



August 23, 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 (the “Applicant”) in the above-referenced file. This letter is respectfully submitted as a final written argument supporting the zone crossing issues discussed in the Hearings Officer’s August 2, 2022 memorandum and to address the public comments received during the re-opened record period. This letter supplements our letter dated August 9, 2022. As previously stated, the zone crossing issue was raised in public comments and at the June 16th hearing. During the initial open record phase and during the re-opened record phase, the Applicant demonstrated that there is no zone crossing issue by providing a graphical attachment to Kittelson & Associate’s June 28, 2022 memorandum to the Hearings Officer (the “Kittelson Memo”), that clearly indicates that cars do not have to cross the OC zone to use the drive-thru. We reiterate that 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.”

The Hearings Officer raised a number of concerns with the Applicant’s analysis of this issue, suggesting that a drive-thru restaurant (defined as “drive-up” or “drive in” in the CDC) may not be permitted under LUBA’s holding in *Wilson v. Washington County*, 63 Or LUBA 314 (2011), *Bowman Park v. City of Albany*, 11 Or LUBA 197 (1984), and *Roth v. Jackson County*, 38 Or LUBA 894, 905 (2000).

The Applicant provided an initial response to these concerns in a letter dated August 9, 2022, and the Applicant maintains its position that none of the holdings discussed in the Hearings Officer’s order prohibit a drive-thru use on the subject property for this Application. The Applicant also provides the Hearings Officer with alternative bases to approve the Application with the proposed access points because the drive aisles and parking areas located in the OC-zoned portion of the property are nonconforming uses and any alteration to these nonconforming uses complies with the applicable nonconforming use requirements of Washington County Community Development Code (“CDC”) and ORS 215.130 *et seq.*

I. Response to Public Comments

During the re-opened record period, the County received six emails and public comments on the subject application. However, only Mr. Ed Trotter's email marked as OR2-b of the record addresses the limited issue raised in the Hearings Officer's August 2, 2022 memorandum. First Mr. Trotter argues "by the applicant's own admission, and drawings provided as part of the hearing, the intent is that the aisle from the east entrance will be used for drive thru queuing." However, the Kittleson Memo clearly shows that cars do not have to cross the OC zone to use the drive-thru and all anticipated queuing can be accommodated on the CBD-zoned portion of the property.

Next, Mr. Trotter argues that the nonconforming use has been abandoned for more than one year. However, Mr. Trotter confuses the Applicant's argument. Whether the Azteca restaurant currently has a drive-thru use is irrelevant. The use question at issue is whether the drive aisles and parking areas located in the OC-zoned portions of the property are a nonconforming use.¹ As a result, the fact that Azteca (located on the eastern portion of the property) does not include a drive-thru is not relevant because the existing drive aisles and parking provide shared access to the drive-thru currently located on the western portion of the property since at least 1978 when the County approved the expansion of the Burger King parking, as shown by the documentation provided in our previous letter dated August 9, 2022.

Lastly, Mr. Trotter argues that the Application does not satisfy the criteria in the CDC for alteration of a nonconforming use. To the contrary, as discussed in detail in Section IV below, the Applicant is reducing the nature and extent of the nonconforming use and thus the proposed alteration of the nonconforming use complies with the nonconforming use requirements of both the CDC and ORS 215.130 *et seq.*

II. *Bowman Park* and its progeny are distinguishable from the facts in this case.

As discussed at length in our letter dated August 9, 2022, *Bowman Park* and its progeny are distinguishable from the instant application because the proposed drive-thru use includes three access points (two on Beaverton Hillsdale Highway for customer access and one on SW Laurel Street for emergency access) and not merely a single point of access. Importantly, in *Bowman Park*, *Wilson*, and *Roth*, the use itself relied on the accessway in question as its sole means of access. Stated simply, all of these cases addressed uses which obtained their sole access points through zones which do not allow those uses. *Wilson*, in particular, clearly stated that the driveway included in the "use" is the one "necessary to connect" the use with the nearest public right-of-way. None of these cases stand for, or support, the proposition that any use that can be accessed by traveling over a zone that does not allow that use, must be denied. As previously stated, this office was unable to locate a single case in which the mere *ability* to access a use through a zone

¹ To the extent it is relevant, the Applicant provided evidence in its August 9, 2022 letter that neither of the existing restaurants on the property have been abandoned for more than one year.

that does not specifically allow that use requires either the principle use itself, or the driveway, to be denied.

As a result, the Hearings Officer should not extend the holdings in *Wilson*, *Roth*, or *Bowman Park* to this Application because (1) the doctrine in those cases has never been used that way and (2) as explained in our August 9, 2022 letter, joint driveways in shopping centers with multiple zones are common. The two examples previously provided, including the existing uses on the property, show how shared drives commonly cross zones that may or may not allow the use that the person using those drives intends to access. Such access arrangements are likely *required* by the CDC in some circumstances. *See, e.g.*, CDC 430-41.2. Extending the zone crossing doctrine to sites with multiple means of access would upend what is a common and desirable aspect of commercial development.

III. The principle use itself need not be denied when it includes an access to a right-of-way that does not violate the zone crossing principles of *Wilson*, *Roth*, and *Bowman Park*.

As a corollary to the points above, the zone crossing issue in this case pertains not to the principle use itself but only to drive aisles crossing the OC zone. Thus, even under their strictest application, neither *Wilson*, *Roth*, nor *Bowman Park* require denial of the Application in its entirety. This is especially true of this case because, unlike all of the other cases considered above, the Application includes a primary access in the CBD zone. As stated in our August 9, 2022 letter, this point is supported by LUBA's holding in *Del Rio Vineyards v. Jackson County*, 73 Or LUBA 301 (2016).

