CITY HALL 22500 Salamo Rd, West Linn, OR 97068 Telephone: (503) 742-6060 Fax: (503) 742-8655

City of West Linn

Memorandum

Date: April 12, 2024

To: Mayor Bialostosky, Mayor
West Linn City Council

From: Darren Wyss, Planning Manager

Subject: Applicant Testimony for AP-24-01 (Icon Commercial Building)

Between the publishing of the AP-24-01 Appeal Hearing Packet on April 4, 2024 and today at 5:00pm, the City received additional testimony from the Applicant. The testimony is attached.

If any additional Applicant 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.

Schwabe

April 12, 2024

VIA E-MAIL

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Hon. Rory Bialostosky, Mayor
City of West Linn
22500 Salamo Road
West Linn, OR 97068

RE: Agenda Bill 2024-04-15-01: Appeal of approval of a Class II Design Review (DR-23-01); Applicant's Response to Appellant's Letter
Our File No.: 132873-285017

Dear Mayor Bialostosky and City Councilors:

This office represents ICON Construction and Development ("ICON") in the above-captioned appeal, which concerns a new commercial building (the "Building") in the Willamette Falls Commercial Design District (the "Design District") at 1919/1949 Willamette Falls Drive, which application (the "Application") was approved by the Planning Commission after a nine-month hearing process. Appellant Ian and Audra Brown (collectively, "Appellant") engaged an attorney who submitted a letter dated April 10, 2024. This letter is respectfully submitted in response to Appellant's letter. As explained below, the Council should reject Appellant's arguments.

1. **The City Council should reject Appellant's proposed additional conditions concerning noise and potential uses of the roof deck.**

Appellant seeks to impose three additional conditions, two of which would restrict otherwise permitted uses of the roof deck. It requests this based on speculative concerns that noisy activities will take place on the roof deck. As explained in detail below, the Council should not impose these additional conditions.

As it regards the Building, the City regulates noise in two primary ways, but neither of those mechanisms allow for denial of the Application or prospective prohibitions on otherwise allowed uses of the Building.

First, there are provisions in the Design Review criteria that allow the City to require a noise study and buffering between the potential noise sources and surrounding areas. These provisions are as follows:

- CDC 55.070.D.2.h: "If staff determines before or during the pre-application conference that the land use is expected to generate noise that may exceed DEQ standards, the application shall include a noise study conducted by a licensed acoustical engineer that demonstrates that the application and associated noise sources will meet DEQ standards. Typical noise sources of concern include, but are not limited to, vehicle drive-throughs, parking lots, HVAC units, and public address systems."
- CDC 55.100.D.3: "Structures or on-site activity areas which generate noise, lights, or glare shall be buffered from adjoining residential uses in accordance with the standards in subsection C of this section where applicable."
- CDC 55.100.D.4: "Businesses or activities that can reasonably be expected to generate noise in excess of the noise standards contained in West Linn Municipal Code Section 5.487 shall undertake and submit appropriate noise studies and mitigate as necessary to comply with the code. If the decision-making authority reasonably believes a proposed use may generate noise exceeding the standards specified in the municipal code, then the authority may require the applicant to supply professional noise studies from time to time during the user's first year of operation to monitor compliance with City standards and permit requirements."

As is appropriate for a commercial development project, the City's Design Review standards provide no basis for denial based on the mere possibility or certain noises. As noted above, the standards allow, but do not compel, the City to require certain buffering between the potentially noise producing use and the noise sensitive location, and to require noise studies in certain instances.

As for this Application, there is no evidence in the record supporting an assumption that the mere existence of a roof-top deck and the stairs and elevator needed to access it will result in "noise in excess of the noise standards contained in [WLMC] 5.487." The improvements originally proposed that would have allowed (if a future tenant wished) use of the roof as a fully-functional lounge or entertainment area have been removed from the Application, and the Application includes metal buffering between the roof deck and adjacent properties, as well as shrubs and planters that will make the buffer more effective.

In this regard, the Planning Commission found that the Application will satisfy these criteria as proposed or with conditions of approval. With regard to noise, the Planning Commission imposed the following condition of approval:

> "10. Noise Study. The applicant shall submit a noise study upon 50% of the total floor area of the building being occupied. Subsequent to the first noise study the applicant shall submit a new noise study, not more than once per year, in response to a noise complaint associated with the rooftop deck. The noise study must address the provisions of West Linn Municipal Code Chapters 5.487(3) and be conducted in July or August."

The Application includes no proposal for a restaurant or other use that could conceivably violate the standards in WLMC 5.487, discussed further below. Rather, Appellant wrongly urges the City Council to prospectively prohibit uses allowed by right in the CDC because they could conceivably produce such a noise before such use is conducted or even proposed. There is simply no basis in the CDC for the Council to do what Appellant asks.

