

**BEFORE THE LAND USE HEARINGS OFFICER  
OF CLACKAMAS COUNTY, OREGON**

Regarding an appeal by VC Cash & Carry, DBA Food Depot, of ) **FINAL ORDER**  
a planning director decision denying a design review application )  
to allow a storage container in an existing loading dock at 12405 ) **Z0075-24**  
SE 82<sup>nd</sup> Avenue in unincorporated Clackamas County, Oregon ) **(Food Depot)**

**A. SUMMARY**

1. On February 28, 2024, VC Cash & Carry, DBA Food Depot (the “applicant”), filed an application (Exhibit 2) for modification of a prior design review approval (Casefile Z0096-02) at the existing Food Depot store at 12405 SE 82<sup>nd</sup> Avenue; also known as tax lot 09500, Section 32DD, Township 1 South, Range 2 East, of the Willamette Meridian, Clackamas County (the “site”). The site and abutting properties to the north, east and the property abutting the southwest corner of the site are zoned RCC (Regional Center Commercial). Properties to the west are zoned R-10 (Low Density Residential, 10,000 square foot minimum lot size). Properties to the south are zoned PMU3 (Planned Mixed Use, three acre minimum lot size).

2. With this application the applicant proposed to place a storage container in an existing loading dock on the site and relocate that loading berth to another portion of the site. The site currently operates as a commercial business (wholesale grocery store) with associated accessory uses/components which are permitted uses in the RCC zone. The existing use is not proposed to change or otherwise be significantly modified by the addition of the proposed storage container.

3. On October 2, 2024, the planning director (the “director”) issued a written decision denying the application. (Exhibit 1). The applicant filed a written appeal of the director’s decision on October 2, 2024. (Exhibit 5).

4. County Hearings Officer Joe Turner (the "hearings officer") held a public hearing to receive testimony and evidence regarding the appeal. A representative of the applicant testified at the hearing in support of the appeal. County staff testified in support of the director’s decision.

5. The hearings officer understands that the applicant desires to have more storage on the site. However, placement of a storage container outside of the existing building on the site must comply with the applicable design review standards of the Code. The hearings officer concludes the applicant failed to sustain the burden of proof that the proposed modification does or can comply with the applicable approval criteria of the ZDO. Therefore the hearings officer denies the appeal and upholds the planning director’s decision denying the application, based on the findings and conclusions adopted or incorporated herein.

## **B. HEARING AND RECORD**

1. The hearings officer received testimony at the public hearing about the appeal on November 14, 2024. All exhibits and records of testimony have been filed with the Planning Division, Clackamas County Department of Transportation and Development. At the beginning of the hearing, the hearings officer made the statement required by ORS 197.763 and disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the hearings officer of selected testimony offered at the public hearing.

2. County planner Erik Forsell summarized the director's decision, his PowerPoint presentation, and the applicable approval criteria.

a. He noted that the applicant is proposing modification of a prior design review approval to allow placement of a storage container in an existing loading dock berth on the site. The director determined that the applicant failed to demonstrate that the storage container complies with ZDO 1005.02, 1005.03, 1005.05, 1005.07, and 1005.08. The applicant failed to provide any additional information or evidence with the appeal demonstrating compliance with these criteria.

b. The storage container is a "structure" that must meet all of the design review criteria of the Code if permanently placed on the site. It may be feasible to design the storage container to meet the criteria, as noted in his incomplete letter (Exhibit 2a). But the applicant has not modified the proposal as necessary to comply with the Code.

c. The applicant's assertions that other businesses are using similar storage containers is not relevant to the approval criteria as those businesses may also be in violation of the Code.

3. Virginia Chong, the owner of Food Depot, appeared on behalf of the applicant. She testified that she wants to park a storage container in a loading dock on the site that is infrequently used. The container will not impact the use, as the container can be moved to allow use of the loading dock when needed. The store receives deliveries every two months, which are unloaded in one to two hours. She noted that other businesses park containers on their properties. Denial of this application will impact her business as she needs more storage on the site.

4. At the conclusion of the hearing the hearings officer held the record open for two months, until January 14, 2025, to allow the applicant the opportunity to meet with County staff to discuss ways to modify the application to comply with the applicable approval criteria and to submit additional testimony and evidence demonstrating such compliance. The hearings officer held the record open for an additional two weeks until January 28, 2025, to allow the public and County staff to respond to the applicant's submittal. The hearings officer held the record open for a final week, until February 4, 2025, to allow the applicant to submit a final argument. The record in this case closed at

5:00 p.m., February 4, 2005. No new exhibits were submitted during the open record period.

### **C. DISCUSSION**

1. ZDO 1305.02.D.2 authorizes the hearings officer to hear appeals of planning director decisions. Pursuant to ORS 215.416(11)(a), appeals of administrative decisions must be reviewed as a *de novo* matter. The hearings officer is required to conduct an independent review of the record. He is not bound by the prior decision of the planning director and does not defer to that decision in any way. New evidence may be introduced in an appeal, and new issues may be raised. The applicant must carry the burden of proof that the application complies with all applicable approval criteria in light of all relevant substantial evidence in the whole record, including any new evidence.