IV. The existing parking and accessways in the OC zone are legal nonconforming uses that may be continued.

As submitted with our August 9, 2022 letter, a preponderance of the evidence in the record demonstrates the following with regard to the east access and drive aisle and the parking areas now zoned OC:

- There has been a legally-established drive-thru use on the west side of property since at least 1978. The parking within the now-OC-zoned portion of the site near SW Laurel Street was legally established at that time.
- The Mr. Steak restaurant (now Azteca) was approved in 1977 and that approval allowed joint access between the two sites so both could use all access points on Beaverton-Hillsdale Highway.
- The conversion of Mr. Steak to D'Lites Restaurant in 1986 included approval of a drive-thru use on the east parcel, directly accessible by the east driveway.
- Customers have been able to access a drive-thru restaurant through the now OC-zoned drive aisle since the Azteca building was built in the late 1970s.

- Aerial photos demonstrate that the shared accesses between the existing Hawaiian Time and Azteca restaurant, established in the late 1970s, have remained since that time.
- Hawaiian Time is currently open and these drives can still be used to access the drive-thru from all access points, including from SW Laurel Street and from Beaverton Hillsdale Highway through the OC zone.
- Existing parking serving the Hawaiian Time restaurant is also present between the SW Laurel Street frontage and the existing drive-thru, including in areas currently zoned OC.
- The code provisions limiting drive-thru uses in the OC zone were applied to the east drive aisle between the two restaurants sometime after 1986, when both restaurants already had joint use of that drive.
- The existing Hawaiian Time restaurant and its drive-thru is still in use.

Given that *Wilson, Roth, and Bowman Park* all consider a driveway to be a “use” connected with whatever principle land use it serves, the Applicant need not prove that proposed In-N-Out Burger restaurant is an expansion, replacement, or continuance of a nonconforming use, only that the proposed uses of OC-zoned land that are proposed to be continued are legally nonconforming. Stated simply, the Application for the proposed restaurant is for a conforming use and the nonconforming use provisions of the CDC and ORS 215.130 *et seq.* only apply to the drive-aisle between the Azteca Restaurant and other existing parking areas within the OC zone.

In determining whether to approve a proposed use as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, the local government must determine (1) whether the use was lawfully established when restrictive zoning was first applied; (2) the nature and extent of such use when it became nonconforming; (3) whether the use has been discontinued or abandoned; and (4) whether any proposed alteration of the nonconforming use complies with standards governing alterations of nonconforming uses. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994). While not defined in the CDC, ORS 215.130(9), defines “alteration” of a nonconforming use as follows:

- (a) A change in the use of no greater adverse impact to the neighborhood; and
- (b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

As stated by LUBA in *Leach v. Lane County*, 45 Or LUBA 580, 607 (2003) “an alteration that happens to reduce off-site adverse impacts is still an alteration, albeit one that almost certainly will be approved under ORS 215.130(9).”

As stated above, and in our August 9, 2022 letter, that use of the drive-aisles and parking areas now located in the OC zone to access a drive-thru located on the western portion of the property was lawfully established when the restrictive zoning was first applied sometime after

1986. Moreover, the nonconforming use was never discontinued or abandoned, even though a drive-thru is no longer located on the eastern portion of the property. With respect to the nature and extent of the nonconforming use, as shown on the Burking King Parking Expansion Approval, attached as **Exhibit 1**, the parking area adjacent to SW Laurel Street included the drive aisle and it appears to include 27 parking spaces on the portion of the property that is now zoned OC. As shown on the Azteca Approved Plot Plan, attached as **Exhibit 2**, the portion of the property now zoned OC includes the drive aisles providing shared access to the drive-thru as well as at least 28 parking spaces. As shown on the Site Plan attached as **Exhibit 3**, and as previously submitted, only 21 parking spaces and a drive-aisle are proposed in the OC-zoned portion of the property located adjacent to SW Laurel Street. In addition, only 23 parking spaces and a drive-aisle are located on the OC-zoned eastern portion of the property.

The Applicant maintains that changes to traffic related to the proposed drive-thru on the west portion of the property is not an alteration the nonconforming drive aisles and parking area located in the OC zone. However, to the extent the Hearings Officer disagrees, 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. 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.

As a result, there is substantial evidence in the record that a reduction in traffic generated from the property will result in a reduction in the use of the drive aisles and parking areas in the portion of the property zoned OC. Thus, to the extent the Hearings Officer concludes that the Applicant is altering the nonconforming use, the Applicant is reducing the nature and extent of the nonconforming use. Coupled with the fact that (i) the Applicant is closing an existing access onto SW Laurel Road and an existing access on Beaverton Hillsdale Highway; and (ii) the entirety of the parking area complies with current landscaping, stormwater, and other applicable standards of the CDC, the Applicant is also reducing the adverse impact on the neighborhood resulting from the nonconforming use.

Attached as **Exhibit 4** are additional findings regarding compliance with the applicable nonconforming use provisions of CDC 440-3, 440-4, and 440-6. As a result, the Hearings Officer can find that the use of the OC-zoned portion of the property is a legal nonconforming use and the proposed use is a permitted alteration to a nonconforming use.

V. CONCLUSION

For the above reasons, the Hearings Officer can find that the zone crossing doctrine does not prohibit either the principle use or the drive aisle used to access the east driveway, and in the alternative, that all proposed uses in the OC zone constitute existing nonconforming uses that have not been abandoned and the Applicant proposes to continue these uses. As a result, the Applicant respectfully request the Hearings Officer to approve the application.