Rather, the primary tool the City has for addressing loud noises is the City's noise ordinance, WLMC 5.487, which applies to every use and activity in the City. As is relevant here, the noise ordinance includes the following limits:

- WLMC 5.487(2) General Prohibition. No person shall make, continue, assist in making, or allow:
  (a) Any unreasonably loud, disturbing, or raucous noise;
  (b) Any noise that unreasonably annoys, disturbs, injures, or endangers the comfort, repose, health, safety, or peace of reasonable persons of ordinary sensitivity, within the jurisdictional limits of the City; or
  (c) Any noise which is so harsh, prolonged, unnatural, or unusual in time or place as to occasion unreasonable discomfort to any persons, or as to unreasonably interfere with the peace and comfort of neighbors or their guests, or operators or customers in places of business, or as to detrimentally or adversely affect such residences or places of business.

- WLMC 5.847(4) Prohibited Noises. The following acts are declared to be per se violations of this chapter. This enumeration does not constitute an exclusive list. It shall be unlawful for any person to commit, create, assist in creating, permit, continue, or permit the continuance of any of the following:

  (a) Radios, Televisions, Stereos, Musical Instruments and Similar Devices. The use or operation of any device designed for sound production or reproduction,

> including, but not limited to, any radio, musical instrument, television set, stereophonic equipment, or similar device that is plainly audible to any person other than the player(s) or operator(s) of the device, and those who are voluntarily listening to the sound, and unreasonably disturbs the peace, quiet, and comfort of neighbors in residential areas, including multi-family or single-family dwellings.
>
> (e) Yelling, Shouting, and Similar Activities. Yelling, shouting, hooting, whistling, singing, or creation of noise in residential areas or in public places, between the hours of 9:00 p.m. and 7:00 a.m., or at any time or place so as to unreasonably disturb the quiet, comfort, or repose of reasonable persons of ordinary sensitivities, unless a special permit is granted by the City Manager. This section is to be applied only to those situations where the disturbance is not a result of the content of the communication but due to the volume, duration, location, timing or other factors not based on content.
>
> (f) Loudspeakers, Amplifiers, Public Address Systems, and Similar Devices. The unreasonably loud and raucous use or operation of a loudspeaker, amplifier, public address system, or other device for producing or reproducing sound is prohibited without a permit from the City Manager. The City Manager may grant a special permit to responsible persons or organizations for the broadcast or amplification of sound as a part of a national, State, or City event, public festival, or special events of a noncommercial nature. This permit shall not be required for any public performance, gathering, or parade for which a permit authorizing the event has been obtained from the City.
>
> (6) Penalties. A violation of this section is a Class A violation and a public nuisance.

The regulations above authorize the City to stop any noises in violation of the limits stated in WLMC 5.487(2). However, not only are Appellant's proposed conditions *not* supported by the CDC, they are not supported by the noise ordinance either. For example, there is no *ban* on the outdoor use of "Radios, Televisions, Stereos, Musical Instruments and Similar Devices" and "Loudspeakers, Amplifiers, Public Address Systems, and Similar Devices." Rather, their use is limited to a level below that is "plainly audible to any person other than the player(s) or operator(s) of the device, and those who are voluntarily listening to the sound, and unreasonably

disturbs the peace, quiet, and comfort of neighbors in residential areas," and "the unreasonably loud and raucous use or operation" of these devices.

All of the regulations above, both in the CDC and WLMC, amount to a restrictive but ultimately common sense approach to noise. On the one hand, the CDC allows the City to require reasonable buffering and a noise study, both of which are already part of Planning Commission's decision. On the other hand, the City is in a position to enforce against unreasonable or bothersome noise levels, particularly between the hours of 9:00 AM and 7:00 PM. Given this regulatory scheme and the fact that no particular use of the rooftop deck is proposed, there is simply no codified basis whatsoever to prohibit otherwise permissible land uses on the roof deck. Doing so could also amount to a de-facto zone change.

Stated simply, Design Review is about just that: design. While building design is required to take into account surrounding uses, the Design Review process cannot and should not be used to restrict otherwise permitted uses in the way Appellant is suggesting. ICON understands the Browns' fears that there could occasionally be loud noises emanating from the roof deck. The additional restrictions they request is neither justified nor legally sustainable.

Nonetheless, ICON wants to be a good neighbor and is generally amenable to performing a noise study if one is reasonably justified and is capable of measuring actual ongoing noise from the roof deck. However, ICON has significant concerns that the condition adopted by the Planning Commission automatically requiring a noise study regardless of the use of the roof deck, while well-intentioned, is neither easily enforced nor reasonable.

