

# City of Portland, Oregon

# **Bureau of Development Services**

#### **Land Use Services**

FROM CONCEPT TO CONSTRUCTION

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Date: October 14, 2011

To: Interested Person

**From:** Douglas Hardy, Land Use Services

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# NOTICE OF A TYPE II DECISION ON A PROPOSAL IN YOUR NEIGHBORHOOD

The Bureau of Development Services has **approved** the Determination of a Legal Nonconforming Status Review, and **denied** the Nonconforming Situation Review for a proposal in your neighborhood. The reasons for the decision are included in this notice. If you disagree with the decision, you can appeal it and request a public hearing. Information on how to appeal this decision is listed at the end of this notice.

# CASE FILE NUMBER: LU 11-142890 NE NU

# **GENERAL INFORMATION**

**Applicant:** Joe Westerman, owner

Bush Avenue Apartments 22231 SW LeBeau Road Sherwood, OR 97140

**Representative:** Kelly Hossaini, attorney

Miller Nash

111 SW Fifth Avenue, Suite 3400

Portland, OR 97204

**Site Address:** 1930 NE Everett Street

**Legal Description:** Block 1, Lot 2, 7 & 8, Lot 6 exc S 42', Byrnes Add

**Tax Account No.:** R124400030 **State ID No.:** 1N1E35DA 07000

Quarter Section: 3032

**Neighborhood:** Kerns, contact Mike Whitmore at 503-233-0305

**Business District:** None

**District Coalition:** Southeast Uplift, contact Leah Hyman at 503-232-0010

**Zoning:** RH High Density Residential

**Plan District:** None

Case Type: Determination of Legal Nonconforming Status Review (NE)

Nonconforming Situation Review (NU)

**Procedure:** Type II, Administrative decision with appeal to the Hearings Officer

#### **PROPOSAL**

The applicant is requesting two separate land use reviews to allow the establishment and operation of multiple mobile food carts (a food court) in a residential zone. The use will accommodate up to 16 food carts, with food preparation occurring wholly inside the food carts. The prepared food will be sold to the general public seven days a week, with hours of operation not extending into the hours between 10:00 pm and 7:00 am. A seating area is proposed in a 400 square foot pole tent that can accommodate up to 42 people. Parking for customers who may drive to the site can be accommodated in the commercial parking lot located immediately south of the site. Garbage and recyclables generated by the proposed use will be collected in dumpsters and roll carts that will be stored on the site.

The proposed use is considered a Retail Sales and Service use, which is prohibited in a residential zone unless nonconforming use rights have been established. In this case, the applicant seeks a Type II Determination of Legal Nonconforming Status Review to document that there are nonconforming use rights for a Commercial Parking use at this site. If nonconforming use rights for a Commercial Parking use are established, the applicant, as part of the current review, requests a Type II Nonconforming Situation Review to convert the Commercial Parking use to a Retail Sales and Service use limited to the operation of a 16-cart food court.

#### RELEVANT APPROVAL CRITERIA

In order to be approved, this proposal must comply with the approval criteria of Title 33. The relevant criteria are:

- 33.258.075.D1- D2 Determination of Legal Nonconforming Status Review; and
- 33.258.080.B1 B3 Nonconforming Situation Review

