



City of Portland, Oregon
Bureau of Development Services
Land Use Services
FROM CONCEPT TO CONSTRUCTION

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Type II Land Use Appeal

MEMORANDUM

Date: May 18, 2023
To: Portland Design Commission
From: David Besley, BDS, Land Use Services, Title 33
(503) 865-6715 / david.besley@portlandoregon.gov
Re: LU 22-159396 AD – Commercial building addition/renovation and loading space modification at 2788 NW Thurman Street
Appeal of a Type II Adjustment Review Approval with Conditions – March 3, 2023
Hearing and request to hold record open – April 20, 2023

Included with this memo is a copy of the proposal for a new mixed-use development 2788 NW Thurman Street in preparation for the proposal's Type II Adjustment Review appeal, to be held on April 20, 2023. Please contact me with any questions or concerns.

I. OVERVIEW

Appeal of a Type II Staff Decision of Approval with Conditions of an Adjustment Review for a proposal to re-purpose an existing tavern into a retail sales and service space (including but not limited to restaurants) with 6-10 tenants, expand the building at the southeast corner, add a partial second floor, add ground level and second floor patios connected via an external stairway, and modify an existing loading space at the southeast corner of NW Thurman St and NW 28th Ave, and in the Northwest Plan District. The two (2) Adjustments were requested to:

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).

NOTE: Because the Adjustment requests are for a site within in the Design Overlay Zone (the site is zoned CM2d), they are appealed to the Design Commission. **The Design Commission is only looking at conditions related to the Adjustment requests (along the south lot line)**, not whether or not the whole project is approvable.

II. DEVELOPMENT TEAM

Architect/Appellant Philip Sydnor, Integrate Architecture & Planning

Owner: Nascent Collective LLC

III. APPROVAL CRITERIA: Adjustment Approval Criteria A. through F. of Section 33.805.040:

- A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and
- B. If in a residential, C11, or IR zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, I, or C12 zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area; and
- C. If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and
- D. City-designated scenic resources and historic resources are preserved; and
- E. Any impacts resulting from the adjustment are mitigated to the extent practical; and
- F. If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable (*not applicable*).

IV. PROCEDURAL HISTORY

- Adjustment Review application submitted on July 1, 2022 and determined to be complete on October 31, 2022. The Adjustment notice was originally mailed November 7, 2022 and was re-noticed on November 18, 2022 to include elevation drawings.
- The applicant requested to extend the review period on January 2, 2023 to the maximum allowed 245 days.
- Staff decision of *Approval with Conditions* issued on March 3, 2023.
- Twenty-eight (28) neighbors collectively appealed the staff decision on March 16, 2023. James McAdoo, Representing the Trolleycar Lofts Homeowners Association, also appealed the staff decision on March 16, 2023.
- The applicant submitted revised floor plans and elevations on April 13, 2023 as a result of a preliminary Life Safety meeting with BDS staff regarding accessibility and egress requirements. The revisions include the following changes:
 - Exterior stadium seating and stairs between patios are flipped (with stadium seating at the north and the stairway at the south) to provide an uninterrupted landing at the bottom of the staircase;
 - More detailed gate and fencing information has been added along the 28th avenue ROW at the west end of the courtyard and loading area;
 - A gate/ screen is provided at the west end of the trash and electric meter location to help better enclose this area; and
 - Stairs between south courtyard and southernmost access area are removed (slopes as determined by civil are indicated).

- The applicant submitted additional revisions on April 19, 2023 to show a gate on the east elevation drawing (accidentally left off in the 4/13/23 revisions), accurately reflect the 9-foot width of the proposed loading space, and provide new 3D renderings to better depict the proposal.
- The Design Commission Hearing was conducted on April 20, 2023 and is summarized as follows:
 - Staff Presentation
 - Appellant 1 (Mary DeVries)
 - Appellant 2 (Thomas Cutler)
 - Supporters of the Appellants (none in attendance)
 - Design Commission questions directed toward Appellants
 - Applicant / Principal Opponent (Renee France and Philip Sydnor)
 - Other Opponents (none in attendance)
 - Design Commission questions directed toward Applicant
 - Appellant 1 Rebuttal (Mary DeVries)
 - Appellant 2 Rebuttal (Thomas Cutler)
 - Request from Appellant Thomas Cutler that record be left open
 - Close Public Testimony
 - Design Commission questions directed toward BDS Staff
 - Design Commission Deliberation
 - Adjustment 2: the Design Commission made comments in support of Staff's recommendation of "approval with conditions," noting that the Adjustment approval criteria are met, and that providing a loading space on site, while not required, will provide a benefit to the neighborhood by reducing loading in the right-of-way.
 - Adjustment 1: the Design Commission made comments in support of Staff's recommendation of "approval with conditions," noting that the Adjustment approval criteria are met, noting appreciation for reuse of an existing building and that a good balance has been struck by reducing overall height and floor area ratio compared to what is allowed, that the proposed development would be a benefit to the public overall, and that many of the appellant objections were about noise on patios, traffic, and the proposed use of the building, which are not relevant to the Adjustment approval criteria.
 - Commissioner McCarter noted that during the building permit review, the planner should verify that landscape planters include filter fabric on the inside,

proper drainage, including plumbing hookup, and automatically controlled irrigation. This will ensure longevity for the landscaping.