This is for three reasons. First, it is not clear how a simple complaint to code enforcement would, as an administrative matter, trigger City planning staff to require a noise study. Second, until the building is occupied by tenants who might make regular use of the roof deck, any noise objectionable to neighbors would be based on isolated incidences that cannot be easily captured in a noise study. Third, it is fundamentally unfair and contrary to the City's nuisance ordinances to require ICON to conduct a noise study (which can cost several thousand dollars) on the mere complaint by a neighbor. Rather, such a complaint should be well-founded. WLMC 5.495–5.535 prescribe the rights and responsibilities for all parties to a nuisance, and requiring ICON to submit a noise study without any due process right to contest the mere accusation of a nuisance would be a significant deprivation of ICON's due process rights. Finally, given that the City retains the authority to require abatement of any nuisance under WLMC 5.5056, which

abatement could include a noise study, the City Council can find that such a condition need not be imposed at all. For all of the above reasons, ICON recommends that Condition 10 be eliminated.

Should the Council decide that the Planning Commission's noise condition is necessary, ICON recommends that the City revise Condition 10 to provide as follows:

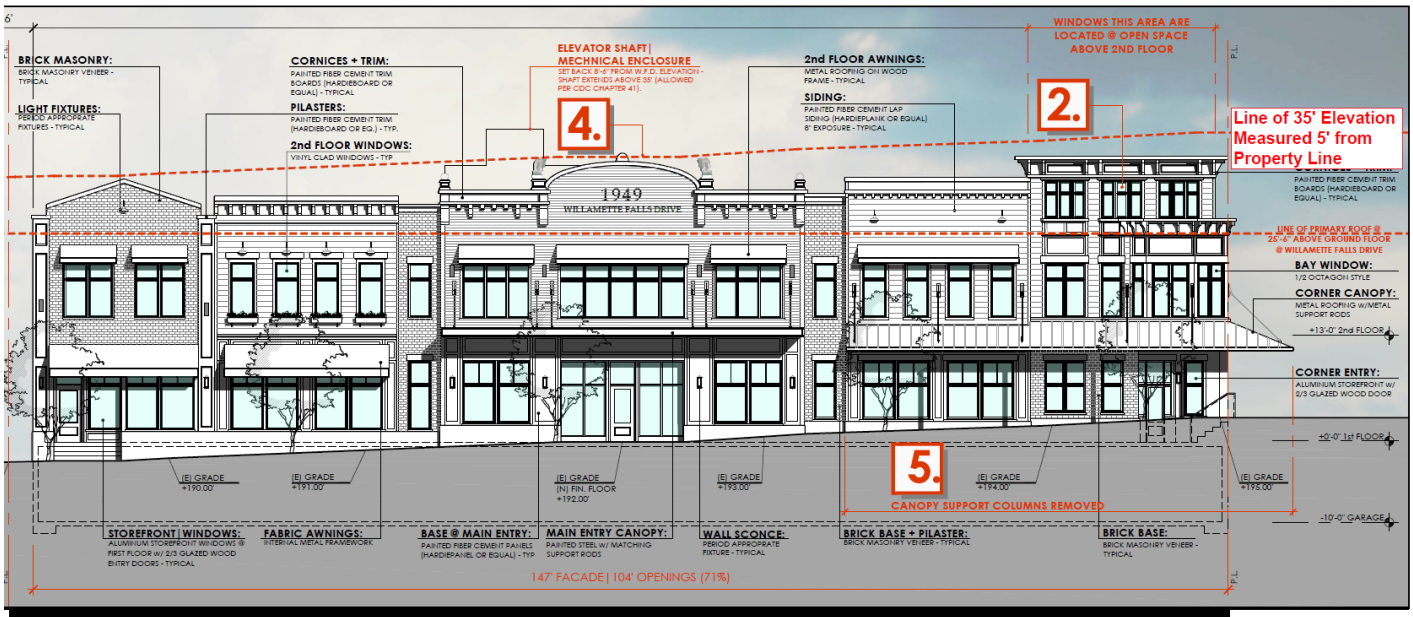
> "10. Noise Study. The applicant shall submit a noise study after the City's issuance of a business license for the building allowing an "eating and drinking establishment," as defined by the CDC. The noise study must address the provisions of West Linn Municipal Code Chapters 5.487(3). The noise study shall be conducted in the first July or August after the business license issues, and when customers are present on the roof deck. The City may order ICON to provide additional noise studies if it receives one or more well-founded complaints related to use of the roof deck, but may not order more than one per year after the first noise study is submitted."

