

May 9, 2023

VIA EMAIL:

Design Commission
City of Portland
1900 SW 4th Avenue, Suite 5000
Portland, OR 97201

RE: Applicant's Final Statement - LU 22-159396 AD

Dear David,

This letter will service as our final statement to the Design Commission reviewing the appeal to the City approved setback adjustments as described in LU 22-159396 AD. Please forward this letter to all other staff and Design Commission members that will be deciding on this matter.

Adjustments requested and Approved:

- 1) Reduce the minimum 10-foot building setback to 6 feet along the south lot line, and to waive the L3 landscaping buffer (PZC 33.130.215.B, Table 130-2); and
- 2) Reduce the residential-abutting setbacks for a loading space from 5 feet with perimeter landscaping to the L4 standard to 0 feet, to waive the perimeter landscape requirement, and to allow the northernmost 4 feet of the loading space to be located between the building and the street (NW 28th Avenue) (PZC 33.266.310.E, Table 266-8)

The appeal in this case is strictly limited to the two adjustments referenced above. As established in the record, the adjustments are requested for a project situated on a site zoned CM2d. The subject site is located in a commercial node of an urban neighborhood along NW Thurman Street, a designated main street. The site is surrounded on three sides by areas also zoned CM2d (to the north, west, and east). The project provides productive reuse of an existing structure through interior and exterior alterations. The building will support commercial uses permitted in the CM2 zone and the building satisfies the objective design standards as well as all development standards with the sole exception of the two standards at issue in this adjustment appeal.

The first adjustments pertain exclusively to the prescribed 10-foot landscaped setback area along the southern property line. The adjustments are being sought to provide access at the southeast corner of the site for deliveries, access to the proposed trash area, and electric utilities. This location was chosen to keep those areas out of the public view and away from the street facing facades. The only element of the building that encroaches into the setback is the elevated structural cover over the trash and recycling area at the southeast corner of the site, that also functions as an elevated planter which has the benefit of providing vegetative buffering at the level of activity; the result being more supportive of the purpose of the landscaping standard compared to providing landscaping at the ground level adjacent to the brick wall. As explained in detail in the record and during the hearing, the tiered outdoor deck areas are all located outside of the required setback, and the largest deck area is setback more than 23 feet from the southern property line. This tiered deck approach at varying heights combined with the overall massing and of the proposed structure ensures that there is ample air and light between the structure and the multi-family residential zone to the south.

The adjustment request for the loading area is locational, as a loading area is not required for the proposed development. The adjustment is sought to make efficient use of the paved and legally existing loading area along the southern edge of the site that has been in use for over 60 years, thereby reducing off-site impacts to the neighbors along NW 28th Avenue by providing on-site delivery access while also adding an additional on-street parking space and additional street tree with the reduction of the existing 24 foot wide curb cut down to 10 feet. As provided in the record, the proposed loading area is adjacent to the parking garage of the residential building to the south. The record further indicates that PBOT reviewed the adjustment requests and has no concerns about the location of the loading area.

In reaching its decision on this appeal, the Design Commission must determine that the requested adjustments satisfy the applicable approval criteria. The Design Commission's scope of review in this case does not extend beyond the requested adjustments. For example, PCC 33.805.040.E requires that the Design Commission find that "any impacts resulting from the adjustment are mitigated to the extent practical." Impacts that are not the result of the adjustment cannot be considered in the Design Commission's findings.

Objections to the requested adjustments raised by appellants and other project opponents were addressed in the staff report and staff memo dated April 13, 2023, as well as by the applicant during the public hearing. Supplemental evidence submitted by the applicants of the appeal consisted of letters from appeal applicants acoustical engineer Kerrie G. Standlee, P.E., a closing letter from Elliot Levin and Lisa Taffe who reside at 1704 NW 28th Ave. in the Trolley Car Lofts, and an additional letter from Elliot Levin and Lisa Taffe's attorney, Thomas Cutler.

In his letter Mr. Cutler asserts that staff failed to properly consider noise impacts, and the resulting decision fails to properly condition approval so as to properly mitigate such impacts, but also acknowledges that noise impacts are not expressly identified as an approval criteria.ⁱ

The letter from Mr. Standlee, is seemingly offered to support the appellant's objections related to potential noise impacts. However, the expert opinion offered by Mr. Standlee focuses exclusively on noise that could be generated by people using the deck areas on the south side of the building or within the building, based upon general deck location and height in relation to the brick wall of the neighboring residential building that forms the southern property boundary of the subject site. Setting aside the speculative nature of many of the assumptions in the letter, the primary flaw with the letter within the context of this appeal is that it addresses noises generated from areas that are in full compliance with the setback standards. In other words, the source of the potential noises identified in the report are all outside of the adjustment areas.ⁱⁱ Mr. Standlee discusses another possible scenario of amplified music being played within the building. Most importantly, that noise source is outside of the limited adjustment areas. Furthermore, amplified noise would be an operation concern of a future potential business.ⁱⁱⁱ

As noted by both Mr. Cutler and Mr. Standlee, the following mitigation measures were offered by the applicant and identified by staff in the staff report, but were not imposed as formal conditions of approval:

- Installation of a gate or fence at the southwestern edge of the building to limit access to the deck areas when the businesses are closed.
- Installation of signage at all south patio access doors stating, "south outdoor areas closed to customers after 10 PM."

For the reasons identified in the record and explained above, the use of the deck areas is not relevant to the requested adjustments. Therefore, the conditions of approval are not necessary for the adjustments to satisfy the applicable approval criterion. Nonetheless, the applicant voluntarily agrees to have them imposed as conditions of approval to this decision if the Design Commission elects to do so.

ⁱ Mr. Cutler also made claims related to purported access rights of the neighboring residential building owners to the exterior of their building wall through the appellant's property. To the extent that any such rights exist or do not exist are a civil matter that is outside of the scope of this land use decision.

ⁱⁱ Mr. Cutler tries to argue if the adjustment were not granted it would result in a reduction of the deck seating area. For the reasons set forth during the hearing and in the record, that is not the case. All of the seating is outside of the 10-foot setback and there is not a requirement to buffer any raised deck seating area from the southern residential property that is outside of the setback. Furthermore, Mr. Cutler's claims that landscaping could be difficult in the location required by the code just lends further support to the conclusion that the setback adjustment equally or better meets the purpose of the standard being adjusted.

ⁱⁱⁱ Non-residential uses which cause off-site impacts to uses in residential zone must comply with noise, vibration, odor, and glare standards at PCC 33.262. Contrary to appellant's claims, this adjustment request for a building that will support allowed uses is not a situation where BDS is empowered to require advance documentation that a specific use will.

In closing, staff found, and we concur, that the proposed adjustments satisfy the applicable approval criteria. For the reasons set forth above, the information provided into the record following the hearing does not alter that conclusion. Therefore, we respectfully request that the Design Commission deny the appeals and uphold the staff approval of the requested adjustments.

Regards,

Erik Opsahl
Owner's Agent