Best regards,

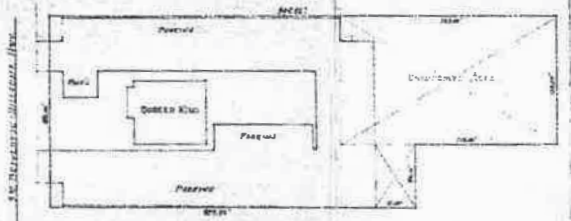


Garrett H. Stephenson

GST:jmhi
Enclosures

cc: Ms. Cassie Ruiz (*via email w/enclosures*)
Ms. Emily Bateman (*via email w/enclosures*)
Ms. Julia Kuhn (*via email w/enclosures*)
Ms. Chris Brehmer (*via email w/enclosures*)
Ms. Sandra Freund (*via email w/enclosures*)
Mr. Joseph O. Gaon (*via email w/enclosures*)

PDX\138634\268779\JOG\34578432.1



Plot Plan
SCALE: 1/8" = 1'-0"



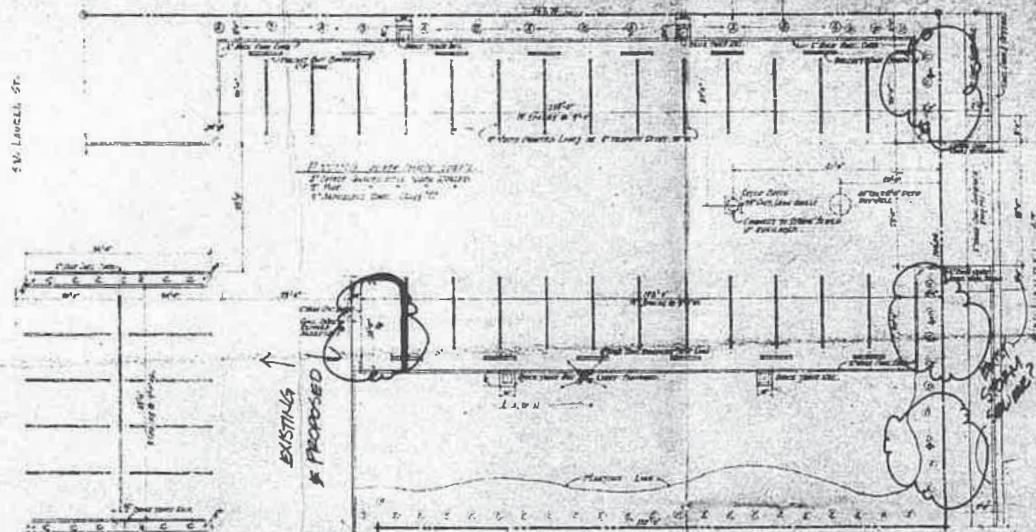
Half Elevation of Approach
SCALE: 1/8" = 1'-0"



Section Through Approach
SCALE: 1/8" = 1'-0"



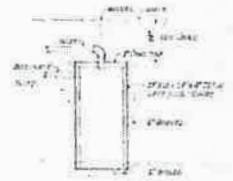
Section Through Approach
SCALE: 1/8" = 1'-0"



EXISTING
&
PROPOSED



Section Through Building
SCALE: 1/8" = 1'-0"



Section Through Building
SCALE: 1/8" = 1'-0"

PLANT LIST

NO.	DETAILS	QUANTITY	SIZE	SPACING	CULTURE	REMARKS
1	GRASS	1000	12"	12"	PERMANENT	
2	FLORAL	100	12"	12"	PERMANENT	
3	SHRUBS	10	12"	12"	PERMANENT	
4	TREES	5	12"	12"	PERMANENT	

*Propose to select quantity
from planting area
which condition upon*

For a proposed subject to the standards of Article
II of the Metropolitan County Community
Code.