2. The Building will not exceed 35 feet.

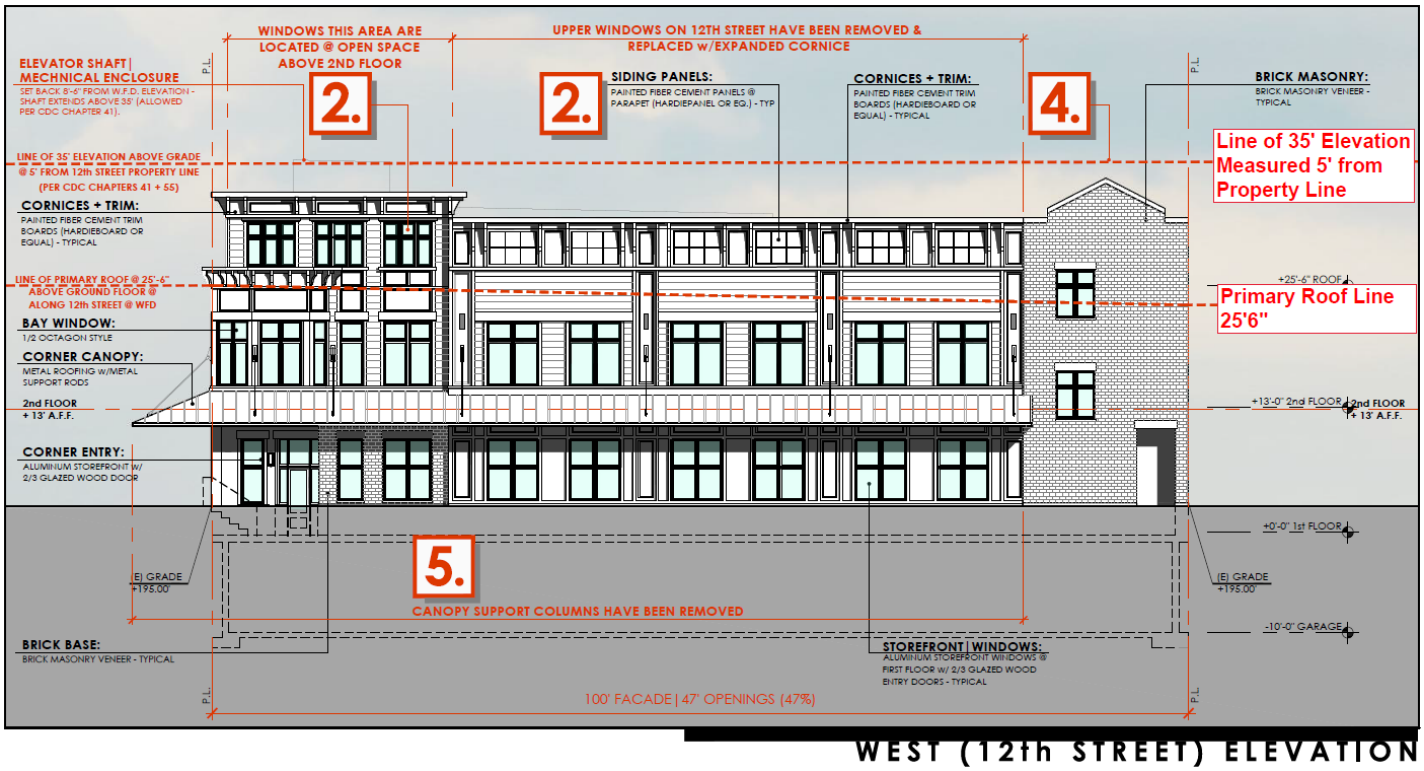
CDC 41.005.A regulates how building height is measured in West Linn:

> "A. For all zoning districts, building height shall be the vertical distance above a reference datum measured to the highest point of a flat roof or to the deck line of a mansard roof or to the highest gable, ridgeline or peak of a pitched or hipped roof, not including projections not used for human habitation, as provided in CDC 41.030. The reference datum shall be selected by either of the following, whichever yields a greater height of building.
>
> 1. For relatively flat sites where there is less than a 10-foot difference in grade between the front and rear of the building, the height of the building shall be measured from the proposed finished grade five feet out from the exterior wall at the front of the building (Figure 1)."

