, staff's understanding is that this drive-thru is not currently operative and hasn't been for some time. If so, this leaves in question the continuity requirement of non-conforming uses for the drive-thru element on the OC District, as codified in statute and similarly at Section 440-4 of the Development Code. It is also unclear whether any historic queuing for the drive-thru on the OC District was identical in scope to (at least) the potential for what might be expected for the drive-thru storage in this application.



LAND USE & TRANSPORTATION MEMORANDUM

Planning and Development Services | Current Planning

Regardless, through submitted site plan and narrative, the applicant maintains (pp 6-12) in their February 13 submittal that queuing for the drive-thru will not occur in the OC District and that changes to traffic patterns related to the proposed drive-thru on the west portion of the property is not an alteration of the non-conforming drive aisles and parking area located in the OC zone.² Submitted testimony by applicant representatives state drive-thru queuing operations can be accommodated on the CBD and that this site has “*more designated drive-thru queuing than any other In-N-Out restaurant in Oregon. As evident on the Applicant’s site plan (Exhibit F), all of the site’s designated queuing areas are within the CBD Zone.*” The applicant narrative further notes the following, specific to applying conditions to the pending traffic management plan:

Instead, the Applicant recommends that such queuing controls be integrated into the TMP itself. The Hearings Officer can add the following condition of approval to ensure that this happens:

“As part of the TMP, the Applicant shall impose site controls to ensure that onsite queuing does not exceed the queuing lanes shown on the site plan. Such measures may include, but need not be limited to, onsite traffic control measures, additional staffing, and special ordering and delivery protocols during the Opening Period.”

The applicant summarizes their position by noting that the *possibility* of zone crossing should not be a reason for denial and suggests any occurrence of such activity should be relegated to code enforcement.

It is not at issue whether the access, restaurant parking and traffic maneuvering in the drive aisles of the respective parking areas have been shared activities of each restaurant across the two districts for over two decades. Even occasional use of (for example) the east access point and drive aisles used to get to the westside restaurant maintains continuity relative to a non-conforming use.

The issue is the potential for queuing for the drive-thru restaurant feature in the CBD, thereby tying that drive-thru use to activities on the OC-District, where a drive-thru restaurant is not permitted outside of serving an office commercial center. Anecdotally at least, it is undisputed that In N Out restaurants have unique traffic considerations relative to other fast-food restaurants, at least during their opening periods, which when measured against traffic demand can be comparatively lengthy. It places staff and the Hearings Officer in a unique conundrum: the applicant’s point above that the *potential* for zone crossing should not be a reason for denial is well taken yet at the same time, no other restaurant generates the kind of traffic demand, at least thru a lengthy opening period, where inadvertent spillover in cuing aisles is a ready possibility.

With that said, staff can rely on the applicant record to presume any queuing in the OC District will not occur and agrees that the required Traffic Management Plan can address on and off-site vehicular activity in order to best manage traffic on Beaverton-Hillsdale Highway and can take up the issue of queuing and how to preclude possible spillover to the OC District in additional depth in that

² The applicant’s alteration for the NCU is specific to their contention of a reduction in the use of drive aisles and parking areas due to certain proposed site modifications. Staff has not taken up consideration of this specific issue in this memo given its secondary nature to the principal determination of prior use, non-conformance, and lawfulness.



LAND USE & TRANSPORTATION MEMORANDUM

Planning and Development Services | Current Planning

document. It is noted that code enforcement of the issue would likely be problematic, as it's unclear what an applicant can do to mitigate for sheer vehicular volume based on popularity. This issue can be addressed if and when a code infraction occurs. Staff agrees the site is lawfully non-conforming for access, parking and drive aisle maneuvering between the two districts.

Finally, staff highlights the following from the footnote comment on page 26 of the LUBA Decision:

“...For the purposes of this decision, we assume that petitioner adequately raised the nonconforming use issue during the course of the proceedings and was not required to modify its application or separately apply for verification of a nonconforming use.”

The issue of whether a new non-conforming use application is required is as yet unresolved. Non-conformity (and the temporary use possibility) was not part of the original applicant submittal and were not addressed directly in the original staff report. Should the Hearings Officer modify his decision in support of the applicant's non-conforming contentions, they should clarify if a new non-conforming use application addressing applicable standards at CDC Section 440 should be submitted to the county.