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City of West Linn

Memorandum

Date: April 12, 2024

To: Mayor Bialostosky, Mayor
West Linn City Council

From: Darren Wyss, Planning Manager

Subject: Public Comments Received for AP-24-01 (Icon Commercial Building)

Between the publishing of the AP-24-01 Appeal Hearing Packet on April 4, 2024, which included two public comments as Attachment 4, and today at 5:00pm, the City received two additional written comments. The comments are attached.

If any additional written testimony is received, it will be forwarded under a separate memorandum after closure of the written comment period at noon on Monday, April 15, 2024.

As always, please contact me with any questions at dwyss@westlinnoregon.gov or 503-742-6064.

Please accept this testimony for the record. Let me know if the pictures don't come through. I tried to send the word file but it said it was too large to attach with the pictures.

Dear City Council:

Please accept my testimony for AP-24-01. I am writing on behalf of myself, not any affiliated group or organization. I am writing in support of the application, in opposition of the appeal.

The main issues cited are the "3rd story" concern and the potential noise issues.

First let's look at the code's definition of a "story" (CDC Chapter 2) it states:
"Story. That portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above…"

The key here is the "ceiling or roof". The topmost story ends at the roof. Our code does not have a "roof" definition, so we go to Websters:
"Roof: The cover of a building"

There will be an entire roof that covers that topmost floor (2nd floor), and the patio is on top of that "roof". Thus, a rooftop patio does not meet the definition of a "story" per code our code definition. There is no "ceiling" or "roof" closing off the patioed area to make it a "story". It has side walls, but side walls do not make it a story. The "roof" or "ceiling" is what makes it a story per our code. There is no ceiling or roof above the patio. Thus, it is not a "story".

Also, just because there are storage areas that may have roofs does not make it a story. I walked the street. There are several buildings on Willamette Falls Dr. that have "storage" areas on top of the 2nd floor roof. These were not considered to be "stories" when they were built. So why are we arbitrarily calling this a "story" now? The fire station was a more recent building. You can see in this picture it clearly has a storage area on top of the 2nd story.

One thing our code is not clear about is whether an “attic” is a story or not. An “attic” space has a roof over it so it could be considered a story. Our code does not define an attic space. However, in the past, attic space has not been considered to be a third story as several buildings on the street have habitable attic spaces, and they were allowed to be built per the two-story code.

Take for instance the building across the street from the Ale and Cider house. This has occupied attic space which could be considered a 3rd story by the definition of a story. They have stairs that go up to that attic space and it is occupied by a business, so it is indeed a “habitable” space.

CIDER HOUSE

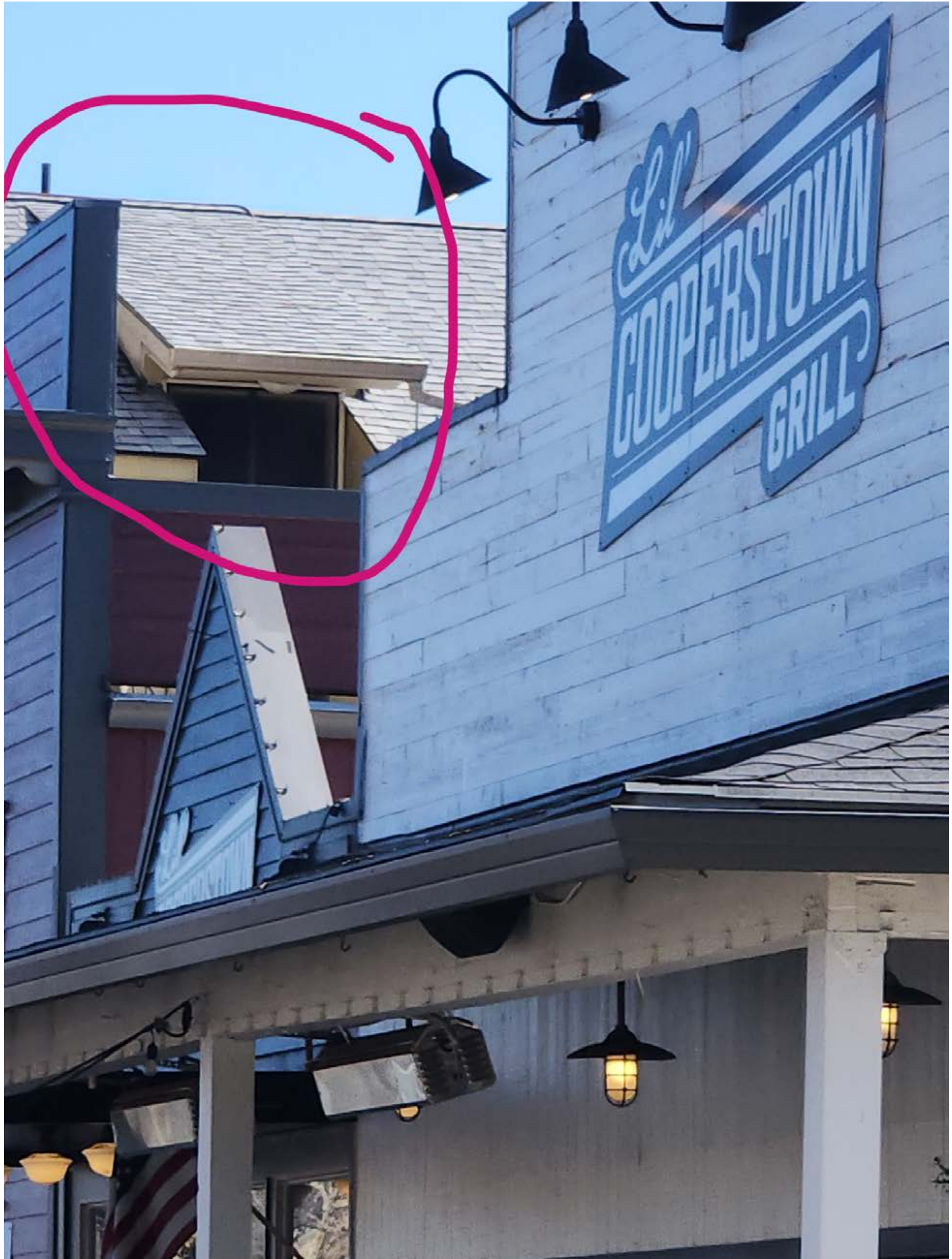
I also walked the alley and the building next to Cooperstown also shows a potential 3rd story attic area. The “3rd story” has a window so I’m assuming it is being used as a habitable space.