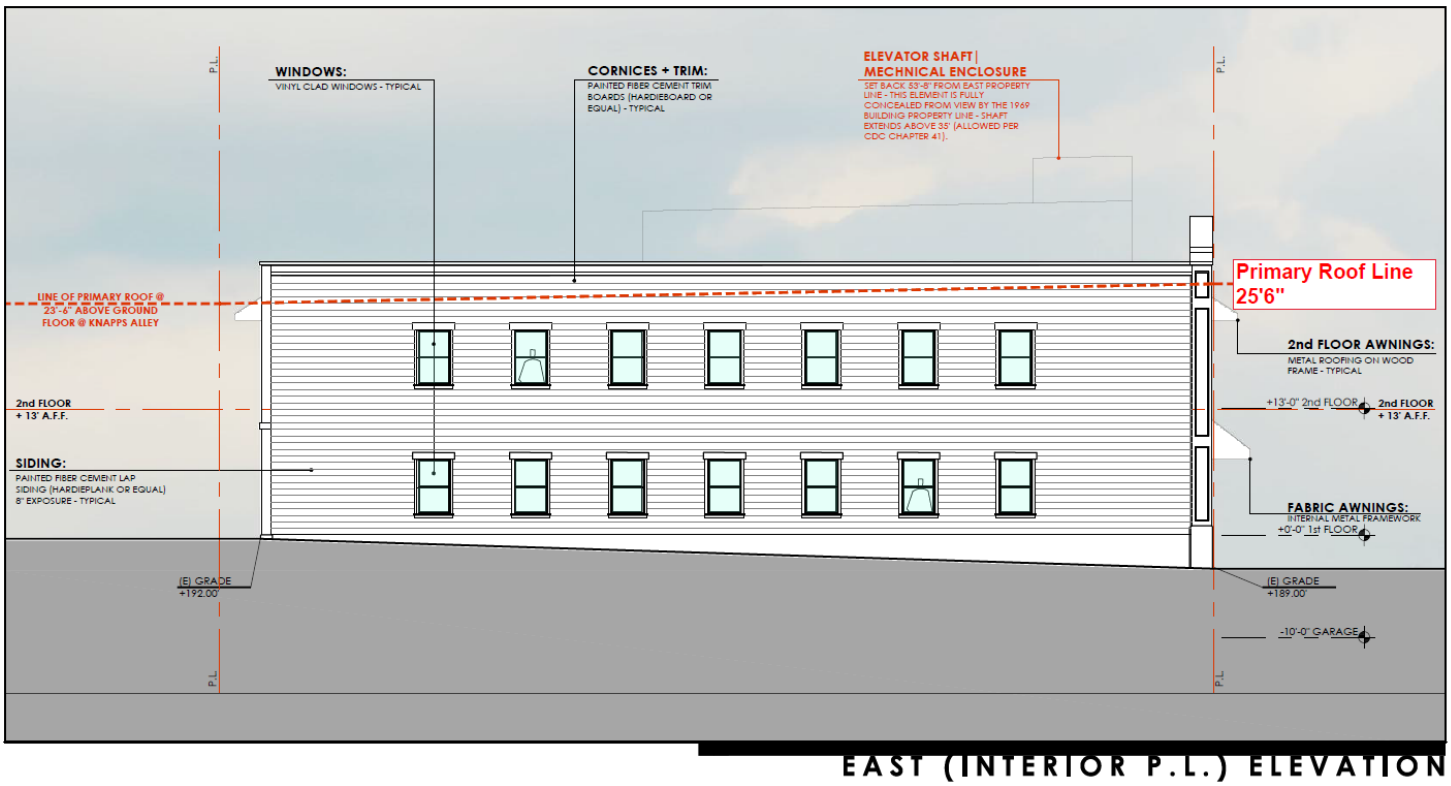
On January 29, 2024, the Applicant submitted a revised set of plans, which illustrate the Building's proposed height in extreme detail. These are excerpted below:

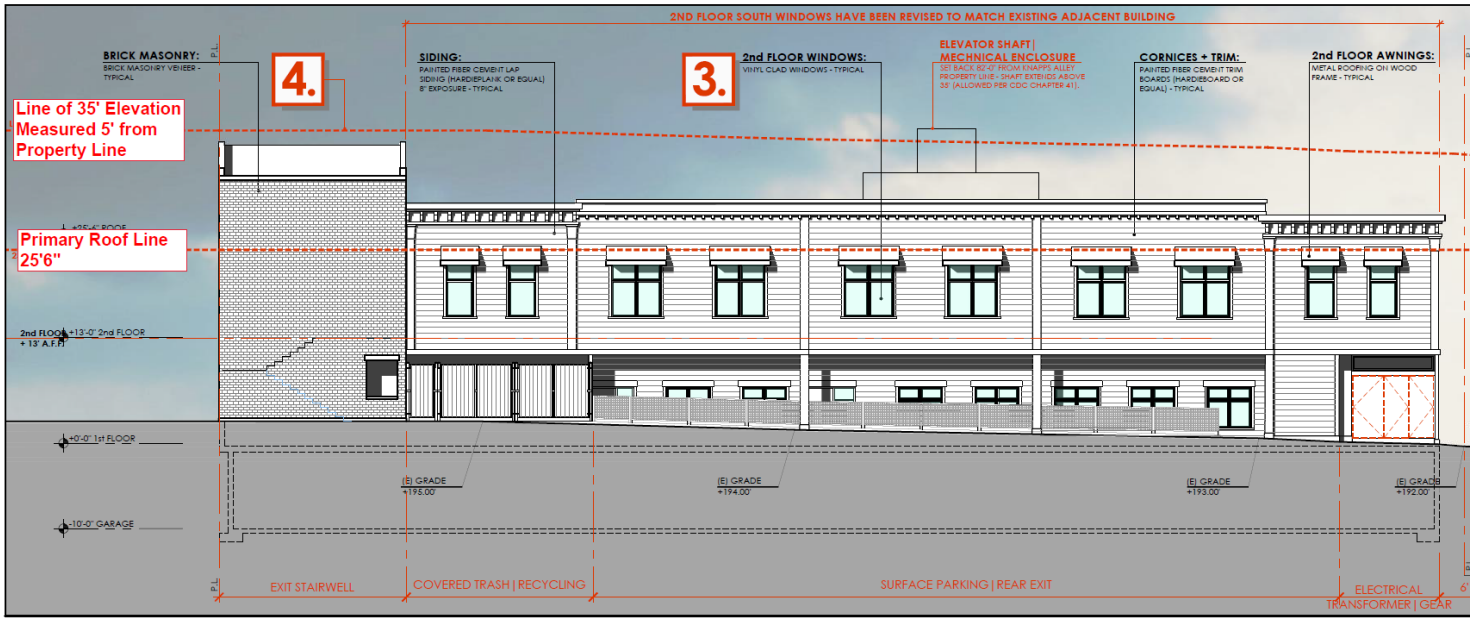


WILLAMETTE FALLS DRIVE ELEVATION



WEST (12th STREET) ELEVATION

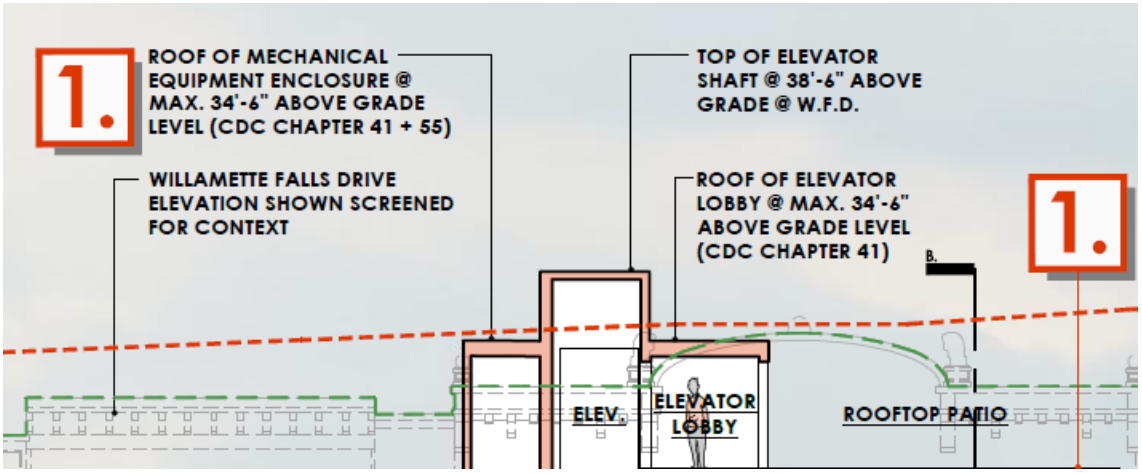

WINDOWS:
VINYL CLAD WINDOWS - TYPICAL
CORNICES + TRIM:
PAINTED FIBER CEMENT TRIM BOARDS (HARDIEBOARD OR EQUAL) - TYPICAL
ELEVATOR SHAFT | MECHNICAL ENCLOSURE
SET BACK 53'-8" FROM EAST PROPERTY LINE - THIS ELEMENT IS FULLY CONCEALED FROM VIEW BY THE 1969 BUILDING PROPERTY LINE - SHAFT EXTENDS ABOVE 35' (ALLOWED PER CDC CHAPTER 41).
P.L.
LINE OF PRIMARY ROOF @ 23'-6" ABOVE GROUND FLOOR @ KNAPPS ALLEY
Primary Roof Line 25'6"
2nd FLOOR + 13' A.F.F.
SIDING:
PAINTED FIBER CEMENT LAP SIDING (HARDIEPLANK OR EQUAL) 6" EXPOSURE - TYPICAL
2nd FLOOR AWNINGS:
METAL ROOFING ON WOOD FRAME - TYPICAL
+13'-0" 2nd FLOOR
2nd FLOOR + 13' A.F.F.
FABRIC AWNINGS:
INTERNAL METAL FRAMEWORK
+0'-0" 1st FLOOR
(E) GRADE +192.00'
(E) GRADE +189.00'
-10'-0" GARAGE
EAST (INTERIOR P.L.) ELEVATION



3 ROOF PLAN + KNAPPS ALLEY ELEVATION

In each of the above images, the top dashed red line shows where the 35-foot elevation is in relation to the proposed building. The bottom dashed red line shows the roof height, which is roughly 25 feet above grade.

The proposed features above 35 feet in height are permitted. CDC 41.030 "Projections Not Used for Human Habitation" provides as follows: Projections such as chimneys, spires, domes, elevator shaft housings, towers, aerials, flag poles, and other similar objects not used for human occupancy are not subject to the building height limitations of this code. The only architectural features exceeding 35 feet in height are the tops of certain decorative architectural features and the top of the elevator shaft. This is shown in the Applicant's January 29, 2024 designs, as excerpted below:



Appellant makes no attempt to explain how decorative architectural features or the top of an elevator shaft are "used for human habitation," and there is no question that humans are not intended to occupy the space above the elevator car.