#### ANALYSIS

Site and Vicinity: The 15,800 square foot lot is located at the southwest corner of NE 20th Avenue and NE Everett Street. It is an irregularly shaped lot, with frontage on NE 20th Avenue, NE Everett Street and NE 19th Avenue. The site is paved in its entirety and striped for a parking lot. There currently is a cyclone fence, approximately 6 feet in height, built to the lot line along the NE 20th Avenue and NE Everett Street frontages. There are approximately 14 to 16 utility trailers ("food carts") arrayed around the perimeter of the site, with additional food carts located toward the center of the site. A tent, approximately 20 feet by 20 feet in area and 20 feet in height, is also located toward the center which provides cover for an outdoor seating area. Fenced areas located along the west edge of the site contain an 8 foot by 16 foot dumpster/recycling area, and an 8 foot by eight foot area containing a portable storage building. There is an additional fenced enclosure, approximately 12 feet by 16 feet in area and 8 feet in height, located in the northeast corner of the adjacent parking lot south of the subject site. This enclosure, located along the site's NE 20th Avenue frontage contains portable toilets for use by the food court. The applicant has indicated the restrooms and enclosure will be relocated to the subject site. Two exterior light fixtures are located along the west edge of the site, and a sign, approximately 12 to 13 feet in height, advertising "Food! Green Castle Food Court/Cart Spaces Available" is located along the NE 20th Avenue frontage of the site. Several signs advertising specific food carts are attached to the fence along both NE Everett Street and NE 20th Avenue.

Uses in the surrounding vicinity reflect the mixture of zoning in the area. Single and multi-dwelling development is found on the same block as the proposed use along NE 19<sup>th</sup> Avenue, and on the west side of NE 19<sup>th</sup> Avenue. A surface parking lot, accommodating approximately 26 spaces is also located on the same block as the subject site. Single- and multi-dwelling uses are found along NE Davis Street, south of the site. Development along close-by

blockfronts along NE 20<sup>th</sup> Avenue include multi-dwelling uses largely south of NE Davis Street, and commercial uses north of NE Davis Street. Development which appears to be single-dwelling residences are found along the adjacent blockfront on NE Everett Street, with the exception of a one-story commercial building located at the northwest corner of NE Everett Street and NE 20<sup>th</sup> Avenue.

**Zoning:** The site is located in an RH (High Density Residential) zone. The Multi-Dwelling zones are intended to preserve land for urban housing and to provide opportunities for multi-dwelling housing. The use regulations are intended to create and maintain higher density residential neighborhoods. At the same time, they allow for large scale institutional campuses and other nonresidential uses but not to such an extent as to sacrifice the overall residential neighborhood image and character. The development standards work together to create desirable residential areas by promoting aesthetically pleasing environments, safety, privacy, energy conservation, and recreational opportunities. The development standards generally assure that new development will be compatible with the City's character. In addition, the regulations provide certainty to property owners, developers, and neighbors about the limits of what is allowed. More specifically, the RH zone is a high density multi-dwelling zone, with allowed housing characterized by medium to high height with a relatively high percentage of building coverage. The major types of new housing development will be low, medium, and high-rise apartments and condominiums. Generally, RH zones will be well served by transit facilities or be near areas with supportive commercial services.

The surrounding area is mapped with a variety of residential and commercial zones. Properties on the same block as the proposed use are all mapped with the RH zone, as are the two block faces on the east side of NE 20<sup>th</sup> Avenue across from the site (see attached zoning map). Blocks immediately south and southwest of the site are also located in the RH zone, with blocks farther east mapped with the R1 Multi-Dwelling zone. The blocks immediately north of the site are mapped with a CS (Storefront Commercial) base zone, which allows a variety of commercial and residential uses. The blocks immediately west of the site are also located in an Commercial zone (CG – General Commercial), which allows a variety of commercial and residential uses.

**Land Use History:** City records indicate one previous land use review for the site from 2004. This review (LU 04-021938 AD) approved Adjustments for a five-story, multi-dwelling residential building with a parking garage below the building, and a surface parking lot to the west of the building.

**Agency Review:** A Notice of Proposal was mailed September 6, 2011. The notified City bureaus have responded with the following comments:

- Bureau of Environmental Services (Exhibit E.1): The Bureau of Environmental Services (BES) has no objections to the requested land use reviews, and included requirements for sanitary service should such services be requested, and information on stormwater management in the case new development or redevelopment on the site occurs. BES also recommends a central location be provided for tenants to dump wastewater as discharges of wastewater to drains in the parking lot, streets, and the like, and discharge to the storm system violate federal, state and local laws. BES also notes grease management devices are recommended, and that the use may be required to comply with the City's Extra Strength Sewer Charge Program.
- Water Bureau (Exhibit E.2): The Water Bureau has no objections to the requested land use reviews, but noted there is no existing water service to the site. The Water Bureau provided requirements for water service should such a service be requested, and noted if public water is desired for the site, it cannot be obtained from adjacent properties.