If neither storage spaces nor attic spaces were considered a “story” in past building applications, why would an open “roof top patio” with no “ceiling” be a “story” in this case? If it is not a story, then this building meets the two-story code.

Likewise, if there was just the storage space with no proposed patio, we would not be having this discussion. The simple fact that there people will be able to use it make it a story? This is just not a good interpretation of the code.

HRB (Historic Review Board) argued that because there was an elevator and stairs to the roof made it a “story”. Again, the buildings shown above have access and enclosed habitable space, yet the HRB did not interpret them to be a 3rd story when they were built. This is just an inconsistent interpretation of the code.

There is also the building next to Cooperstown. There is a door that goes out to a small patio. While technically on the 2nd story, you can see that “outdoor patios” can come in all shapes and sizes.



Lil'
COOPERSTOWN
GRILL

Which begs the question, if the proposal had just a patio this large (say 5x5 space), would it be a “story”? If the answer is “no”, then it is not a story.

This is the back of another building (I think it is the back of the Saloon):

You can see they have a door that goes on to the roof of that little accessory structure. Is that accessory building two stories? Under the HRB’s interpretation of the code, if it has stairs and access to it, it must be a “story”. You can hopefully see that just because there is “access” to the roof, doesn’t make it a story. If you added patio furniture on top of this roof, it likewise wouldn’t make it “habitable” space. It would still just be a “rooftop”.

Let’s look at “habitable”. Again, I’ll go back to our code. It says this:
“Habitable floor. Any floor usable for living purposes, which includes working, sleeping, eating, cooking or recreation, or a combination thereof. A floor used only for storage purposes is not a habitable floor.”

This is not a “habitable” floor. Nor are the storage buildings on top “habitable” space. It is not “habitable” space, I would also argue it is not a story. In the appellant’s brief, they didn’t use the word “habitable”. They used “human occupancy”. Going back to our code, all the definitions in our code that reference “human occupancy” refer to living spaces. Accessory Dwelling Unit (ADU), Dwelling Unit, Manufactured Home, Group Residential, Mobile Home, all these that mention “occupancy” have the “working, sleeping, eating, cooking” areas. Again, a rooftop patio with no place for sleeping, eating, or cooking is not fit for “human occupancy”. Perhaps the appellant may be confusing “occupancy” as it relates to fire code (how many people can occupy a space at one time). Our building code in referencing whether something is a story has to do with “living space” (whether it is fit for someone to live there). It does not have to do with whether someone can “access” a space and “occupy” it temporarily. Again, my examples of the patios above, no one would consider these to be “living” or “habitable” spaces. This is why I can’t understand the interpretation of the code with this building.

To think of this another way, if this was a home, and you had a “rooftop patio” on top of the house (you see this a lot at the coast), you cannot count that patio in the square footage of the home. The way homes are appraised, only the “habitable” square footage is allowed to be considered when you buy a home. If you built on a “screened in patio” on your house, this likewise, per real estate appraisal guidelines cannot be included in the square footage (unless it has heat going to it). Likewise, a garage is not considered “habitable” space (again unless it is built with heat to it). So even a fully enclosed space (which this is not) is not considered to be “habitable” unless it is “livable”. So, in all these real-world examples, this rooftop patio as being proposed would never be considered included in square footage of the building so why should it be considered a “story” in this case?