Even if humans could occupy these spaces, the Oregon Structural Specialty Code (OSSC) does not *regulate* them as occupancy spaces. Particularly with respect to elevator shafts, "elevators and related machinery, stairways or vertical shaft openings, […] including ancillary spaces used to access elevators and stairways" are considered non-occupancy penthouses, similar to mechanical equipment. OSSC 1511.2.2. The OSSC considers these spaces to be part of the floor beneath, in this case, the Building's second floor. OSSC 1511.2. Finally, the OSSC allows such facilities to extend 18 feet above the rooftop. *Id*. Here, the top of the elevator shaft extends only 13 feet, 6 inches above the rooftop, and only 3 feet, 6 inches above the 35-foot height limit.

Elevator housings are utterly common in commercial construction, as are vestibules to protect elevators doors from the rain and wind. While there is no definition of "occupancy" in the CDC, in this instance the Council should interpret its height limitations consistent with the state's commercial building code. A contrary interpretation would make it effectively impossible to provide elevator access to commercial buildings that are at or near their height limitations.

Finally, Appellant is incorrect that the panels, vertical pilasters, and cornices are subject to the standard in CDC 50.080.B.3, which provides that "a false front shall be considered as the peak of the building if it exceeds the gable roof ridgeline." This standard does not apply because the

Building does not have a gable roof, and therefore no "gable roof ridgeline."[1] Regardless, as Appellant concedes in its letter, many buildings in the Design District have flat roofs and parapets consistent with ICON's proposed design.

For the above reasons, the Building meets the Design District's height standard.

3. The proposed Building consists of two stories, not three.

The building is proposed to be two stories. City's codified definition of "story" is as follows:

> "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 above. If the finished floor level directly above a basement or unused under floor space is more than six feet above grade as defined herein for more than 50 percent of the total perimeter, or is more than 12 feet above grade as defined herein at any point, such basement or unused under floor space shall be considered as a story."

This definition plainly means that the top floor must have a ceiling. The space enclosed by the building's cornice, painted panels, and painted vertical pilasters does not constitute a third story because they are placed above the Building's roof, and they *lack* a ceiling. The Building plainly meets the Design District's limitation of building to two stories.

4. The City Council need not and should not remand the application to the HRB.

As explained in the Staff Report, the Application has undergone four hearing processes. On June 13, 2023, the HRB held its initial hearing, after which it referred the Application to the Planning Commission. On October 4, the Planning Commission remanded the application back to the HRB. On November 14, the HRB held a second hearing. On February 21, 2024, the Planning Commission considered design changes to eliminate the third story that concerned the HRB, and approved the Application. Appellant's final argument asserts that the HRB should hold yet another hearing. The City Council should reject this argument.

[1] A gable roof is "double-sloping roof that forms a gable at each end." Webster's Third Int'l Dictionary, Unabridged (1993)

Stated plainly, this Application has been put through enough public review. While it is true that the HRB is empowered to "make *recommendations* to the approval authority" on a Class I or II Design Review in the Design District, the HRB is not the approval authority for these applications; the Planning Commission is. CDC 99.060.B. There is no provision in the CDC that requires HRB review of every design adjustment proposed to the Planning Commission. The Applicant has already adequately responded to the recommendation by the HRB that a third story not be allowed by eliminating the third story. Appellant apparently participated in all of these hearings, so there is no question that their concerns about rooftop activities were considered.

Appellant is not looking for a better or more comprehensive public process. Rather, the Browns simply do not like the idea of an accessible roof deck and even though that deck is plainly allowed by the CDC, they want another opportunity to further delay a public review process that has been ongoing now for more than nine months. There is no question that the "false front" (as defined by Appellant) is not, in fact, a third story and does not exceed the height limit, thus an additional Design Exception is not required. Otherwise, the building meets all "clear and objective" standards related to building height and its roof deck in CDC 58. There is simply nothing substantive to be gained by a further remand to the HRB, and the Council should refuse such a request.

5. Conclusion

For the above reasons, the Council should reject Appellant's arguments, and affirm the Planning Commission's decision with a modification of that decision to eliminate or revise Condition 10, as explained above.

Best regards,

Garrett H. Stephenson

GST:jmhi

cc: Darren Gusdorf
Mark Handris
Scot Sutton
Kevin Godwin

SG ARCHITECTURE, LLC

11 April, 2024

DESIGN REVIEW APPLICATION | CITY COUNCIL MEETING

CITY COUNCIL
City of West Linn
22500 Salamo Road
West Linn, OR 97068

PROJECT NO. 20-119
Design Review Application **DR-23-01**

COUNCILORS,

Thank you for this opportunity to present our response to the neighbor's appeal of the Planning Commission's approval of our proposed 1949 Willamette Falls Drive building.

My name is Scot Sutton, I am a partner at SG Architecture, 10940 SW Barnes Rd #364, Portland 97225.