Ordinance number: 100

Section: 100

Approved: *[Signature]*

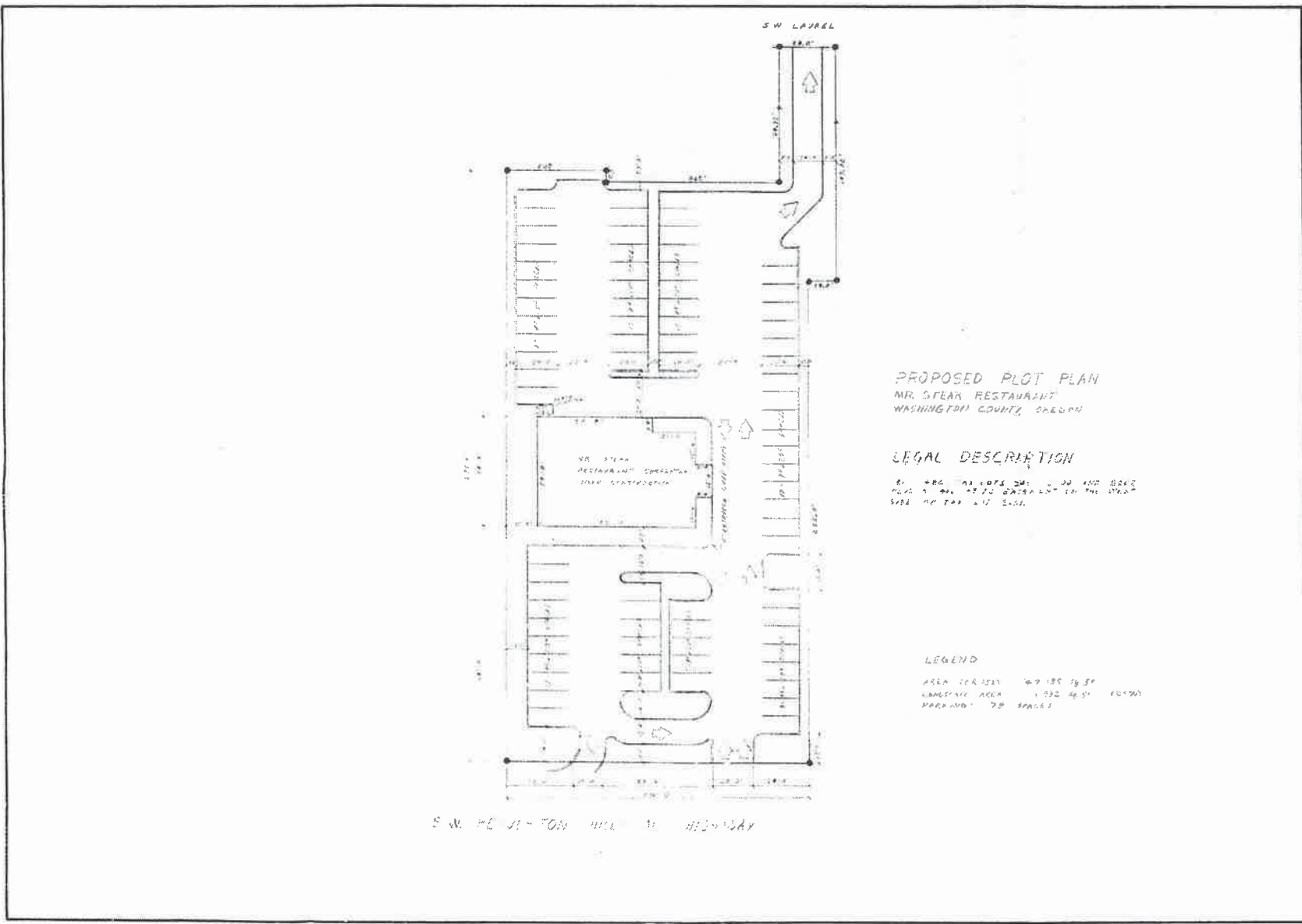
Date: 9-1-78

ADDITION OF PARKING AREAS
"BURGER KING"
520 DEWEYTON-ILLIUMINE HWY.

RALPH E. BANFORTH, A.L.A.
ARCHITECT
1001 N. 3rd St.
PORTLAND, OREGON
97208

REGISTERED ARCHITECT
1971
STATE OF OREGON

DATE: 9-1-78 SHEET NO. 1 OF 1
JOB NO. 78-06



S.W. 1/4 SECTION 11 - TOWN 11 N. - RANGE 13 W.