- Fire Bureau (Exhibit E.3): The Fire Bureau has no issues with the requested land use reviews as long as Fire Code requirements are met at time of permit review and/or set-up of the food carts. A separate permit would also be required for the tent, as well as propane tank permits for the individual food carts.
- Bureau of Development Services/Site Development Section (Exhibit E.4): Site Development has no concerns with the requested land use reviews.
- Bureau of Development Services/Life Safety Plans Examiner (Exhibit E.5): The Life Safety Plans Examiner noted that the proposal, including the tent and any trailers for public seating, must be designed to meet all applicable building codes and ordinances. The Life Safety Plans Examiner noted that at least one exterior accessible route shall be provided within the site boundaries, and that an accessible parking space is required. Public restrooms meeting OSSC 2902 and Table 29-A requirements must be provided.
- Portland Parks & Recreation/Urban Forestry (Exhibit E.6): Urban Forestry has no concerns with the requested land use reviews.
- Bureau of Transportation Engineering and Development Review (Exhibit E7): In reviewing the trip generation and on-street parking factors, the Bureau of Transportation (PBOT) finds that the proposed food court will not result in any increase in overall detrimental impacts (over the impacts of the last legal use) on the surrounding area, and has no objections to the requested land use reviews. Additional details from PBOT are provided below in response to the approval criterion in 33.258.080.B.1.b.

**Neighborhood Review:** A Notice of Proposal was mailed on September 6, 2011. A total of five written responses have been received from either the Neighborhood Association or notified property owners in support of the proposal (Exhibits F.1 – F.5). The applicant's application also included an additional 34 responses in support of the proposal (Exhibit A.2, Attachment 1). A summary of the issues raised in the letters is as follows:

- the food court is a great resource, with cart owners who are professional, passionate and committed;
- the food court provides good food in a great atmosphere and is a community gathering place:
- the food court provides covered seating, parking, restrooms and an ATM;
- the food court is better than the former parking lot, which was used as a dumping ground for garbage and abandoned cars;
- the food court is clean, inviting, safe and quiet, with only the smells of food;
- the food court brings a sense of community to the area;
- the food court will boost the economy;
- the food court has been a positive change for neighboring residents, and has increased livability;
- as an adjacent resident, I have never been kept awake or annoyed by noise, and the lighting is directed away from residences;
- the trash and recycling area are emptied regularly so there is no odor;
- as a resident in the area since 1977, the lot has only been used occasionally as a parking lot and more often not used for any purpose; I am happy to see it used for a food court;
- as an adjacent resident, seeing the lot full of life is better than an empty parking lot;
- I have lived in the area 18 years and the lot was only used for dumping; a food court at this location is an asset to the neighborhood;
- the food court replaces a parking lot that was an eyesore and felt unsafe; and
- the food court generates no noise, smoke or fumes.

Included in the letters of support is correspondence from the Kerns Neighborhood Association (Exhibit F.5). The Neighborhood Association is in support of the proposal, with the following conditions:

- the food court and food carts be operated in a clean, safe and professional manner;
- the food court and food carts be in compliance with all applicable laws, statutes, codes, ordinances and permits required for this use; and
- that use of the site be limited to the operation of a maximum of 16 food carts, and that here be no other Retail Sales and Service uses allowed.

The Neighborhood Association finds that while the lot is zoned residential, it is on a busy arterial street adjacent to other commercial uses. Additionally, the parking lot was a dumping ground for garbage, and the owner of the property has been willing to make changes to the food court to mitigate community concerns.