- Because it was requested that the record be left open, the timeline and submittals are noted as follows:
 - Deadline for new evidence: Friday April 28, 2023 @ 9am
 - Three (3) responses were received on April 28, 2023 (summarized in Section V below).
 - Deadline for response: Friday May 5, 2023 @ 9am
 - No responses were received.
 - Deadline for final argument: Friday May 12, 2023 @ 9am
 - The Applicant submitted a final written argument on May 11, 2023.

V. NEW EVIDENCE SUBMITTAL

Three documents were submitted before the *new evidence* deadline of Friday April 28, 2023. They are available online (<https://efiles.portlandoregon.gov/record/15914666>) and are summarized as follows:

1. Elliot Levin and Lisa Taaffe: We hoped that the impact on the neighborhood residence would be considered as well as what is “allowed” within zoning code. The developer’s intention to direct the most significant impacts toward the adjacent residential neighborhood rather than commercial zoning is frustrating and we feel our concerns are not being heard or considered. We find it hard to fathom that the project will comply with noise restrictions. The applicant has not shared the most current configuration of the planned project, which eliminated the driveway and the lower section used to store garbage, which would be preferable. We hope the appeals board will reject the Adjustment and encourage this plan instead.

A reduction to the building setback would increase the maintenance costs to the north wall Trolley Car Lofts building, which requires periodic brickwork due to the age of the building. “Why should the HOA have to pay increased costs to maintain a shared wall for an unnecessary adjustment?”

It is inaccurate that the Northwest District Association (NWDA) approved the project; their approval was conditional upon the applicants doing a sound impact study and having a Good Neighbor Agreement in place. “Adjustments should not be granted until after a noise impact study is done for the project, both with and without the Adjustment.” Good Neighbor Agreements are not enforceable and the applicant has not cared to behave as a “good neighbor,” in part because of alley cleanliness and drainage maintenance issues with a shared drain.

We did not have the time we thought during the appeal hearing. Had we been given the time we believed we had during the appeal we would have asked that the commission impose the 14 permit conditions relating to operating house, ambient noise, music restrictions, outdoor cooking restrictions, loading space restrictions, gate requirements, patio access, sidewalk dining location restrictions, property management availability, venting requirements, easement

allowance relating to wall and drain maintenance, lease restrictions, and applicant compensation for maintenance.

2. Thomas H. Cutler: Contrary to staff's apparent belief, the code requires consideration of all potential impacts, including noise. Noise is not specifically mentioned, because the subsections are broadly worded so as to include all types of adverse impacts (i.e., noise, visual impacts, odors, vibrations, traffic, conflicting use, etc). The planter boxes would be "required" regardless of the Adjustment request (for design, visual impacts and patron comfort and privacy). If the proposal met setback requirements, the patio area would be shortened by 4 feet, resulting in a substantial decrease in deck square footage; compliance with the code as written would result in less deck occupancy, less people, less noise, less commotion, and fewer impacts on neighbors.

The applicant's assertions that the requested adjustments would have "no impacts" on the surrounding residential neighbors is absurd. An acoustic engineer's testimony has been submitted as evidence (see section V.3. below). Mr. Standlee concludes that residences and the surrounding area will be substantially impacted, the applicant and staff have failed to properly consider noise impacts, and the resulting decision fails to properly condition approval so as to mitigate such impacts. [Mr. Standlee's findings are summarized.]

We urge the board to request that the conditions of approval be corrected and supplemented consistent with staff's findings and recommendations (staff indicates numerous limitations, conditions and mitigation measures, many volunteered by the applicant, which are omitted from the conditions of approval section of the decision), consistent with Mr. Standlee's recommendations and Mr. Levin's requests for further conditions to protect the neighbors from expected impacts. Staff's decision should be reversed, or at least remanded, to correct the proceedings and properly apply the applicable criteria and require needed conditions.