2. **ZDO Section 510, RCC – Regional Commercial Center: Table 315-1 Table of Uses (Retail - Grocery Store)**

**FINDING:** The modification does not alter the existing grocery store use on the site, which is a permitted use in the RCC zone.

3. **ZDO Section 1005, Site and Building Design**

**FINDING:** As discussed above, the applicant is proposing a modification to a previously approved design review. ZDO 1309.01.B requires that the modification shall be consistent with the zoning ordinance provisions that were in effect on February 28, 2024, the date the application was submitted pursuant to 1309.01.B.

The modification proposal in this instance is limited in scope; it does not increase habitable space nor does it significantly alter the site or building design. To that extent, applicable findings are made to each subsection found in Section 1005. Findings are limited to the proposal and its relation to applicable sections of the approval criteria. Generally speaking, the Hearings Officer's analysis finds that the proposed relocation of the loading berth to accommodate a new storage container does not have a significant effect on the site design but the storage container does not meet the building design criteria among other specific criteria related to design review.

4. **ZDO SECTION 1005.01, Site and Building Design – Purpose**

**FINDING:** The proposal is to add a storage container on the site. The addition will not detract from a lively, safe and walkable area and will accommodate the needs of the users at the development, providing additional storage needed by the applicant. No appreciable changes or impacts because of the change are anticipated, and the new storage and loading dock could efficiently utilize the land in the site area.

The applicant states that the loading dock area is abandoned and is not, or infrequently, used and that the storage container provides more flexibility for the storage of material for sale which is an efficient use of the land for a permitted use in the zone.

*These criteria are met.*

5. **ZDO SECTION 1005.02, Site and Building Design – General Site Design Standards**

**FINDING:** The proposal is to add a storage container to the site, which is an accessory use to a preexisting commercial use present on the site. The storage container will have no impact to walkways on the site and the structure will be located in a loading dock area that was previously not easily visible to the public realm and will remain that way. The loading dock area is partially obscured by fencing and other equipment storage.

However, the storage container is not oriented to the front lot line and does not have doors that meet the orientation requirements required for new retail buildings pursuant to 1005.02 G and H.

*These criteria are not met.*

6. **ZDO SECTION 1005.03, Site and Building Design – Building Design**

**FINDING:** A storage container is a structure per ZDO 202, which defines a structure as ‘anything constructed or erected’. The storage container appears to meet this strict definition of a structure because it is constructed or erected and then placed on the site. Therefore, the standards described in this section are applicable to the placement of the storage container.

The storage container does not meet the entrance way, glazing, roof design and materials standards found in this section and, given the nature of storage containers, it would be very difficult for a storage container to ever meet these standards. The building design standards are intended to regulate new development so that it is cohesive, relatively attractive and compatible with existing development.

The loading, storage, parking and utilitarian aspects of the area where the proposed storage container will be located are consistent with the criteria found at ZDO 1503.I(4), which requires that loading and delivery areas are located to the side or rear of buildings. The replacement loading berth area is proposed to be located on the northern portion of the structure, which is to the side of the existing structure.

*These criteria are not met.*

7. **ZDO SECTION 1005.04, Site and Building Design – Outdoor Lighting**

**FINDING:** The proposal does not include changes to or addition of outdoor lighting.

*These criteria are met.*

8. **ZDO SECTION 1005.05, Site and Building Design – Additional Requirements**

**FINDING:** The site is approximately 1.69 acres (~73,000 square feet) so the site must comply with three (3) additional techniques. The prior decision (County File Z0096-02) references and makes findings towards the structures on site being constructed to maximize solar gain for the purpose of energy efficiency and the ability to use photovoltaics. The site has the following attributes as demonstrated by the provided site plans:

- Modulate building to maximize solar access
- Deciduous trees to provide summer shade and allow winter sun;
- High albedo roof surface on the primary structure.

**FINDING:** The applicant made no findings towards these standards and therefore the record does not contain enough information to verify that these are met for the proposed storage container.

*These criteria are not met.*

9. **ZDO SECTION 1005.06, Site and Building Design – Modifications**

**FINDING:** Not applicable; no modifications are requested or warranted.

10. **ZDO SECTION 1005.07, Site and Building Design – Clackamas Regional Center Area Design Standards**

**FINDING:** The site is within the Clackamas Regional Center area, as shown on Comprehensive Plan Map X-CRC-1. The proposed storage container does not meet any of the building and materials standards as mentioned in findings above. In addition, it does not meet the more specific regional center area design standards for structures.

*These criteria are not met.*

11. **ZDO SECTION 1005.08, Site and Building Design – Regional Center Design Standards**

**FINDING:** The criteria of this section apply to this application because the site is designated “Regional Center” on Comprehensive Plan Map X-CRC-1. The storage container does not meet these standards.