PROPOSED PLOT PLAN
MR. STEAK RESTAURANT
 WASHINGTON COUNTY, OREGON

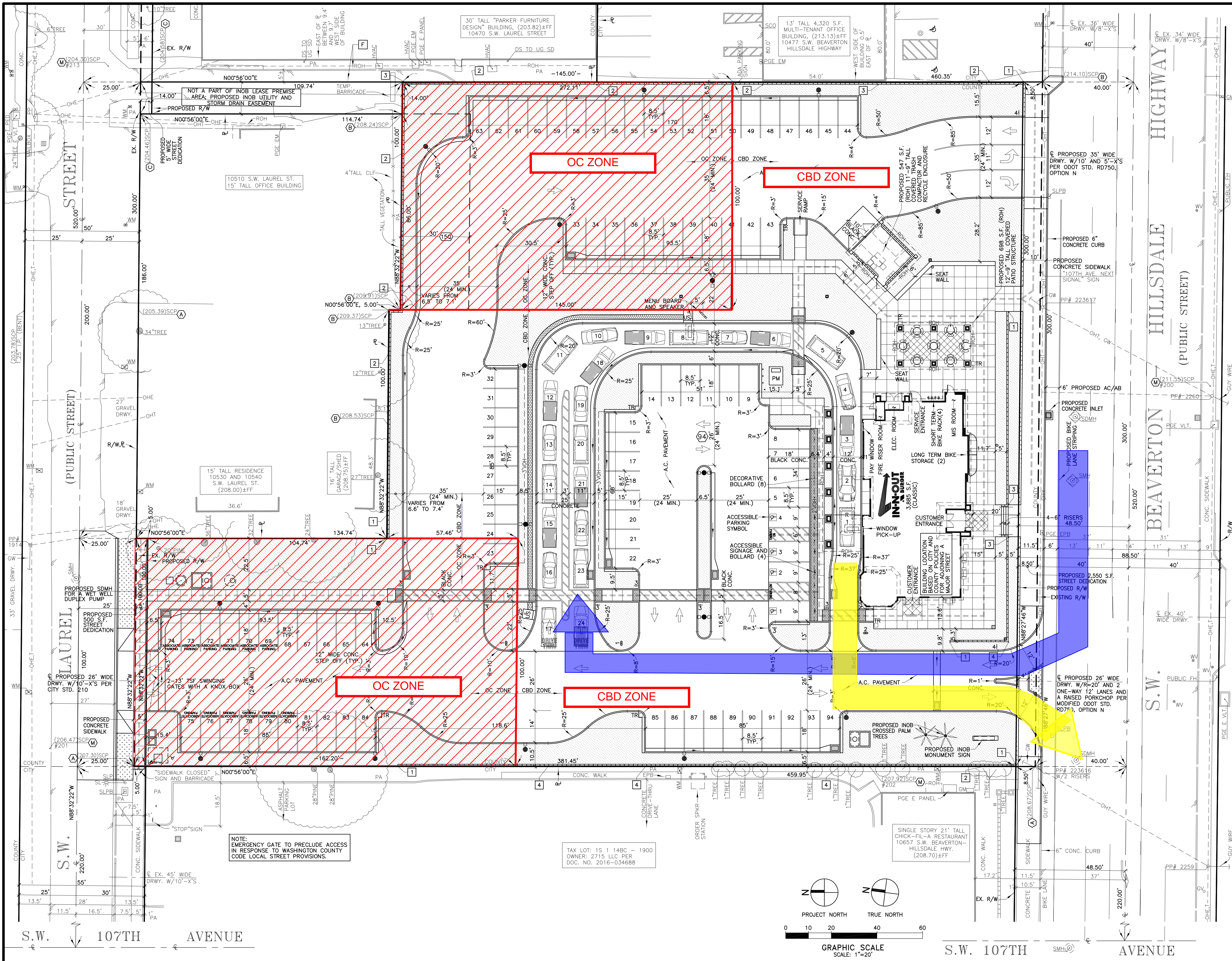
LEGAL DESCRIPTION

BEING MORE OR LESS THE SW 1/4 AND S2/2 OF SECTION 11, T11N, R13W, S1W, WASHINGTON COUNTY, OREGON.

LEGEND

AREA COVERED 47,185 SQ. FT.
 UNIMPAVED AREA 1,532 SQ. FT. (32' x 48')

DATE: 1-20-78	BY: J.C.
DRAWN: J.C.	CHECKED: _____
APPROVED: _____	
COMPLETE ME STEAK RESTAURANT 1111 1111 ALL RIGHTS RESERVED	
SHEET 1 OF 1	



- ### LEGEND
- NEW 24"x36" CONCRETE DRAIN BOX INLET WITH A FLOOR PLUS FOSSIL FILTER INSERT FOR THE PRE-TREATMENT OF STORMWATER RUNOFF.
 - PROPOSED INOB INSTALLED AND MAINTAINED 22'-6" TALL FIXTURE HEIGHT LIGHT POLE ON TOP OF A 30" TALL 24" DIAMETER CONCRETE BASE FOR A TOTAL HEIGHT OF 25' TALL.
 - PROPOSED INOB INSTALLED AND MAINTAINED LANDSCAPED PLANTER AND IRRIGATION SYSTEM ON SITE, INCLUDING AREA UNDER BUILDING ROOF OVERHANG (ROH) AND VEHICLE OVERHANG (VOH) CONSISTING OF APPROXIMATELY 23,326 SQUARE FEET (25.1%).
 - BLACK TRUNCATED DOMES DETECTABLE WARNING STRIP.
 - VEHICLE DETECTOR LOOP.
 - PROPERTY LINE.
 - OUTDOOR SEATING PATIO TABLE WITH UMBRELLA (4 SEATS).
 - OUTDOOR SEATING PATIO TABLE WITH NO UMBRELLA (4 SEATS).
 - OUTDOOR SEATING PATIO TABLE WITH NO UMBRELLA (2 SEATS).
 - NEW 3" TALL 18"x24" LIT "DRIVE THRU" DIRECTIONAL SIGN.
 - NEW 3" TALL 18"x24" LIT "THANK YOU, DO NOT ENTER" DIRECTIONAL SIGN.
 - NEW PEDESTRIAN CROSSWALK SIGN.
 - NEW ACCESSIBILITY ENTRY SIGN.
 - IN-N-OUT BURGER.
 - PROPOSED TAN COLOR SPLIT-FACE CMU WALL AND 2" CAP.
 - EXPOSED HEIGHT OF PROPOSED CMU RETAINING WALL IN FEET WITH A 46" TALL TUBE STEEL FENCE (TSF) ON TOP WHEN THE EXPOSED HEIGHT IS GREATER THAN 30".
 - LOC INOB LIMITS OF PROPOSED CONSTRUCTION.
 - LL PROPOSED INOB LEASE PREMISES LINE.
 - VOH VEHICLE OVERHANG WITH NO OBSTRUCTIONS INCLUDING LIGHT POLES, TREES AND SIGNAGE.
 - ADA ACCESSIBLE PATH OF TRAVEL. ACCESSIBLE PATH OF TRAVEL IS NOT LESS THAN 4 FEET WIDE, AND DOES NOT EXCEED A RUNNING SLOPE OF 1:20 (5%) OR A CROSS SLOPE IN EXCESS OF 1:50 (2%). REFER TO SHEET C33 FOR SPECIFIC SLOPES AND GRADES.
 - PGE ELECTRIC PAD MOUNT TRANSFORMER WITH BOLLARDS.
 - TR PORTABLE TRASH RECEPTACLE ON A MINIMUM 24"x24"x4" CONCRETE PAD.
 - NEW CONCRETE SIDEWALK.
 - REFER TO THE BOUNDARY MONUMENT AND SURVEY CONTROL POINT DESCRIPTIONS SHOWN ON SHEET C36.
 - (150) SIMPLIFIED PLOTTABLE EASEMENT DESCRIPTION SHOWN ON SHEET C36.
 - (US) DRIVE-THRU CATWALK CONCRETE PAD WITH UMBRELLA STAND PER DETAIL "11" SHOWN ON SHEET C...
 - PROPOSED 18" TO 27" TALL 22" WIDE STUCCO COVERED SEAT/SCREEN WALL WITH A PRECAST CONCRETE CAP.
 - PROPOSED INOB INSTALLED AND MAINTAINED OFFSITE STREET LANDSCAPE PLANTER AND IRRIGATION SYSTEM CONSISTING OF APPROXIMATELY 429 SQUARE FEET IN S.W. LAUREL STREET AND 266 SQUARE FEET IN S.W. BEAVERTON-HILLSDALE HIGHWAY.
 - REFER TO SHEET C36 FOR ENCROACHMENT NOTES.
 - PROPOSED PRECAST CONCRETE MODULAR WETLANDS UNIT W/ LANDMOD-6-8-5'-0"-V STORMWATER BIOFILTRATION SYSTEM.
 - 24" WIDE MATTED INOB ASSOCIATE WALKWAY PER CONSISTING OF APPROXIMATELY 360 SQUARE FEET.
 - CF CURB FACE.

