



# CITY OF West Linn

## Memorandum

Date: March 15, 2022

To: Chair Walvatne  
West Linn Planning Commission

From: John Floyd, Associate Planner

Subject: Public Comments Received for DR-21-11, MISC-21-14, and SGN-21-20

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One additional comment was received between publication of the staff report and noon on March 15, 2022. The additional comment was submitted by John Boyd on March 14<sup>th</sup> and is attached for the Commission's review. The comments consist of a series of questions regarding process and use determination, and do not present facts or evidence as to how the proposal is inconsistent with approval standards. Summary responses to major points are below:

### *Issue 1: Interpretation Process*

*"The issue focuses on the two outside dining areas and eight outside food carts that will stay on site months at a time. There was no evaluation (past a statement that food carts are permitted in the zone) of this use. How was the interpretation of the use approved? (CDC 1.060)"*

**Staff Response: CDC 01.060 grants the initial authority and responsibility to interpret the code to the Planning Director. This authority is exercised on a daily basis as part of every development application processed by the Planning Department, including the recommendation contained within the staff report. Within that report, Staff Finding 2 notes that the definition of eating and drinking establishments was written expansively to include a broad variety of business models preparing and selling food, including those not specifically listed as a "typical use".**

***"Establishments or places of business that are not drive-through restaurants and primarily engage in the sale of prepared or produced food and beverages for on-premises consumption, on-premises sale, or take out service. On-premises sales do not include sales to secondary retailers or wholesalers. Typical uses include, but are not limited to: fast food establishments, restaurants, delicatessens, brew-pubs, coffee shops, taverns, bars and lounges."***

**Within capitalist economic systems such as that of the United States, business models and market opportunities are in constant evolution and it is neither possible nor preferable to have a code definition that tries to encompass every possible business model or configuration.**



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As noted in the application, the project site will be hosting up to eight food carts that will be making food and beverages for on-premises sale, consumption, and/or takeaway. All carts will be licensed by Clackamas County Environmental health consistent with county and state requirements for mobile food units (aka food carts). Therefore, a plain reading of the definition of eating and drinking establishments would encompass food carts.

Historical CDC amendments under Ordinance 1686 were focused on permitted and conditional uses in the Mixed Use (MU) zone, and this project not located in the MU zone. Food carts met the definition of Eating and Drinking Establishments prior to this ordinance, as they do today.

*"The use cannot be processed as an unlisted use under Chapter 80 because the proper process was not followed. (CDC 80.030)."*

**Staff response: CDC 80 (Unlisted Uses) is not applicable as food carts meet the definition of eating and drinking establishments, a use permitted in the General Commercial zone (CDC 19.030(10)), as discussed above.**

*2a). The land use action is based upon an interpretation that food carts are a permitted use. No findings are provided as to what information was made in making this interpretation or what process was followed.*

**Staff Response: See prior response regarding the use assignment as an eating and drinking establishment.**

*2b). Options to update the code: The change to the Willamette area zoning has a legislative history in file CDC 18-02...*

**Staff Response: These comments discuss legislative action that is outside the scope of this quasi-judicial hearing. As discussed above, Ordinance 1686 is not applicable as the project site is not located the MU zone and the text amendments did not change the definition of eating and drinking establishments.**

*2d). USES...The Director interpretation (1.060) asserted that "Eating and Drinking Establishment" includes a food cart. Was notice provided of this interpretation and was the right to appeal provided?*

**Staff Response: Per CDC 01.060(A), notice is only required when a party requests an interpretation from the Planning Director and then appeals the decision issued by the Planning Director. Please see Staff Response to Issue 1 on how and why food carts meet the use definition of eating and drinking establishments. An eating and drinking establishment is a listed, permitted use within the General Commercial zone.**



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2e) *Food carts or mobile vendors have been consistently processed in the West Linn code as Temporary Uses.*

**Staff Response:** Temporary uses are defined in CDC 02.030 as *“A use which, by its nature, will last under two years...”* Nothing in the proposal suggests that the use is time limited. Evidence suggesting the opposite includes the following:

- The project includes substantial investment in the restoration and adaptive reuse of the existing service building and fuel canopy into a pub and year-round outdoor seating area;
- RV style hookups to provide water, sewer, and electricity to each cart;
- Construction of permanent ADA compliant restroom facilities within the existing building; and
- Operation is expected to be year round and not seasonal in nature.