*These criteria are not met.*

12. **ZDO SECTION 1005.09, Site and Building Design – Fuller Road Station Community Dimensional and Design Standards**

**FINDING:** Not applicable; the site is not located in these areas.

13. **ZDO SECTION 1005.10, Site and Building Design – PMU District Standards**

**FINDING:** Not applicable; the site is not zoned in PMU.

14. **ZDO SECTION 1005.11, Site and Building Design – Sunny Side Village Standards**

**FINDING:** Not applicable; the site is not in Sunny Side Village.

15. **ZDO SECTION 1005.12, Site and Building Design – Government Camp Standards**

**FINDING:** Not applicable; the site is not in Government Camp.

16. **ZDO SECTION 1006, Utilities, Street Lights, Water Supply, Sewage Disposal, Surface Water Management, and Erosion Control**

**FINDING:** The proposal does not involve any new habitable conditioned space, bedrooms, bathrooms, kitchens or change of use that would alter or increase the amount of water and sewage load on the site.

The service providers (Clackamas River Water and WES) have not indicated any concern for the proposal or requested any further permitting for the proposed storage container.

*These criteria are met.*

17. **ZDO SECTION 1007, Roads and Connectivity**

**FINDING:** Not applicable. No new roads, right-of-way or streets are proposed nor is there a proposal for alteration to any access.

18. **ZDO SECTION 1009, Landscaping**

**FINDING:** Not applicable, as no modifications to the landscaping plan are proposed. The site plan shows adequate and functional landscaping consistent with the previous approval.

19. **ZDO SECTION 1010, Signs**

**FINDING:** Not applicable. No new signage is proposed.

20. **ZDO SECTION 1015, Parking and Loading**

**FINDING:** The applicant is proposing to relocate the loading berth associated with the loading dock on the site. The applicant provided an updated site plan and photos in response to an incomplete determination as evidence that a new loading berth area can be accommodated on the northern portion of the site. In fact, the new loading berth area provides better turning radii than the existing loading dock area which is relatively constrained.

*These criteria are met.*

21. **ZDO SECTION 1021, Solid Waste and Recycling**

**FINDING:** Not applicable. No modifications to the solid waste and recycling areas are proposed.

22. **ZDO SECTION 1309, Modification.** A modification to an approved Type II or III land use permit, or conditions thereto, requires review as a Type II applications pursuant to 1307, Procedures, and shall be subject to the following standards and criteria:

- A. **A modification shall be consistent with the prior approval;**
- B. **A modification shall be consistent with the ordinance provisions in effect on the date the modification is submitted; and**

**FINDING:** As demonstrate by the findings above, although the storage container is consistent with the prior approval, it is not consistent with the current ordinance provisions and therefore cannot be approved.

*These criteria are not met.*

- C. **A modification shall not result in any of the following:**
  - 1. **A change in the type of use**
  - 2. **An increase of greater than 25 percent of the original approved building floor area;**
  - 3. **An increase of greater than 25 percent of the original approved lot coverage;**
  - 4. **An increase in the density of the development (residential or recreational uses), or intensity of use, as demonstrated by a change**

**in occupancy rating requiring substantial modifications to structures;**

- 5. An increase in traffic congestion or use of public facilities;**
- 6. A reduction in approved open space;**
- 7. A reduction of off-street parking spaces or loading berths, except as provided under Section 1015;or**
- 8. A reduction in required pavement widths or a change in major access locations, except as required by the County**

**FINDING:** The applicant has demonstrated and staff have verified in the record that the proposed modification will not cause any of the above to occur.

*These criteria are met.*

#### **D. CONCLUSION**

Based on the above findings and discussion, the hearings officer concludes that the applicant failed to carry the burden of proof that the design review modification complies with the applicable approval criteria. Therefore the appeal should be denied, the director's decision should be affirmed, and the application should be denied for the reasons provided herein.

#### **E. DECISION**

Based on the findings, discussion and conclusions provided or incorporated herein and the public record in this case, the hearings officer hereby denies Z0075-24 (Food Depot).

DATED this 24th day of February, 2025.



Joe Turner, Esq., AICP  
Clackamas County Land Use Hearings Officer

#### **APPEAL RIGHTS**

ZDO 1307.14(D)(6) provides that, with the exception of an application for an Interpretation, the Land Use Hearings Officer's decision constitutes the County's final decision for purposes of any appeal to the Land Use Board of Appeals (LUBA). State law and associated administrative rules promulgated by LUBA prescribe the period within which any appeal must be filed and the manner in which such an appeal must be commenced. Presently, ORS 197.830(9) requires that any appeal to LUBA "shall be filed



not later than 21 days after the date the decision sought to be reviewed becomes final.”  
This decision will be “final” for purposes of a LUBA appeal as of the date of mailing  
(which date appears on the last page herein).