

**BEFORE THE LAND USE HEARINGS OFFICER
OF WASHINGTON COUNTY, OREGON**

Regarding an application by In-N-Out Burger for)	ORDER RE-OPENING
Special Use and Development Review approval)	<u>THE RECORD</u>
for a fast food restaurant with drive-thru at)	Casefile No. L2200066-
10535 and 10565 SW Beaverton Hillsdale)	SU/D/PLA/PLA
Highway in unincorporated Washington County)	(In-N-Out Burger)

I. SUMMARY

1. The applicant, In-N-Out Burger, requests Special Use and Development Review for an approximate 3,885 square foot eating and drinking establishment (fast food restaurant) with drive-thru and outdoor seating on a 2.24-acre parcel located at 10535 and 10565 SW Beaverton Hillsdale Highway (OR 10); also known as tax lots 02000, 02100, 02400, and 02401, 1S1 14BC (the “site”). The applicant also requests approval of two Property Line Adjustments to remove lot lines from Tax Lots 2000, 2400 and 2401 of Assessor’s Map 1S1 14 BC. The property line adjustments will result in the consolidation of the three tax lots for the project site.

a. The majority of the site and the property abutting the northeast corner are zoned CBD (Community Business District). The northeast and northwest corners of the site and the property abutting the north boundary of the site are zoned OC (Office Commercial). Properties to the north, across SW Laurel Street, are zoned R-15 (Residential, 15 units per acre). Properties to the west, south, and southeast are in the City of Beaverton. The restaurant and associated drive-thru lanes are located solely in the CBD District. The OC zoned portion of the site will be used for parking and landscaping.

b. The site is currently developed with two existing restaurants, one with a drive-thru (Hawaiian Time), the other with dine-in, Azteca, which is permanently closed. Previous casefiles associated with the site include Development Review 77-00122, 78-00043, 78-00062, 78-00078, 83-00209, 86-00041, 88-00619T, 90-00387, 91-00252.

c. SW Beaverton-Hillsdale Highway abutting the south boundary of the site is a County Arterial but under Oregon Department of Transportation (ODOT) jurisdiction. Therefore, a county Access Management Plan was not required. The applicant will be required to submit a Traffic Management Plan, to be approved by ODOT in coordination with Washington County and the City of Beaverton. SW Laurel Street a county Local road abuts the north boundary of the site.

d. The site currently has three driveway accesses to SW Beaverton-Hillsdale Highway and one driveway access to SW Laurel Street. The proposed use will take access from SW Beaverton-Hillsdale Highway (OR-10) using two of the three existing driveways. The applicant will close the existing middle driveway to SW Beaverton-Hillsdale Highway. The western driveway will be limited to right-in/right-out movements only. The driveway access will be redesigned to include a “pork-chop” island

designed to restrict vehicular left turning movements. The eastern access will operate as a “full access” (right-in/right-out/left-in/left-out) under “normalized” operating conditions. The eastern access will be restricted to right-in only, during the “opening period” of the fast-food restaurant. The SW Laurel Street driveway will be restricted to emergency access only. This access will be gated and locked with a Knox-box.

e. Proposed hours of operation are Sunday through Thursday, 10:30 a.m. to 1:00 a.m., and Friday and Saturday, 10:30 a.m. to 1:30 a.m. The Code does not limit hours of operation in the Community Business District (Section 430-41).

f. Additional basic facts about the site and surrounding land are provided in the Staff Report to the Hearings Officer dated June 16, 2022 (the “Staff Report”).

3. Washington County Land Use Hearings Officer Joe Turner (the “hearings officer”) conducted a duly noticed online public hearing regarding the application on June 16, 2022. At the conclusion of the public hearing, the hearings officer ordered the record held open for three weeks, until July 14, 2022, to allow all parties an opportunity to submit additional testimony and evidence and for the applicant to submit a final argument.

4. Testimony submitted during the open record period raised an issue that was not addressed in the application or at the hearing. The hearings officer finds that, because this is largely a new issue, all parties should be allowed the opportunity to provide written argument about that issue.