In January of 2022 we began designing this multi-tenant, multi-use building, with the intention that it will ultimately house any business use allowed in the zone, which could include retail, office, service, or restaurant. The design includes a total of 40,300 square feet, with 26,200 square feet on two floors and a 14,100 square foot underground garage. As required under Chapter 58 of the CDC, the façades along Willamette Falls Drive and 12th Street are designed in a western false front style similar to the historical styles found in 1880-1915 architecture in the region. In early 2023 we twice presented it to the Willamette neighborhood association.

In our Design Review application, we requested three exceptions to the Chapter 58 requirements: substitution of cementitious siding for the required wood siding, the inclusion of brick masonry as an allowed façade material, and to be allowed to use decorative iron columns to support a large canopy at the intersection of Willamette Falls Drive and 12th Street. In June of 2023 We presented our design review application to the Historic Review Board.

At that time our proposal included an enclosed rooftop mezzanine, which was intended to be part of the leased space beneath it on the second floor. Whether that rooftop space would become office or conference space to serve a service business, or a lounge attached to a restaurant was unknown, as no tenant had been selected for the second-floor space. Currently, there are still no tenants committed to the project.

While the Oregon Structural Specialty Code classifies a mezzanine as a part of the floor below, and not a separate floor, the CDC defines a floor as, essentially, a space with both a floor and a ceiling or roof. The HRB conditionally approved that first application, including the requested exceptions, and with a condition that the proposed canopy column locations be approved by the City's Engineering Department. The HRB declined to make a determination at to whether the enclosed mezzanine was allowed in the zone and recommended that the Planning Commission decide.

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Portland, OR 97225
503.201.0725

In preparation for our Planning Commission hearing in October 2023, we elected to make some adjustments to the building design to address the neighbors' and board's concerns. Those adjustments included changing the mezzanine space from business occupancy to unoccupied storage, deleting rooftop restrooms, deleting the decorative columns at the corner canopy, resizing the windows facing the neighbors along Knapps Alley, and eliminating the mezzanine level windows along 12th Street – essentially doing everything that the City and the neighbors had requested.

In a gesture of good will, we added an enclosed mechanical equipment room to house HVAC units, to help reduce their noise as compared to locating them individually above their respective tenant spaces. Unfortunately, when we appeared for the October 2023 Planning Commission hearing we were advised that – due to an objection raised by the neighbors - we would need to return to the HRB to present the revised rooftop storage as a "design exception" under chapter 58. In late October of 2023 the HRB denied our request for a design exception.

We elected to rescind our request for design exception so that we could present our updated proposal to the Planning Commission for their review February of this year. For this meeting, we determined to go as far as we could reasonably go in changing the design to attempt to make the neighbors happy. We eliminated the rooftop storage entirely, reduced the size of the outdoor deck and moved it as far away from the neighbors as we could to lessen any noise that might occasionally emanate from the deck while in use. In addition, we have included a full screen of shrubs in front of steel panels around the entire perimeter of the deck to further reduce the chance of noise reaching the neighbors. By reducing the size of the deck, we were able to eliminate the need for a second stairwell, which allowed us to reduce the impact of the stair closest to the neighbors. The Planning commission approved our proposal with the conditions that are before you in the neighbor's appeal.

As to the neighbors' other concern: that the building exceeds the 35' height restriction in the zone, this complaint is a mystery. Even a cursory glance at the drawing exhibits shows that every part of the building falls comfortably below the height limit - the lone exception being the top of the elevator shaft *which is expressly permitted* under Chapter 41. While the HRB saw fit to impose noise and light conditions on the proposal, those conditions merely restate what is already in the Code, while leaving the adjudication of those items open to interpretation in ways that the Code does not, and presumably does not intend.

In sum, we have made multiple major adjustments and concessions to our proposal in an effort to ameliorate the neighbors' concerns – despite our position that most of what we have given up was in fact permitted under the CDC and OSSC. The neighbors continue to push the same noise concern that they have pressed since the original HRB hearing, despite having no evidence to show that this concern has merit. They have also suggested, without evidence, that the lighting for the deck will fail to comply with the City's regulations. There are currently both noise and lighting ordinances in Chapter 5 of the municipal and Chapter 55 of the CDC respectively to which we must conform, which restrict noise and light levels and spread.

At this point we have invested an extraordinary amount of time and money, making concession after concession to neighbor's whose motive appears to be simple: prevent the project from happening. Everything in the design of our proposal fits squarely and unquestionably within the letter of the regulations, and with this appeal the neighbors are continuing to obstruct our pursuit of a fully compliant commercial building in a commercial zone. We respectfully ask that the Council remove the Planning Commission's conditions that make up the basis of this appeal, and approve the proposal as submitted.

Councilors, thank you for your time and consideration, we are happy to answer any comments or questions you may have, and look forward to your decision.

Sincerely,

SCOT SUTTON | SG Architecture, LLC
503-347-4685 | ssutton@sg-arch.net