- ### GENERAL NOTES
- IN-N-OUT BURGER GROSS SITE AREA: 97,701 SQ. FT. OR 2.243 ACRES.
 PROPOSED 5' LAUREL STREET DEDICATION: 570 SQ. FT. OR 0.013 ACRES.
 PROPOSED 8.5' BEAVERTON-HILLSDALE HIGHWAY DEDICATION: 2,550 SQ. FT. OR 0.059 ACRES.
 MINUS NET FLAG STRIP AT NORTHEAST CORNER: 1,536 SQ. FT. OR 0.035 ACRES.
 NET SITE AREA: 93,045 SQ. FT. OR 2.136 ACRES.
 - EXISTING COUNTY ZONE: CBD (COMMUNITY BUSINESS DISTRICT) FOR TAX LOTS 15114BC02000, 15114BC02400 AND 15114BC02401 FRONTING S.W. BEAVERTON-HILLSDALE HIGHWAY.
 OC (OFFICE COMMERCIAL DISTRICT) FOR TAX LOT 15114BC02100 FRONTING S.W. LAUREL STREET.
 - GENERAL LAND DESIGNATION:
 - EXISTING LAND USE: ONE-STORY 3,555 SQUARE FOOT "HAWAIIAN TIME" RESTAURANT WITH A SINGLE 170' LONG DRIVE-THRU LANE AND 81 SURFACE STRIPED AND UNSTRIPED PARKING SPACES FOR THE PROPERTY AT 10565 S.W. BEAVERTON-HILLSDALE HIGHWAY.
 ONE-STORY 6,043 SQUARE FOOT "AZTECA MEXICAN RESTAURANT" AND 60 SURFACE STRIPED PARKING SPACES FOR THE PROPERTY AT 10505 S.W. BEAVERTON-HILLSDALE HIGHWAY.
 - 5 SPACES PER 1,000 SQUARE FEET OF GROSS FLOOR AREA PLUS OUTDOOR PATIO SEATING AREA = 24 MINIMUM PARKING SPACES REQUIRED.
 12.4 SPACES PER 1,000 SQUARE FEET OF GROSS FLOOR AREA PLUS OUTDOOR PATIO SEATING AREA = 58 MAXIMUM PARKING SPACES
 - IN-N-OUT BURGER URBAN BUILDING AREA = 3,885 S.F.
 INDOOR SEATING = 84 SEATS.
 OUTDOOR SEATING = 34 SEATS (10 TABLES).
 OUTDOOR SEATING AREA = 698 S.F. STRUCTURE PLUS 64 S.F. EACH FOR 0-4 SEAT TABLES (0 S.F.) PLUS 20 S.F. FOR 3-2 SEAT TABLES (60 S.F.) = 758 S.F.
 - REQUIRED LANDSCAPE AREA WITHIN PROPERTY (15%) = 14,178 S.F.
 - LANDSCAPE AREA PROVIDED WITHIN PROPERTY = 23,326 S.F. (25.1%).
 - IN-N-OUT BURGER PARKING SPACE DETAILED SUMMARY TABLE
 - ALL NEW SIGNS SHALL BE APPROVED BY A SEPARATE CITY PERMIT.
 - COUNTY TAX LOT: 15114BC02100, 15114BC02000, 15114BC02400 AND 15114BC02401.

SHEET INDEX OF COUNTY ENTITLEMENT DRAWINGS

NO.	SHEET TITLE
C30.0	COUNTY ENTITLEMENT NEW SITE PLAN
C30.1	COUNTY ENTITLEMENT TRAFFIC MANAGEMENT PLAN
C31	COUNTY ENTITLEMENT EXISTING SITE PLAN
C32	COUNTY ENTITLEMENT DEMOLITION PLAN
C33	COUNTY ENTITLEMENT GRADING AND DRAINAGE PLAN
C34	COUNTY ENTITLEMENT STORM DRAIN AND UTILITY PLAN
C35	COUNTY ENTITLEMENT DRAINAGE ANALYSIS SITE PLAN
C36	COUNTY ENTITLEMENT TOPOGRAPHY SURVEY MAP
C37	COUNTY ENTITLEMENT BOUNDARY AND EASEMENT MAP
LPP.1	COUNTY ENTITLEMENT LANDSCAPE PLANTING PLAN
LOC.1	COUNTY ENTITLEMENT SITE CONSTRUCTION CONCEPT DETAILS PLAN

DEVELOPER:
IN-N-OUT BURGER
 13502 HAMBURGER LANE
 BALDWIN PARK, CA 91706
 CONTACT: CASSIE RUIZ
 PHONE: 626 813-8226

Underground Service Alert
 Call: Toll Free
811
 TWO WORKING DAYS
 BEFORE YOU DIG

REVISIONS

▲	
▲	
▲	
▲	
▲	

GHA PROJECT NO. ---
GHA
 Architecture/Development
 14901 Quorum Drive
 Suite 300
 Dallas Texas 75254
 Ph: (972) 239-8884
 Fax: (972) 239-5054