5. However, this application is subject to the 120-day clock provided by ORS 215.427(1), which requires that the County issue a final decision in this case within 120 days after the application was deemed complete. ORS 215.427(5) authorizes the applicant to extend the 120 period. Currently the 120 day period expires on August 5, 2022. Therefore, the hearings officer cannot reopen the record unless the applicant agrees in writing to extend the 120 day clock to accommodate this open record period.

6. Therefore, reopening of the record in this case is subject to the applicant’s agreement to extend the 120 day clock.

a. If the applicant submits a written statement agreeing to extend the 120 period until 4:00 p.m. on August 31, 2022, the hearings officer will reopen the record in this case subject to the schedule set out below.

b. If the applicant does not submit a written statement agreeing to extend the 120 period until 4:00 p.m. on August 31, 2022, the hearings officer will issue a final order in this case no later than August 5, 2022.

B. DISCUSSION

1. Under CDC 205-5.1, every party is entitled to an opportunity to be heard and present and rebut evidence. Nothing in the CDC precludes reopening the record open after

the public hearing. The hearings officer finds that reopening the record to allow all parties an opportunity to address the issue discussed below is necessary to serve the interests of a full and fair review of this application and a correct interpretation of the County Code, provided the process affords all parties a meaningful opportunity to participate. Accordingly the hearings officer concludes that the public record should be reopened for additional legal argument subject to appropriate procedural safeguards.

2. There is a dispute about whether the “drive-thru” portion of this use will be located in the OC zoned portion of the site, where drive-thru uses are generally prohibited. The hearings officer will address that issue in the Final Order for this case. No new argument is needed or allowed about that issue during the open record period.

3. However, the applicant’s final argument about the drive-thru issues cites to LUBA’s decision in *Wilson v. Washington County*, 63 Or LUBA 314 (2011)(LUBA No. 2011-007). *Wilson* involved an application for a winery on an EFU zoned parcel where the driveway to the winery crossed another parcel owned by the applicant that was zoned EFC. Based on the facts of that case, wineries were a permitted use in the EFU zone and prohibited in the EFC zone. LUBA upheld the county’s decision denying the application for the winery, because the access road was part of the winery and wineries were not permitted on the parcel where the access road would be located, citing its prior decisions in *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984) and *Roth v. Jackson County*, 38 Or LUBA 894, 905 (2000). In *Wilson*, LUBA held:

Bowman Park and *Roth* stand for the somewhat unremarkable proposition that where a property is to be developed with a commercial or industrial use, the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right of way is properly viewed as part of the commercial or industrial use. Whether that driveway is labeled as “accessory” to the business, as in *Roth*, or an integral part of the use itself, as in *Bowman Park*, is not material.

Wilson at p. 5.

4. The facts of this case appear to be very similar to those in *Wilson*. The site is zoned CBD and OC. Drive-thru restaurants are a permitted use in the CBD zone (CDC 313-3.6) and generally prohibited in the OC zone (CDC 312-5.2). The applicant proposed to construct a portion of the use, parking, and a parking lot drive aisle, within the OC zone. Based on LUBA’s holding in *Wilson*, the drive aisle within the OC portion of the site is part of the proposed drive-thru restaurant use. The parking area is also part of the drive-thru restaurant use. However, drive-thru restaurants are prohibited in the OC zone. Therefore, based on *Wilson*, this application for a drive-thru restaurant that relies on parking and access within the OC zone, where drive-thru restaurants are prohibited, must be denied.

5. In addition, even if restaurants are allowed in the OC zone, drive-thru facilities are clearly prohibited. The applicant proposed to utilize the drive aisle in the OC zoned

portion of the site to provide access to the drive-thru; vehicles will enter the site at the eastern driveway, travel north through the OC zoned portion of the site, and then enter the drive-thru. As in *Wilson*, *Bowman Park*, and *Roth*, the internal driveway on the site that connects the drive-thru to SW Beaverton Hillsdale Highway is properly viewed as part of the drive-thru use. Therefore, it appears that the entire use is prohibited because drive-thrus are prohibited in the OC zone.

6. The applicant argues that *Wilson* is distinguishable because the drive aisle in the OC zoned portion of the site is not the sole access to the site. Therefore it is not “necessary” for cars to cross the OC zone to get to the drive-thru. (p. 2 of Exhibit 4uu – the applicant’s July 14, 2022, final argument). However, during the “opening” period of the use all drive-thru traffic will be routed through the eastern driveway on the site, which requires that customers drive-thru the OC zoned portion of the site. Even during “normal” operations, the parking area and drive aisle within the OC zoned portion of the site are clearly part of the drive-thru restaurant use. Therefore, it appears that the application cannot be approved because drive-thru restaurants are not allowed in the OC zone.