3a). *The submitted plans note a change the size of the garage building to allow for bathrooms and bar area. It also adds an outdoor cooler and garbage enclosure. Consider now the lot covered in eight food pods and two outdoor dining areas. These additions are not calculated or discussed.*

**Staff Response:** This is an incorrect reading of the plans. As discussed in staff finding 20, the proposed alterations do not increase the square footage of the existing building and are entirely within the existing footprint. The proposed bathrooms and bar area only change the internal configuration of how space is distributed, with related exterior changes to provide new entries into the reconfigured spaces. No changes are proposed to the footprint of the existing fuel canopy, and food carts are licensed by the state as vehicles and not structures, and therefore cannot be included in building square footage measurements. Lot coverage is not relevant as the maximum permitted lot coverage in the Willamette Falls Drive Commercial Design District is 100% per CDC 58.090(C)(1)(d). Therefore, the proposal is properly considered under a Class I Design Review.

*Further sanitation (hand washing for carts and disposal of water) was not addressed. Will utilities be above or below ground for the carts?*

**Staff Response:** As noted above, the applicant will be providing RV-style hookups for water, sewer and electricity for each cart, with the associated utility lines buried underground. See Sheets A.1, 3, and 6 on pages 121, 126, and 129 of the staff report. Additionally, each food cart will be subject to ongoing inspection by Clackamas County Environmental Health for compliance with state and local sanitation and food safety requirements.

Planning Commission  
City of West Linn  
22500 Salamo Road  
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John Boyd  
West Linn, OR

RE.: DR-21-11/MISC-21-14/SGN-21-20

Commissioners:

The issue before you is a Design Review for a drinking establishment, alteration of a non conforming structure, sign approval and consideration of eight food carts.

There are three core issues with this request. To assist in your review, sections of the CDC are referenced and an abridged portion of the CDC is provided as an appendix to this letter.

**Core Issue 1 INTERPRETATION PROCESS:**

1a). The drinking establishment (pub) within the garage structure is not in question.

1b). The issue focuses on the two outside dining areas and eight outside food carts that will stay on site months at a time. ***There was no evaluation (past a statement that food carts are permitted in the zone) of this use. How was the interpretation of the use approved?*** (CDC 1.060)

In the staff report for DR. 21-12, the director makes an interpretation using the definition of eating and drinking establishments, which contains examples like taverns and restaurants, for example, all brick and mortar structures. The director comes to the decision that food carts are permitted uses by assertion not by code. This determination had no findings, the review provides no standards, no approval criteria, no public input on the interpretation process. Does that meet the requirements of the code for a director interpretation process? (CDC 1.060), (CDC 80 Unlisted Uses), or (CDC 99.060)

The staff report references “Eating and drinking establishments” in support of food carts.

This use is clearly defined in the code and was not changed when the city updated the code in 2018 CDC-18-02. This Willamette Falls working group reviewed zoning map areas and suggested updates to the CDC text. The Planning Commission considered the amendments, made a few changes and forwarded the packet to Council who adopted the changes in Ordinance 1686.

A review of CDC 18-02 along with a scan of the video record is needed. The workshop/hearing discussion will reveal that at no point was food carts/mobile vendors considered. Has that action been taken? Food carts are not defined, not listed in parking standards, not addressed in design standards and only addressed in Temporary Use Standards. Consider the street fairs and fireworks stands you see annually. The use cannot be processed as an unlisted use under Chapter 80 because the proper process was not followed. (CDC 80.030). Review the definition provided at the end of this document and in the CDC. It clearly defines and provided examples of the brick and mortar uses that have developed in our community.

**Core Issue 2 USE ANALYSIS:**

2a). The land use action is based upon an interpretation that food carts are a permitted use. No findings are provided as to what information was made in making this interpretation or what process was followed.

These are trailers, not brick and mortar structures. They address restaurants or drinking establishments (like the pub) the code is silent on carts as a permanent use.

The code does provide for temporary uses. Both the temporary use section and municipal code have provisions and have processed mobile vendors including carts. The use of carts have historically been temporary uses.

2b). Options to update the code: The change to the Willamette area zoning has a legislative history in file CDC 18-02. The intent of these changes were to address specialty alcohol bars, artisan food makers and make uses for brick and mortar structures more current and assure these types of fixed uses were allowed. None of the record for the code changes in 2018 under CDC 18-02 had any recommendation or discussion of food carts or mobile vendors.

At the end of each year, the Planning Commission meets to discuss goals for the upcoming year and consider needed changes to the code. At that time the list of uses for consideration in the docket process listed mobile vendors with a low priority. Council did not add that action to the docket. (CDC 2.010.D.) (CDC 2.030 "Eating and Drinking Establishments"), (CDC 2.030 "Temporary Uses"), (CDC 2.030 "Use"), (CDC 98.030), (CDC 99.060.A.3) (Municipal Code 7.800)

This decision lacks analysis for interpretation, research of prior code years to determine if mobile vendors were allowed and what actions were considered to add mobile carts legislatively. Further, the findings do not consider how temporary use that approve carts and (fireworks) stands impact the definition of the use. Has this interpretation that modifies the code follow the process outlined in the CDC?