Two letters have been received in opposition to the proposal (Exhibits F.6 and F.7). The principal issues included in these responses included:

- odors from food preparation;
- sanitation:
- increased noise later into the night;
- bright lights;
- parking and traffic;
- littering from "to go" containers";
- portable toilets on the site are an eyesore;
- foot traffic has substantially increased in the neighborhood, with more transient activity;
- increased foot traffic making it difficult to back out of my driveway on NE 20th Avenue;
- decrease in available on-street parking due to customers who drive to the food court;
- off-street parking provided for customers is limited;
- the previously approved residential development for the site would be a preferable use, and would bring additional residents into the neighborhood; and
- there is plenty of retail and commercial space on E. Burnside Street and NE Sandy Boulevard, and no need to bring commercial uses into an established neighborhood.

One issue raised in a letter of opposition pointed out a regulation in Zoning Code Section 33.258.050.D.1 that states, "If a nonconforming uses changes to another use without obtaining all building, land use, and development permits that would have been required at the time of change, the legal nonconforming use has been discontinued." As detailed later in this decision, the existing parking lot is considered to be in the Commercial Parking use category, which is a nonconforming use in this zone. Changing the activity from a Commercial Parking use to a food court, which is considered a Retail Sales and Service use, would be allowed only if approved through a Nonconforming Situation Review (and "land use permit"). No such review has been approved for this change. However, Zoning Code Section 33.258.050.D.1 also states, "If a nonconforming use is discontinued for three continuous years, the nonconforming use rights are lost." While the change in use from a Commercial Parking Lot to a Retail Sales and Service use was first established on the site in March 2011 without benefit of a land use permit (or other permits that may have been required), thereby discontinuing the nonconforming Commercial Parking use, the Commercial Parking use has not been discontinued for a period of more than three continuous years. As long as the nonconforming Commercial Parking use is reestablished by March 2014, its nonconforming use rights will not be lost.

Regarding the other issues raised both in support and in opposition to the proposal, those issues that are pertinent will be addressed below in response to the approval criteria,

## ZONING CODE APPROVAL CRITERIA

#### 33.258.075 Determination of Legal Nonconforming Status Review

- **A. Purpose.** This review will determine if a use or site has legal nonconforming situation rights. In addition, it will determine what the current legal use is, based on the use categories in Chapter 33.920.
- **B. When this review is required.** Determination of Legal Nonconforming Status Review is required where a land use review or building permit is requested, and the applicant does not provide standard evidence or the Director of BDS does not find the evidence to be satisfactory. (See 33.258.038). This review also may be requested by an applicant when it is not required.
- **C. Procedure.** Determination of Legal Nonconforming Status Reviews are processed through a Type II procedure.

## D. Approval criteria.

- 1. The legal status of the nonconforming situation will be certified if the review body finds that:
  - a. The nonconforming situation would have been allowed when established; and
  - b. The nonconforming situation has been maintained over time.

### Findings:

#### Nonconforming Situation Allowed When Established

As indicated below, the applicant has used past zoning maps and building permit history to demonstrate that a Commercial Parking lot was an allowed use when established.

The applicant has provided a copy of a variance approved by City Council in September of 1965 that approved a variance modifying the required setback and landscaping for a proposed parking lot on the subject site (Petition # 4735) (Exhibit A.1, Attachment 1). The applicant has also provided a copy of a 1965 building permit (Permit # 423156) issued to the owner of the property, Jantzen Realty, that approved the construction of a parking lot on the subject site (Exhibit A.1, Attachment 4). In 1965, the site was located in an AOP zone (Apartment Residential with a Parking Zone).

The applicant is seeking to document that this parking lot constructed in 1965 was Commercial Parking, available for any one to use, and not parking that was accessory to another use. (If accessory to another use, the parking lot would be considered part of that use, as opposed to Commercial Parking.) While regulations of the AO zone do not specify Commercial Parking (or any use that would be similar to Commercial Parking) as an allowed use in this zone, the P zone did appear to allow parking that was available to a variety of uses. Specifically, the purpose

statement for the zone stated, "In recognition of the increasing use of automobiles for individual travel within Portland and in view of the need for greater spaces for parking next to businesses, industries, places of public assembly and other uses permitted in C and M zones, the Council may from time to time as warranted, establish and superimpose P Parking Zones upon other regular R and A Zones in addition to P Zones established by this title" (Section 33.70.010 of the Zoning Code in effect in 1965). Given neither the variance nor the building permit issued in 1965 identified the parking lot as being accessory to a particular use, and that the P zone was intended to provide additional parking with no specific prohibition of Commercial Parking, BDS determines that the evidence submitted in the record documents that a Commercial Parking use was an allowed use when established on the site.

