

RE: In-N-Out Burger

Case File L2200066-SU/D/PLA/PLA

Response to applicant's letter dated 09AUG22

Page 1/39 refers to access to the site and that access is not required to cross the OC zones. It should be noted that all eastbound traffic is required to access the site across two separate OC zones. Given that this includes access from Highway 217 this is not an insignificant amount of traffic. Additionally, all westbound traffic would have to pass the east entrance and cross in front of the drive thru exit to enter the drive thru. It is very possible that the exiting and entering traffic will impact each other effectively making the east entrance the only feasible entrance to the site.

More significant is that 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. Although access and parking may be considered as an "accessory" it is unfathomable that drive thru queuing be considered "accessory" and not a principle use of the drive thru. An arbitrary line on a drawing should not be allowed to circumvent not only the stated intent as noted by the applicant but the reality of the operation. Please refer to the photos of the Keizer location previously submitted where the applicant continues to use areas well outside the arbitrary lines as part of the drive thru queuing. Note a review of the video from the hearing will substantiate the applicant (Cassie Ruiz) stating that the aisle will be used for additional queuing and the drawings provided by the applicant and used by staff and the applicant in the presentations show queuing in the western OC zone.

Paragraph I:

Applicant continues the argument that the noted cases are for "sole" access and not applicable. As noted above although there are multiple entry points the east access is the sole access for eastbound traffic and will certainly be the main, if not sole access for westbound traffic. Applicant continues to argue citing instances where there are multiple uses sharing entrances which does not apply to this development.

Paragraph II:

Applicant continues to focus on access and ignores that they previously stated this would be used for queuing an obvious principle use of a drive thru. Note 1 on page 5 continues to discuss the supposed temporary nature of the east entrance being the sole entrance. As noted above this is the sole entrance for eastbound traffic and likely the case for westbound. Page 6 the applicant describes the west access as the primary access. Given the above the west entrance certainly cannot be considered the primary access given it does not serve eastbound traffic and westbound would have to pass the east entrance to use it. If after the temporary period traffic is such that using the west entrance causes too much back up on BHH the east entrance could become the sole entrance negating this argument.

Paragraph III:

Applicant makes a valid argument that with the approval of D'Lites a drive thru was approved on the east property. Applicant further claims that the nonconforming use has not been abandoned for more than a year. This is only true if the east entrance is only considered access to a drive thru and not the intended principle use as stated by the applicant of queuing for the drive thru. The facility on the east

property, under any name, has not been a drive thru for well over 1 year. Unfortunately I do not have official records, but I believe Azteca was in business for over 20 years with no drive thru. This speaks to the east parcel but as noted in applicants drawings there is an OC zone to the west as well that per applicants testimony will be used as drive thru queuing. Although this is on the Hawaiian Time property there is no historical evidence that the portion on the OC zone was ever defined as, or used as, queuing space. In my experience traffic volume at Hawaiian Time was never sufficient to use this portion as queuing.

Applicant also ignores several key elements of CDC 440. Foremost is the intent:

*“The purpose of this Section is to generally encourage the **discontinuance of nonconforming uses** and structures or **changing of nonconforming uses** and structures to **conforming or more conforming uses** or structures.”*

Given that the applicant could not determine when the OC zone was created it is certainly possible it was after the abandonment period of the drive thru queuing on the east property with the specific intent of eliminating a drive thru on that parcel.

CDC 440 does not address a Type III review of an existing non-conforming use. It follows that given a Type III usually has more stringent requirements it would most certainly have to at least meet the same standard as a Type II. Approval of a continuing non-conforming use is noted in 440-6.2 and include the following requirements from 440-6.2-B.

1 – The alteration will have no greater adverse impact on the neighborhood.

It is unlikely that the increased traffic and ours of operation are not a greater adverse impact than the existing facilities.

2 – Any increase in the area of the nonconforming use, excluding floor area, shall be limited to a one time increase up to 10%

Defining the non-conforming use as queuing space the designated and/or intended queuing area likely exceeds a 10% increase.

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.

The subject property certainly has other conforming uses and given this is a replacement, relocation is not pertinent.

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:

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

Increased operation hours will certainly increase glare. Higher traffic volumes will increase noise, odor, and fumes.

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

Notwithstanding the questionable traffic study this facility will most certainly increase vehicular trips to this site.

(f)The comparative hours of operation;

Applicant hours as stated multiple times are well beyond the current facilities.

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

The increased traffic will certainly adversely impact the degree of service to adjacent business and possibly emergency services.

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

Beaverton Hillsdale Highway is a major thoroughfare and commuter route. Given the history of In-N-Out it is hard to imagine that it will not have an adverse impact traffic on BHH most certainly a need of the area.

Even if one accepts applicants contention that the aisle is only access and is therefore a legal non-conforming use it does not meet the requirements of CDC 440-6.2-B as described above.

CDC 440-3.2 should not be taken lightly. This section requires that the non-conforming use be "sporadic and intermittent". With no legal definition this is difficult to assess. Based on the Keizer location this could be daily during peak ours and continue indefinitely which would not seem to meet the definition of either term.

In keeping with the hearings officer clear instruction that the decision must be made on legal grounds I offer the following summary.

- The development does not meet the intent of CDC 440 to eliminate or reduce non-conforming uses.
- The path crossing the two OC zones is not merely access, but as described and represented by the applicant, is to be queuing space which is a principle use of a drive thru and does not have a legal non-conforming use standing.
- If one accepts applicants assertion that it is merely access and is not the sole access it still fails to meet various sections of CDC 440-6.2-B and is unlikely to be sporadic or intermittent as required by CDC 440-3.2.

Any or all of these are sufficient legal grounds for disapproval.

Please note the above assessment of CDC 440 is based on the version prior to Ordinance 885. Given the timing of Ordinance 885 I was not confident which version applied given the timing of the submissions. Even if the revised version is applicable the proposal fails to meet several sections of CDC 4406-2.B.

It should not be lost that one section of Exhibit 5 highlighted by the applicant notes:

"The exit from the site is proposed via a 14 foot wide exit only driveway fronting onto SW Laurel Street to decrease conflicts with Beaverton-Hillsdale Highway traffic by routing traffic to either 103rd or 107th, where there are more convenient intersections."

Even in 1977 it was realized that adding traffic to BHH was not suitable. It is unlikely that a Burger King in 1977 generated nearly the traffic In-N -Out will generate and BHH certainly did not have the traffic volume it does today.

It should also be noted that applicant did not show photos of the Vagabundos Cosina with the abandoned drive thru.

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Sandy Freund

From: LUT Development
Sent: Friday, August 12, 2022 3:11 PM
To: Sandy Freund
Subject: FW: [EXTERNAL] Please no In n' Out Burger on Beaverton-Hillsdale Hwy

From: Mark Ross <rossta1414@yahoo.com>
Sent: Tuesday, August 9, 2022 10:29 AM
To: LUT Development <lutdev@co.washington.or.us>
Cc: Ivy Ross <bravepearl06@gmail.com>
Subject: [EXTERNAL] Please no In n' Out Burger on Beaverton-Hillsdale Hwy

We implore the county to deny the request for Casefile L2200066-SU/D/PLA/PLA (In-N-Out Burger) to proceed. The area lacks sufficient CURRENT traffic and transit infrastructure and this business would greatly exacerbate travel snarl and access to area businesses, including ours.

Thank you

-Mark and Ivy Ross

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