2c). Only the pathways identified in the code can authorize a use or interpret a use.

CDC 1.060 Allows the planning director to make an initial determination on a use. This is a decision appealable to the Planning Commission: a land use action.

2d). USES The Code identifies uses in five differing chapters. The initial duty to interpret is raised in Chapter 1. A use and sub types of uses are defined in Chapter 2.030. They are listed in sixteen zones and the five overlay zones. Uses are permitted, permitted with standards, conditional, non-conforming, non-complying and unlisted. (CDC Chapter 1.060), (CDC Chapter 2), (CDC Chapters 8 to 28,58 and 59 Listed but not provided in appendix). The non conforming uses area addressed in Chapters 65. The Unlisted uses are found in Chapter 80.

The CDC is amazingly robust and has addressed the spectrum of uses. Has Staff correctly addressed this use and followed the correct process? The uses identified in the code are permitted, permitted with standards, conditional, accessory or temporary. In some instances uses can be pre-existing, these uses are clear early stated because they are found in past ordinances that have since been repealed.

The Director interpretation (1.060) asserted that "Eating and Drinking Establishment" includes a food cart. Was notice provided of this interpretation and was the right to appeal provided? The Planning Commission would hear an appeal of a Directors interpretation under 99.060.B.4. While staff did not clarify, the use is must either be defined and listed, non-conforming use or unlisted use. Since it clearly is not listed or defined in the code, no findings were provided to assert it is a non-conforming use, it must be an unlisted use. Why wasn't the evaluation of the use determination explained in the findings. The land use action is based upon the assertion the uses are permitted without speaking to the path that brought them to the conclusion. ***The staff report asserts "The proposed indoor pub and food carts meet the definition of eating and drinking establishments in CDC 02.030, which was written expansively to include a broad variety of service models..."***

\* 80.030 requires an interpretation.

\* 80.040 prohibits unlisted uses if they can be found in another zone. Temporary uses are listed in most zones and address construction offices, firework stands and vendors during council approved events

\* 80.050 Contains applicable standards. Sub C requires the proposed use be the same general type.

An interpretation is a land use decision. This interpretation was not submitted or reviewed as provided in the code and doesn't meet criteria.

2e). Food carts or mobile vendors have been consistently processed in the West Linn code as Temporary Uses. They are not a similar use is noted in chapter 80. This submittal was not processed in a hearing before the planning commission. The only way to add a new use is by a legislative amendment under chapter 98.

\* These uses are allowed in some that have crafted code for mobile vendors and food pods. The City of West Linn has not taken that action. The City of West Linn Municipal Code 7.954 Exemptions allows Retail and or dining furnishing for temporary community sponsored events as approved by the city manager or designer. All of our businesses have to be brick and mortar. Temporary uses allow for tents, carnival events or street fairs.

2f). The use process: an interpretation was made by the Director pursuant to 1.060 that "Eating and Drinking Establishments" was determined to include a food cart. There was no notice provided of this interpretation nor was the right to appeal provided. (CDC 99.060.B.4. ) The use must either be defined and listed, be a non-conforming use or unlisted use. No application was submitted and would not be appropriate to process as there are other uses in the code (temporary uses). Why wasn't the evaluation of the use determination explained in the findings.

### **Core Issue 3 DESIGN REVIEW:**

3a). The submitted plans note a change the size of the garage building to allow for bathrooms and bar area. It also adds an outdoor cooler and garbage enclosure. Consider now the lot covered in eight food pods and two outdoor dining areas. These additions are not calculated or discussed. Further sanitation (hand washing for carts and disposal of water) was not addressed. Will utilities be above or below ground for the carts? No criteria were addressed because food carts do not exist in the code. Was the addition to the garage less than 5% of the building? How was the food court and outdoor seating area addressed in this calculation? Was the Type I design review, correct? As a new use with significant design changes a Type II design review would be appropriate. Review the purpose of design review, was the intent of design review met? (CDC 55.010)

In closing, the Planning Commission has a challenging role. They sit in front of their friends and neighbors discussing projects knowing they must review criteria for each project. It is human to work towards a common solution. The danger is when the quasi-judicial judges (Planning Commissioners) applying criteria assume a policy maker role. That role of policy maker rests with city council. One of the core questions considers citizen involvement and how it's addressed in this process? The code criteria concerns are ***opportunities for the public to participate in an informed manner***. The public standing in front of the PC has the right to speak on code interpretation for food carts, the alteration of a non conforming structure and the best Type of Design Review. How was the public educated on the process? How was the planning commission educated on the process? And in the end, how was the city best served by this process? The code sections provided in the text and appendix will allow you to consider the facts with core content from the code. I encourage you to read the full sections.