CIVIL ENGINEER:
MSI ENGINEERING, INC.
 CIVIL ENGINEERS AND LAND SURVEYORS SPECIALIZING IN SITE DEVELOPMENT
 301 NORTH SAN DIMAS AVENUE, SAN DIMAS, CA 91773
 (909) 305-2395 FAX (909) 305-2397

Aaron D. Pellow
 AARON D. PELLOW R.C.E. 91119 DATE 01-26-2022

REGISTERED PROFESSIONAL ENGINEER
 91119
 OREGON
 MARCH 03 2011
 AARON D. PELLOW
 EXPIRES: 12-31-2022

IN-N-OUT BURGER
 10505 AND 10565 SW BEAVERTON-HILLSDALE HIGHWAY
 BEAVERTON AREA OF WASHINGTON COUNTY, OR 97005

COUNTY ENTITLEMENT NEW SITE PLAN
 EXHIBIT 3
 Page 1 of 1
C30.0

Exhibit 4

Alteration of Nonconforming Use

Relevant Code Sections are shown in *italics* with responses following.

CDC 440-3 Determination of a Nonconforming Use

40-3.1 The nonconforming use was lawfully established in accordance with applicable land use standards. Building permits or tax records may be used as evidence to prove when the use was established.

RESPONSE: As provided in our August 9, 2022 letter, aerial photos and County permit records demonstrate that the existing drive aisles providing shared access and parking areas have been in place on the subject property since the late 1970s and the prior Burger King Restaurant added its drive-through in 1978, before the OC-zone drive-thru limitations were enacted.

440-3.2 The nature and extent of the nonconforming use at the time it became nonconforming. Sporadic and intermittent nonconforming uses may continue as nonconforming uses provided the continuation of the use continues to be sporadic and intermittent.

RESPONSE: Aerial photos and site photos demonstrate that the driveways were maintained in their current form for at least the last 25 years, which exceeds the maximum 20-year timeframe for proving ongoing use in ORS 215.130(11).

440-3.3 The nonconforming use has continued since it became nonconforming. Utility bills, tax records, business licenses or telephone directory listings may be used as evidence to demonstrate how the use has continued.

RESPONSE: Building and land use permit records demonstrate that the use of the drive aisles and OC-zoned parking has continued since at least 1978 to serve a drive-thru use.

CDC 440-4 Discontinue or Abandonment

If a nonconforming use of land or structure is discontinued or abandoned for more than 1 year for any reason except bona fide efforts to market the property or structure, it shall not be resumed unless the resumed use conforms with the applicable requirements of this Code at the time of proposed resumption. Once a nonconforming use has been changed to a conforming use, no structure or land shall be permitted to revert to a nonconforming use. Any future uses shall conform with the applicable requirements of this Code.

RESPONSE: Building and land use permit records demonstrate that the use of the drive aisles and OC-zoned parking has continued since at least 1978 to serve a drive-thru use on the western portion of the property, which is still in operation. To the extent that it is relevant, the Azetca restaurant use on the eastern portion of the property has been in operation as recently as March 2022. As a result, the nonconforming use of land or structure has not be discontinued or abandoned for more than one year.

440-6 Alterations to a Nonconforming Use or Structure

Alterations to a nonconforming use or structure are permitted through a Type I or II procedure. Alteration includes a change in nonconforming use of a structure or parcel of land; or replacement, addition or modification in construction to a structure.

440-6.2 Alterations Permitted Through a Type II Procedure

B. An alteration to change or expand a lawful nonconforming use, or to change, repair or remodel a structure associated with a lawful nonconforming use other than a single dwelling unit, or a structure used as a single dwelling unit in a commercial, mixed-use, industrial or institutional district, may be permitted provided:

(1) The alteration will have no greater adverse impact on the neighborhood;

RESPONSE: The alteration will have no greater adverse impact on the neighborhood because the Applicant is proposing to reduce the amount of parking in the OC-zoned portion of the property while maintaining the drive aisles. Moreover, the proposed alteration will comply with the current landscaping and stormwater regulations, which will result in increased landscaping and screening from the surrounding neighborhood and less stormwater runoff affecting the surrounding neighborhood. Importantly, 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 and will result in reducing the adverse impacts on the surrounding neighborhood.

Changes to traffic related to the proposed drive-thru on the west portion of the property is not an alteration of the nonconforming drive aisles and parking areas located in the OC zone. However, to the extent the Hearings Officer disagrees, the Applicant has submitted a Traffic Analysis that specifically, shows:

- 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 studied intersections 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.

As a result, the proposed alteration will result in a reduction in the use of the drive aisles and parking areas in the portion of the property zoned OC. Thus, the alteration will have no greater adverse impact on the neighborhood.

(2) Any increase in floor area shall be limited to a one time increase up to 20 percent;

RESPONSE: The Applicant is not proposing to increase the floor area of the nonconforming use.

(3) Any increase in the area of the nonconforming use, excluding floor area, shall be limited to a one time increase up to 10%;

RESPONSE: The Applicant is not proposing to increase the area of the nonconforming use, excluding floor area.

(4) For residential uses, there shall be no increase in the number of dwelling units;

RESPONSE: No residential use is proposed.