To look at it another way, what if the applicant was proposing a rooftop garden instead of a patio? It would still have elevator access, “structures” in the form of a “greenhouse” and presumably a chair or two to sit down and take a break. Would that be approved? I’m sure if it was a rooftop garden, there would be less pushback from the neighbors. But does the simple fact that it will have patio furniture with people sitting and socializing instead of having plants make it a story?

Moving on to the appellant’s concern about the Conditions of Approval. As staff mentioned in the Planning Commission hearing, outdoor seating is allowed by the code. If a restaurant went into the building, for instance, it could have outdoor seating on the side or even the backside of the building right next to these neighbor’s driveways. Why would we regulate a rooftop patio based on noise if we don’t regulate the street level outdoor patio seating noise?
(Side note: I don’t believe we ever implemented that “sidewalk café” code EDC helped work on. That could regulate things like noise and shielding of noise for outdoor dining. If rooftop patio noise needs regulation, it should be done via the sidewalk café code, not the building code).

Similarly, we don’t consider outdoor patio space that all the restaurants have now “habitable” space? So why does the simple fact that the outdoor patio space is placed on top of a roof

suddenly make it “habitable” space as the neighbors are implying and need additional conditions for noise? The uses proposed for the building are allowable “outright” per the code. They are not proposing any use that requires a “conditional use” permit. While I feel like the Planning Commission’s conditions were reasonable, I do also feel that it wasn’t their purview to impose this since the uses being considered for this property are uses that are allowed outright in the code, and there are no proposed tenants right now.

The applicant has tried really hard to accommodate the neighbors. The applicant has made the patio in the center of the building, away from the neighbors. Originally the outdoor space was to be possibly used for a restaurant. I personally feel this is a great use of the space. We need more commercial space in the city. Most cities have 40% or more of their land dedicated to commercial uses. We have something like 4%. We desperately need this building to bring more businesses and local jobs to the city. Likewise, something like a rooftop patio would bring additional customers to the area, which is important for all the downtown area business. Having more customers makes it better for all types of businesses. I’m sad this is no longer being considered but appreciate that the owners are willing to compromise with the neighbors. The current proposed use is passive, with people working in the building wanting to get some sunshine or an occasional gathering may be possible. I don’t know how this could possibly be any louder than again having outdoor dining on the back or side of the building which is allowable whether there is a rooftop patio or not.

We also have noise ordinances that will limit the noise to a reasonable decibel level, and within certain hours. (or again sidewalk café code could further restrict this). If the building tenants start to surpass that noise level or hours, the city has recourse to control this with the municipal code. But you cannot restrict the applicant from building simply because you are worried there will be noise without proof there will be noise. If they were building a factory, for instance, you would then have proof there will be noise that exceeds a certain decibel level. In that case it would be reasonable to add conditions of approval regarding noise. But without any known tenants for the building, there is no reason to assume that the uses of this building will be any louder than it is currently with outdoor dining already going on in the zone. Also, as mentioned, our zoning code has the “outright uses” allowed because they create a reasonable amount of noise. Things that create more noise would have to go through the “conditional use” process. But right now, there are no tenants. The applicant has stated that the patio won’t be used for a restaurant. So having people that work in the building go up to the patio to get some Vitamin D and mingle can’t possibly be enough noise to warrant denying a property owner the right to build.

I will also point out that the neighbors appealed this application on their own. There was not enough support I’m assuming with the Willamette Neighborhood Association to warrant the WNA filing an appeal at no charge. Thus, the issues lie solely with the few neighbors who decided to build a home that backs up to a commercial district. Those homes were built recently or added on to recently. I remember when there were nice large lots with small homes and beautiful trees there before. I did not complain when they destroyed the beauty of my neighborhood with their gigantic homes with no yards. Likewise, they cannot take away another

property owner's rights simply because they don't want a big building there. If you decide to build a home that backs to a commercial district, you must expect there will be some level of noise associated with living there. I live across the street from a school and a block from a park. I expected when I purchased my home that noise would be part of my daily life.

My business is also located directly across the street from the building this will be attached to. When the applicant built the last building, they knocked out my internet several times. The building of the underground parking lot shook my building and knocked down some of my displays breaking things in the process. However, I still want this building to be built knowing that I will probably experience the same issues during construction. Overall, we need more places for businesses. It is a minor inconvenience to spur economic development of the area.

I urge you to deny the appeal and approve this building application. There is just no good interpretation of the code to warrant denial of this application, and it would be unfair considering the precedence set by other buildings in the area that have attic or storage spaces already existing on the top of their two-story buildings.