Thank you for your consideration of these issues.

John Boyd

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#### Code Citation and supportive Text

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#### Chapter 1 General

##### 01.060 INTERPRETATION

A. The Planning Director shall have the **initial authority and responsibility to interpret all terms, provisions and requirements** of this code. A request for an interpretation shall be made in writing to the Planning Director. The **Director's interpretation may be appealed to the Commission as provided by CDC 99.060(B).**

B. The Director may develop guidelines to aid in the implementation and interpretation of the provisions of this code.

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#### Chapter 2 Definitions

##### 02.010 INTERPRETATION SPECIFIC WORDS AND TERMS INTERPRETATION

For the purpose of this code, certain terms or words used herein shall be interpreted as follows.

A. The word "shall" is mandatory, the word "may" is permissive.

B. The words "used" or "occupied" shall include the words "intended, designed, or arranged to be used or occupied."

C. The word "lot" or "parcel" includes the future tense, the singular number includes the plural, and the plural number includes the singular.

**D. Words not specifically defined herein shall have the meaning specified in Webster's Third New International Dictionary of the English Language, Unabridged. (Ord. 1604 § 1, 2011; Ord. 1636 § 2, 2014)**

2.030 DEFINITIONS.

**Eating and drinking establishments** . Establishments or places of business that are not drive through restaurants and primarily engage in the sale of prepared or produced food and beverages for on-premises consumption, on-premises sale, or take out service. On-premises sales do not include sales to secondary retailers or wholesalers. **Typical uses include, but are not limited to: fast food establishments, restaurants, delicatessens, brew-pubs, coffee shops, taverns, bars and lounges.**

**Temporary use** . A use which, by its nature, will last under two years, with the exception of drop boxes and structures/trailers serving a similar function and construction related uses and facilities. Examples of temporary uses include, but are not limited to: uses associated with the sale of goods for a specific holiday, activity or celebration, such as the sale of Christmas trees and fireworks; uses associated with construction; seasonal uses, such as the sale of fresh fruits, produce, and flowers; **uses associated with festivals, celebrations or special promotional events; a real estate office within a development limited to the sale of real estate in the development;** and portable outdoor storage units or similar structures as are typically used for storing items in conjunction with a move, minor remodel or construction project. Temporary uses do not include businesses seeking a temporary or interim location.

**Use** . The purpose for which land or a structure is designed, arranged, or intended, or for which it is occupied or maintained.

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35.010 APPLICABILITY EXEMPTIONS TEMPORARY USE STANDARDS DURATION OF TEMPORARY USES APPLICABILITY Notwithstanding the limitations of use established by this code, **the approval authority can authorize temporary uses consistent with the provisions of this chapter.** (Ord. 1613 § 6, 2013)

35.020 EXEMPTIONS The following temporary uses and structures are exempt from the provisions of this chapter:

A. Construction related uses including, but not limited to, trailers and staging areas, on sites approved for the associated development.

B. Portable outdoor storage units or similar structures as are typically used for storing items in conjunction with a move, minor remodel, or construction project that will remain on site 14 days or less during a given calendar year. (Ord. 1613 § 6, 2013)

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55.010 PURPOSE AND INTENT – GENERAL

The purpose of the design review provisions is to establish a process and standards for the **review of development proposals in order to conserve and enhance the appearance of the City and to promote functional, safe, and innovative site development.** Attention will be paid to the proposal's scale, layout and design, its compatibility with the surrounding natural environment, and the **character of the surrounding neighborhood or area. The intent is to ensure that there is general compatibility between adjoining uses, that private and common outdoor space is provided, that vehicular access and circulation are safe, and that areas of public use are made aesthetically attractive and safe.** Also of concern are the needs of persons with disabilities. Developers of multi-family, industrial, commercial, office, and public building projects are required to take steps to reduce reliance on the automobile by, in part, encouraging other modes of transportation such as transit, bicycles, and foot traffic, and through building orientation or location. (Ord. 1650 § 1 (Exh. A), 2016)

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55.020 CLASSES OF DESIGN REVIEW

A. Class I Design Review. The following are subject to Class I Design Review:

1. Modification of an office, commercial, industrial, public or multi-family structure for purposes of enhancing the aesthetics of the building and **not increasing the interior usable space** (e.g., covered walkways or entryways, addition of unoccupied features



such as cupolas, clock towers, etc.).