7. It could be argued that the parking lot and drive aisle in the OC zoned portion of the site are allowed as an “accessory” use to the proposed drive-thru restaurant use in the CBD zoned portion of the site.¹

a. The parking lot and drive aisle will serve, primarily, those persons regularly and customarily involved with the restaurant use and parking lots and drive aisles are customarily incidental restaurant uses on the same lot. Parking lots and drive aisles are not identified as a primary use elsewhere in the Code. Therefore, it could be argued that the parking lot and drive aisle are allowed in the OC zoned portion of the site as an accessory use to the primary drive-thru restaurant use in the CBD zoned portion the site where drive-thru restaurants are a permitted use.

b. This appears to be the staff and the applicant’s argument. In the application narrative the applicant states “ The Application does not propose a Type I, II or III use in the OC zone. Only non-required off-street parking and non-required driveway are located in the OC zone, both of which are accessory uses.” (See p. 4 of the application narrative, Exhibit PH-5). The Staff Report notes “The OC portion of the site is limited to the drive aisle and off-street parking, both of which are associated with the proposed eating and drinking establishment with drive-thru located solely on the portion of the site designated CBD.” (p. 8 of the Staff Report). However, LUBAs holding in *Wilson* and *Roth* - that the issue of whether a driveway is labeled as “accessory” to the use or part of

¹ CDC 430-1 provides:

Accessory uses and structures support and are subordinate to the use of a site.

Accessory buildings and structures shall serve, primarily, those persons regularly and customarily involved with the use and include buildings and structures customarily incidental to a permitted use located on the same lot. Uses identified elsewhere in this Code are not accessory uses.

the use itself, is not material - appears to conflict with the accessory use argument in this case. (*Wilson* at p. 5).

8. The issue of whether aisles and parking areas that are accessory to the proposed drive-thru restaurant use are prohibited in the OC zone based on LUBA's holdings in *Wilson*, *Bowman Park*, and *Roth* was not raised at the hearing or during the open record period. Therefore, the hearings officer finds that all parties should be permitted an opportunity to address this issue and facilitate the hearings officer's interpretation of the Code, provided the applicant agrees to extend the 120 day clock to accommodate an additional open record period for that purpose.

9. The open record period is strictly limited to the issue discussed above; whether parking lots and drive aisles in the OC zone are allowed or prohibited as part of a drive-thru restaurant use in the CBD zone.

C. ORDER

1. IF the applicant submits a written agreement to extend the 120 day clock until August 31, 2022, to accommodate an additional open record period and submits a written agreement to that effect to the County by 4:00 p.m. on Tuesday August 2, 2022, the hearings officer orders the public record to be held open in the matter of L2200066-SU/D/PLA/PLA (In-N-Out Burger), subject to the following schedule:

a. Until 4 P.M., Tuesday August 9, 2022, for all parties to submit new written legal argument regarding the issue discussed above;

b. Until 4 P.M., Tuesday August 16, 2022, for all parties to respond in writing to the new legal arguments received by the County by 4 P.M., Tuesday August 9, 2022. The hearings officer finds that a third week of open record is not necessary in this case, because the open record is limited to legal arguments only; and

c. Until 4 P.M., Tuesday August 23, 2022, for the applicant alone to submit a final written argument.

2. All written arguments must be in writing and must be received by the Washington County Department of Land Use and Transportation by 4 P.M. on the relevant closing date.

3. The hearings officer will issue a written final order no later than September 6, 2022.

4. If the applicant chooses not to extend the open record period or fails to submit a written agreement to that effect by 4:00 p.m. on Tuesday August 2, 2022, the hearings officer will not reopen the record in the case. The hearings officer will decide this case based on the existing record and will issue his final decision no later than August 5, 2022.

DATED this __ day of August 2022.

A handwritten signature in black ink, appearing to read 'Joe Turner', with a long horizontal flourish extending to the right.

Joe Turner, Esq., AICP
Washington County Land Use Hearings Officer