(5) The alteration is designed to mitigate to the extent practicable adverse impacts caused by the alteration; and

RESPONSE: The alteration results in a reduction in the amount of parking provided in the OC-zoned portion of the property and a maintenance of the drive aisles serving the drive-thru use on the western portion of the property. Thus, the alteration results in a reduction in the scope of the nonconforming use.

(6) The alteration will meet all applicable standards of the primary district and the standards of Article IV to the extent practicable.

RESPONSE: As shown on the plans submitted with this application, the alteration of the nonconforming use complies with all applicable standards of the OC zone and the standards of Article IV, including all landscaping and stormwater requirements.

(7) In addition, alterations to expand a nonconforming use or structure shall address the following:

(a) The alteration is necessary to avoid future deterioration or obsolescence; and

(b) Relocation would create undue hardship.

RESPONSE: The Applicant is not proposing to expand the nonconforming use.

(8) In addition, alterations to change a nonconforming use and structure shall address the following:

The alteration will have no greater adverse impact on the neighborhood considering factors such as:

(a) The character and history of the development and of development in the surrounding area;

RESPONSE: The alteration will have no greater adverse impact on the neighborhood based on the character and history of the development and of the development in the surrounding area. Specifically, the drive aisles and parking areas serving a drive-thru have existed at the property since at least 1978. The development history of the property is outlined below.

- There has been a legally-established drive-thru use on the west side of property since at least 1978. The parking within the now-OC-zoned portion of the site near Laurel Avenue was legally established at that time.
- The Mr. Steak restaurant (now Azteca) was approved in 1977 and that approval allowed joint access between the two sites so both could use all access points on Beaverton-Hillsdale Highway.
- The conversion of Mr. Steak to D'Lites Restaurant in 1986 included approval of a drive-thru use on the east parcel, directly accessible by the east driveway.
- Customers have been able to access a drive-thru restaurant through the now OC-zoned drive aisle since the Azteca building was built in the late 1970s.
- Aerial photos demonstrate that the shared accesses between the existing Hawaiian Time and Azteca restaurant, established in the late 1970s, have remained since that time.
- Hawaiian Time is currently open and these drives can still be used to access the drive-thru from all access points, including from Laurel Street and from Beaverton Hillsdale Highway through the OC zone.
- Existing parking serving the Hawaiian Time restaurant is also present between the Laurel Street frontage and the existing drive-thru, including in areas currently zoned OC.
- The code provisions limiting drive-thru uses in the OC zone were applied to the east drive aisle between the two restaurants sometime after 1986, when both restaurants already had joint use of that drive.
- The existing Hawaiian Time restaurant and its drive-thru is still in use.

(b) The comparable degree of noise, vibration, dust, odor, fumes, glare or smoke detectable at the property line;

RESPONSE: The nonconforming use on the subject property has provided access to commercial use and a drive-thru since at least 1978. Therefore, anticipated impacts associated with the alteration of the nonconforming use will be similar if not less in nature. 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. The alteration of the nonconforming use will result in a reduction in vehicles using the parking areas and drive aisles, which will result in a reduction in vibrations, dust, odor, fumes, glare or smoke detectable at the property line.

(c) The comparative numbers and kinds of vehicular trips to the site;

RESPONSE: Changes to traffic related to the proposed drive-thru on the west portion of the property is not an alteration to the nonconforming drive aisles and parking areas located in the OC zone. However, to the extent the County disagrees, as stated above, a reduction in traffic generated

from the property will result in a reduction in the use of the drive aisles and parking areas in the portion of the property zoned OC. 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 and both will result in reducing the adverse impacts on the surrounding neighborhood.

(d) The comparative amount and nature of outside storage, loading and parking;

RESPONSE: The Applicant is proposing to reduce the amount of parking within the OC-zoned portion of the property. No outside storage or loading are located in this portion of the property.

(e) The comparative visual appearance;

RESPONSES: The Applicant is proposing to repave and stripe this OC-zoned portion of the property. In addition, the project will comply with all landscaping and screening requirements in the CDC, which will improve the visual appearance of the property from the surrounding neighborhood.

(f) The comparative hours of operation;

RESPONSE: The hours of operation are only relevant criteria insofar as they would have an adverse impact on the neighborhood. There is no evidence in the record that there has been a limitation on the hours when people could access the drive aisles and parking areas on the property. While the Applicant has stated that the hours of operation for the drive-thru use on the CBD zoned portion of the will be 10:30 AM to 1:00 AM Sunday through Thursday, and 10:30 AM to 1:30 AM Friday and Saturday, there is no evidence in the record that the proposed hours of operation will have a greater adverse impact on the neighborhood. To the contrary, the Applicant is proposing to close an existing access from SW Laurel Road, which will reduce the adverse impacts on the surrounding neighborhood.

(g) The comparative effect on existing vegetation;

RESPONSE: As shown on the landscaping and planning plan (LPP.1) submitted with this application, the project will comply with all landscaping requirements in the CDC, which will improve the existing vegetation on the property.

(h) The comparative effect on water drainage;

RESPONSE: As shown on the (i) drainage analysis plan (C35); and (ii) the grading and drainage plan (C33) submitted with this application, the Applicant will comply with all stormwater requirements of the CDC, which will improve water drainage on the property.

(i) The degree of service or other benefit to the area; and

RESPONSE: The alteration to the nonconforming use will not result in a decrease in the degree of service to the area. The Applicant submitted relevant service provider letters with its application confirming same.

(j) Other factors which tend to reduce conflicts or incompatibility with the character or needs of the area;

RESPONSE: While not necessarily related to the alteration of the nonconforming use itself, the Applicant is proposing a Traffic Mitigation Plan to address the public's concerns regarding traffic generated from the entirety of the project.