...

3. Addition or reduction of less than five percent of total square footage of a commercial, office, public, multi-family, or industrial building.

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#### 80.010 PURPOSE

It is not possible to contemplate all of the various uses which will be compatible within a particular zone. Therefore, unintentional omissions occur. The purpose of these provisions is to establish a procedure for determining whether certain specific uses would have been permitted in a zone had they been contemplated, and whether such unlisted uses are compatible with the listed uses. (Ord. 1339, 1993)

#### 80.030 DETERMINATION PROCESS

A. Upon application and payment of fees, the determination regarding an unlisted use shall be made by the Commission pursuant to the provisions of CDC 80.050 subject to the limitation set forth in CDC 80.040.

B. The Planning Director shall maintain a list by zone of approved unlisted uses, and the list shall have the same effect as an amendment to the use provisions of the applicable zone. (Ord. 1339, 1993)

80.040 LIMITATION The Commission shall not authorize an unlisted use in a zone if the use is specifically listed in another zone as either a permitted use or a conditional use. (Ord. 1339, 1993)

80.050 APPROVAL STANDARDS Approval or denial of an unlisted use application by the Commission shall be based on findings that:

- A. The use is consistent with the Comprehensive Plan;
- B. The use is consistent with the intent and purpose of the applicable zone;
- C. The use is similar to and of the same general type as the uses listed in the zone;
- D. The use has similar intensity, density, and off-site impacts as the uses listed in the zone; and E. The use has similar impacts on the community facilities as the listed use. (Ord. 1339, 1993)

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#### 98.010 PURPOSE

The purpose of this chapter is to establish procedures applicable to this code for the consideration of legislative changes to the provisions of the Comprehensive Plan, implementing ordinances and maps.

The procedures of this chapter are not required for adopting or amending Comprehensive Plan supporting documents which are not provisions of the plan. Plans that are supporting documents shall be adopted pursuant to the procedures set forth in Chapter 100 CDC. (Ord. 1434, 1999)

#### 98.030 DOCKET

A. Comprehensive Plan, CDC and zoning map amendments to be prepared and processed in a given year shall be listed on a docket established consistent with this section.

1. Proposing amendments and projects. Anyone may request a Comprehensive Plan, CDC or zoning map amendment or a related project on a form submitted to the Community Development Department.

2. Planning Commission review. Each year, staff shall present the proposed project list to the Planning Commission to give them the opportunity to review the proposed projects, add projects of interest, and to prioritize the proposed projects within their purview.

3. City Council review and action. The City Council shall set the docket each year after considering the proposed project list.

B. Exception. The City Council may initiate Comprehensive Plan, CDC and zoning map amendments outside of the docketing process. (Ord. 1474, 2001; Ord. 1613 § 22, 2013; Ord. 1621 § 25, 2014)

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**99.060.A.3 Make initial interpretation of the provisions of this code.**  
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**SPECIAL EVENT PERMITS**

7.800 Definitions

As used in Sections 7.800 to 7.880, the following words and phrases shall have the meanings given to them in this section:

**Applicant.** Any person or organization who seeks a special event permit from the City Manager to conduct a special event governed by this chapter. An applicant who is an individual must be 18 years of age or older.

**Athletic Event.** An occasion in which a group of persons collectively engage in a sport or other form of physical exercise on a City street, sidewalk, alley or the street right-of-way, which obstructs, delays, or interferes with the normal flow of pedestrians or vehicular traffic or does not comply with traffic laws and controls. Athletic events include bicycle and foot races within City rights-of-way.

**Block Party.** A festive gathering on a residential or commercial street or area requiring a closure of a street, or a portion thereof, to vehicular traffic and use of the street for the festivity.

**Carnival.** The exhibiting or conducting of a traveling show or of entertainment open to the public, including any caravan, museum, menagerie, animal collection, circus, sideshow, rodeo, carnival, animal exhibition, feats of horsemanship, acrobatic performance, "wild west" show, or any other show or entertainment similar in character.

**City Manager.** The City Manager or, in the Manager's absence, the Acting City Manager.

**Special Events.** Carnivals, community celebrations, outdoor festivals, athletic events, block parties, parades, fairs, animal races, and similar public gatherings that take place on City property or rights-of-way or that require the closure of any portion of a City street.

[Added by Ordinance No. 1493, adopted 02-05-2003.]

...