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May 12, 2022

VIA E-MAIL – planning@ci.woodburn.or.us

Woodburn Planning Commission
City of Woodburn
Attn: Planning Division
270 Montgomery Street
Woodburn, OR 97071

Re: Woodburn Fast Serv Inc. and LB Group, LLC
2540-2600 Newberg Highway, Woodburn, OR
City File No. CU 21-02

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MAY 12 2022

COMMUNITY DEVELOPMENT
DEPARTMENT

Dear Commissioners:

This law firm represents Woodburn Fast Serv Inc. and LB Group, LLC, which both own real property in the City of Woodburn. We have reviewed the staff report in the above-referenced land use matter and the related materials, and have the following comments on behalf of our clients in opposition to the proposal. Also, enclosed please find separate comments specific to the applicant's Traffic Impact Analysis prepared on behalf of our clients by Kittelson & Associates.

First, the approval recommended by staff is too vague and uncertain to be approved. The applicant submitted two alternative site plans, and staff has recommended allowing the applicant to develop either site plan, depending on how the applicant resolves an issue related to access from Highway 214 (this is referred to in the staff report as the "ODOT factor"). In this case, the two alternative site plans are significantly different as to the proposed uses of each parcel, the total square footage to be built and the location of the convenience store. As such, the applicant has basically made two different applications, and the recommended approval fails to choose between them. Instead, it allows the applicant to later choose which site plan it wants based on the applicant's own understanding of the ODOT factor (see condition PP.1). A land use decision that does not even identify the site plan being approved makes it difficult if not impossible for the public to meaningfully comment on whether or not the proposal meets the applicable criteria, since the public cannot even determine what the proposal is.

Second, the staff report fails to make adequate findings that numerous applicable criteria are or can be satisfied. Instead, staff repeatedly makes noncommittal statements like "it is unclear if there is conformance" (see, e.g., pages 7, 11, 12), or

the proposal is "probably conforming" (page 8), or that the applicant will "revise any nonconformance during building permit review" (page 11). As to other criteria, staff outright finds that the criteria are not met (see, e.g., WDO 3.05.02(E)(2) on page 10). In both situations, staff then states (without further analysis) that conditions of approval will be imposed to secure conformance.

These are not legally adequate findings. Conditions of approval are not findings, and cannot substitute for a determination of compliance with applicable approval criteria. Instead, a decision must find that compliance with the criteria is feasible, which means that "substantial evidence supports findings that solutions to certain problems ... are possible, likely and reasonably certain to succeed." *Meyer v. City of Portland*, 67 Or App 274 fn. 5 (1984), *rev den* 297 Or 82 (1984). Once those findings are made, conditions may then be imposed to evaluate the details of how to achieve compliance and to select the precise solution. *Id.*

Here, the findings do not come close to this standard. Instead, they expressly abdicate the obligation to determine if criteria are or can be met, and in at least one case the findings outright conclude that a criterion is not met. Findings must be written "to establish the factual and legal basis for the particular conclusions drawn," none of which has occurred here. *Thormalen v. City of Ashland*, 20 Or LUBA 218, 229 (1990).

Furthermore, in many cases the draft conditions are hopelessly vague as to the solution or improperly defer the determination of compliance to administrative staff. For example, see condition D3 which merely states that "[t]o conform to WDO 3.05.02J, during building permit review the Director may administratively establish details, specifications, and revisions to administer the WDO section." This gives the Commission and the public absolutely no insight into how unspecified "details, specifications and revisions" might possibly insure that WDO 3.05.02J is met. The Director's obligation is not even mandatory, as he or she only "may" establish standards. See also condition CU9.D.2(c) which purports to give the Director administrative authority to make unspecified changes to the project if needed to address an ODOT objection in the future. Conditions like these that shift discretionary decisions to administrative personnel expressly violate the requirements of *Meyer* and also the WDO. See WDO 4.01.06.A, which states that "[a]ll conditions of approval shall be clear and objective or if the condition requires discretion shall provide for a subsequent opportunity for a public hearing," and WDO 4.02.07 which requires that any request to subsequently modify a condition of approval must be considered pursuant to the procedures and standards that applied to the original application (i.e., notice and a public hearing).



Third, the staff report is similarly deficient in its findings of conformance with applicable Comprehensive Plan policies. There is simply no analysis of the relevant policies or any facts in evidence as to how those policies are met (see page 19). Instead, staff merely lists the policies that it thinks are applicable and states that conditions are imposed "in support of" those policies, but then none of the conditions cross-reference any of the policies so there is no way to cross-check to see if such conditions have in fact been recommended.¹ Any analysis of how the proposal meets or doesn't meet those policies, or of the facts that support imposition of conditions to meet those policies, is completely absent and therefore meaningful review by the public or the Commission is impossible.

Fourth, the analysis supporting the recommendation to approve the exception to street right of way and improvement requirements is inadequate. WDO 5.03.03(B) requires a weighing and balancing of four criteria in deciding whether or not to grant an exception, all of which relate to the proposed project's impacts on public infrastructure. The staff report (page 22) contains no analysis of any of those criteria. The report makes no mention at all of the project's impacts and instead expressly relies on the applicant's desire to reduce costs, which is plainly not a relevant criterion. Staff then describes some kind of trade with the applicant where the exception is granted in exchange for certain improvements by the applicant on Oregon Way. However, staff does not explain why this trade is appropriate or even allowed, nor does it explain why the improvements on Oregon Way cannot be imposed as a condition of approval and thereby eliminate the need for any trade. As with the findings for other criteria, the findings in response to the exception request do not address the applicable criteria or provide any evaluation of the evidence in support of the findings, and are therefore inadequate.

In summary, the staff report and hence the proposed findings are almost entirely devoid of the analysis of the evidence in the record necessary for the Planning Commission to be able to determine whether or not the proposal meets the requirements of the WDO. Instead, staff punts on almost every required finding and merely recommends conditions of approval requiring the applicant to satisfy the criteria later. The staff report does not even make a recommendation as to the most basic finding of all – the site plan that is being approved – and instead defers this most fundamental of issues to a later time. In essence, the proposed findings do little more than restate the criteria and improperly transfer the obligation to evaluate the project and make a decision from the Planning Commission (and its

¹ Moreover, the Comprehensive Plan policies are only listed by number, thereby completely frustrating review by anyone who does not concurrently have access to a copy of the Comprehensive Plan.



City of Woodburn Planning Commission
May 12, 2022
Page 4

associated public process) to later administrative processes shielded from public review. The application should be denied.

Thank you for your consideration of these comments. Please enter this letter into the record of this matter.

Best regards,



David J. Petersen
DJP/rkb
Enclosure

cc (via e-mail): Robert J. Barman
Garry L. LaPoint
Wayne K. Kittelson
Danny Draper

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