3. Kerrie G. Standlee, P.E.: In reviewing the conditions specified by staff at the end of the decision document, it was noted that neither of the NWDA suggested conditions were actually included. In addition, even though the applicant has indicated that they could take some steps to have an influence on the noise that would be generated on the outside decks, there is no requirement within the conditions of approval requiring those steps be taken. It seems it would be wise to actually include wording in the conditions of approval that reflect what the applicant has indicated they could do, and what the NWDA suggests be done.

The applicant noted the outdoor patios on the south side of the proposed development would be lower than the parapet of the residential building to the south, primarily to mitigate visual impacts, but it was implied the same effect would apply to noise generated on the decks. That is not correct; sound generated on the decks would reflect off the wall of the commercial building and basically negate the noise reduction benefits expected for the elevation difference.

By having the south decks located between three hard surfaced walls, the sound level within the deck area will be louder than would normally be expected due to the number of people potentially located on the decks and due to reflected sound caused by the surrounding walls. The proposed landscaping would provide no absorption of sound to the space. It is possible the outdoor sound level from just people talking could be in the range of 70 dBA, and the sound traveling over the parapet wall to 2nd floor residential windows of the neighboring condos to the south could possibly be as high as 60 dBA. These factors should be considered when deciding if the characteristics of the residentially zoned property will or will not be impacted by sound associated with the outdoor deck area.

There is no discussion as to how early the deck will be open for business; this fact should be considered in setting conditions of approval as well. There will be a section of the south wall of the building that will have a metal folding door system that can be opened to the deck area. There is no mention in the decision document if there will be any restrictions on when that wall section can and or cannot be opened during daytime or nighttime hours. If the wall section is opened, any sound generated within the building will radiate to the outdoor deck area, even if the deck is closed. It is advisable to have some limitations on when that folding door could be opened; otherwise, the sound level reaching the 2nd floor level windows at residential receivers to the south will likely exceed the limits specified in Title 18 for amplified sound.

VI. STAFF RESPONSE TO NEW EVIDENCE

1. The letter submitted by Elliot Levin and Lisa Taaffe does not appear to contain new evidence; concerns about the use and noise have been reiterated. Regarding the statement that “the applicant has not shared the most current configuration of the planned project, which eliminated the driveway and the lower section used to store garbage,” Staff is unfamiliar with this document; it is not what was approved in the Adjustment request or part of the revised floor plans and elevations on April 13, 2023 or April 19, 2023.

In response to the comments about the NWDA conditions, The NWDA recommended the following conditions of approval,

- a. Professional acoustic engineering review of all exterior mechanical equipment to assure acceptable operating noise levels, including the use of plantings for attenuation; and
- b. An executed Good Neighbor Agreement, negotiated in good faith by the applicant and the affected neighbors, to address any anticipated operational issues arising from the proposed uses and the location of exterior public seating areas.

An acoustic engineering review is not something that BDS can require as a condition of approval because it is not within the bounds of the Portland Zoning Code (PZC). Per PZC Section 33.262.050, “*City noise standards are stated in Title 18, Noise Control. In addition, the Department of Environmental Quality has regulations which apply to firms adjacent to or near noise sensitive uses such as dwellings, religious institutions, schools, and hospitals*”

Good Neighbor Agreements cannot be conditions of approval because they are private agreements between neighbors and not enforceable by the City.

In response to the requested condition that the fence should have 50% visibility or less, this is already a requirement within the Portland Zoning Code (Section 33.130.270.C) and compliance would be verified during the building permit review.

2. The noise concerns included in Mr. Cutler’s letter are addressed above (VI.1)
3. Staff did not include conditions of approval for signs (noting the limited hours of patio use) or a gate (limiting street access to the patios) because these are already indicated on the floor plans (Exhibit C.2) and would need to be included as part of the building permit submittal/review to be in substantial conformance with what was approved through the Adjustment review. The NWDA’s conditions are addressed above (VI.1). The noise concerns included in Mr. Standlee’s letter are addressed above (VI.1).

VII. FINAL ARGUMENT SUBMITTAL

Eric Opsahl, the owner's agent, submitted a summary of the Adjustments requested and how the proposal meets the Adjustment approval criteria, and a response to the letter from Mr. Standlee, noting that it addresses noises generated from areas that are in full compliance with the setback standards. He requests that the Design Commission deny the two appeals and uphold the staff approval of the requested Adjustments.

NEXT STEPS

- 1) Deny one or both appeals and uphold the staff decision of approval with conditions.
 - This could also add, delete, or revise one or more conditions of approval from the original staff decision.
- 2) Request the applicant to return with further revisions, or
- 3) Approve one or both appeals, overturning the staff decision of approval with conditions, which would require the proposal to meet the building setback and landscaping standards and/or the loading space setback and landscaping standards.