Thank you as always for your service.

Shannen Knight
West Linn resident and Business Owner

Wyss, Darren

From: A Sight for Sport Eyes [redacted]
Sent: Thursday, April 11, 2024 6:10 PM
To: Wyss, Darren
Subject: Additional testimony for AP-24-01

CAUTION: This email originated from an External source. Do not click links, open attachments, or follow instructions from this sender unless you recognize the sender and know the content is safe. If you are unsure, please contact the Help Desk immediately for further assistance.

Darren, did you get my first testimony? I got an auto response that you were out of the office. Please add this to the record as well.

I apologize for submitting additional testimony. I just read the appellant's attorney's testimony and felt compelled to respond to this.

First, the inefficiency of the proposed screening is conjecture by the attorney. A quick Google search shows that steel screening is a good sound barrier. (more on the science here)

Steel sound barrier walls are **excellent products for outdoor applications**. They are very effective at blocking noise from equipment of processes that need ventilation and/or cover a large area.

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I would also argue that the patio in the center of the building is away from the neighbors to some extent and that in and of itself is "screening". I will also add that the original design included storage areas which would have provided extra screening that the neighbors are requesting. However, the storage sheds were removed after neighbor concerns.

The attorney also mentions CDC 55.110(D)(4):

"Businesses or activities that can reasonably be expected to generate noise in excess of the noise standards"

The key phrase here is "reasonably be expected". Again, there is no tenant and thus no "business or activity" that is "expected to generate" noise.

While we don't know how much noise an outdoor patio will create, sound travels in all directions. It is possible with the common upwind we have that the sidewalk cafe noise would actually be greater than a rooftop patio for those neighbors. The attorney is again conjecturing that the noise will be beyond municipal code limits without any proof.

For that reason I would disagree with the proposed condition #1 by the attorney. You could modify this to "any proposed tenant that wants to use the rooftop for a lounge or restaurant must have a sound study done before issuing an occupancy permit." If the rooftop lounge doesn't surpass any noise standards, then it should be allowed. But again, cross that bridge if and when it happens. Denying a building application because you are "afraid" of what may go in it is not a clear and objective standard.

Condition #2 is also an unwarranted condition. Right now their neighbor can have a party and blast speakers as long as they don't again violate the noise code. To ask that no one can use any speakers, again, when there is no proposed occupant, is just not a justifiable request. No other neighbor or business has this restriction so why would you place this restriction on a building with no proposed tenant when you don't know if it is even going to be a problem?

#3 is similar to what the Planning Commission asked for, but the additional condition of "every year" is excessive again because the city has ways to regulate with the municipal code if there are violations. Making a business have to pay for an expensive sound study every year when there are no violations is a financial burden for a business owner. It is not something you make any of the other businesses who have sidewalk cafe's do which makes it inherently unfair.

Again, the best way to deal with these kind of "what if" scenarios would be in the sidewalk café code as mentioned in my previous testimony.

As to CDC 58.080.B.3, the code does not state the building should not "look like" 3 stories. It states it cannot BE more than 2 stories. Whether or not it looks like 3 stories is irrelevant. The code does not state that the façade cannot have windows. However, I did show in my pictures examples of buildings that have actual 3rd stories and windows as well.

Going back to my first testimony, an elevator is not fit for human occupancy. As the staff found, the elevator itself is similar to the shaft and other parts that make it an elevator, not habitable space. This is a mis-understanding of what human occupancy is.

Lastly to the HRB issue. I watched all those meetings. If the applicant would have stuck with that first design that was approved by HRB, and in between the HRB and PC meeting decided that they didn't need those storage sheds and that the patio could be smaller to appease neighbors, and they could reduce the height to get it under the 35', I'm sure HRB would have not felt that they needed to re-review this application. The HRB approved essentially this same application with minor changes unrelated to historic preservation so it does not need to go back to the HRB.

Lastly, this is the attorney that represented the school district on the Athey Creek school build. I find it interesting that during the Athey Creek hearings, Ms. Richter argued that the concerns of the neighbors were irrelevant as they did not pertain to code. Somehow, though, in this application, Ms. Richter wants Council to ignore code and put incredibly harsh restrictions on this property owner and future business tenants due to neighbor concerns. Athey Creek project was a "conditional use" permit so the voices actually did matter in that application as part of a conditional use permit is that you have to fit the needs of the community. This application is a "permitted outright" use being

proposed. The code trumps neighborhood concerns as outright uses are not subjective like the condition uses are.

I will agree with one thing with the neighbors. The lighting from the current building is excessively bright. The property owner could generate some goodwill by reducing the wattage of bulbs or the number of lights on the backside of the building, or turning the lights off completely after 2am.

Thank you again for letting me submit additional testimony.

Shannen Knight

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