# Nonconforming Situation Maintained Over Time

The Commercial Parking use on the site became nonconforming in 1981 when the zoning changed from AOP to RH (High Density Residential). Commercial Parking is not an allowed use in the RH zone. As such, it is necessary for the applicant to demonstrate that a Commercial Parking use operated at the site since 1981 without a vacancy of more than three continuous years.

The applicant has provided aerial photos beginning in 1984 and extending to 2010 that seek to demonstrate the lot continued to be used for Commercial Parking. These photos demonstrate that cars were parked on the site without a three year vacancy between 1984 and 1990, and between 1994 and 2010 (Exhibit A.1, Attachment 7). An affidavit from Janine Ronzheimer, employed with Jantzen Incorporated from 1982 to 2002, states that during her employment with the company the lot was used for parking associated with a variety of nearby businesses (Exhibit A.3, Attachment 8).

While the aerial photos demonstrate that parking was occurring on the lot during the period between 1984 to 1990 and 1994 to 2010, the photos do not document whether the lot operated as a Commercial Parking lot, or as a parking accessory to another use. (The affidavit from Ms. Ronzheimer does document that between 1982 and 2002 the lot was used for Commercial Parking.) The parking lot could not have been used as parking accessory to an adjacent or nearby residential property as Zoning Code Section 33.266.100.E (Proximity of Parking to Use) states that parking accessory to a residential use must be on the site of the residential use. As there is not, nor has there been, any residential use on the lot at least since 1965, the parking could not have been considered accessory to a residential use. Regarding the potential that the lot was used as accessory to a nonresidential use, there is no evidence in the record (such as a land use or building permit) that would indicate the parking of vehicles in the lot was for a specific use, and no reason to conclude that the parking lot did not continue to be anything other than Commercial Parking.

Based on the evidence in the record, BDS finds that the applicant has demonstrated a Commercial Parking Use has been maintained over time on the site.

#### Summary

The applicant has demonstrated that the Commercial Parking use was allowed when established, and has been maintained over time without a lapse exceeding three continuous years. This criterion is met.

2. The review body will determine, based on the evidence, what the current legal use is, using the definitions in Chapter 33.910 and the use categories in Chapter 33.920.

**Findings:** As indicated above in D.1, the applicant has adequately demonstrated that the parking lot was used by a variety of users, and was not accessory parking to a particular use. Parking that is not specific to a particular use is considered Commercial Parking, per the characteristics identified in Zoning Code Section 33.920.210. Specifically, this section states, "Commercial Parking facilities provide parking that is not accessory to a specific use. A fee may or may not be charged. A facility that provides both accessory parking for a specific use and regular fee parking for people not connected to the use is also classified as a Commercial Parking facility."

Based on the description in Zoning Code Section 33.920.210, the legal use on the site is Commercial Parking, and this criterion is met.

# 33.258.080 Nonconforming Situation Review

- **A. Procedure.** A nonconforming situation review is processed through a Type II procedure.
- **B. Approval criteria.** The request will be approved if the review body finds that the applicant has shown that all of the following approval criteria are met:
  - 1. With mitigation measures, there will be no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area taking into account factors such as:
    - a. The hours of operation;
    - b. Vehicle trips to the site and impact on surrounding on-street parking;
    - c. Noise, vibration, dust, odor, fumes, glare, and smoke;
    - d. Potential for increased litter; and
    - e. The amount, location, and nature of any outside displays, storage, or activities; and

# Findings:

#### Hours of Operation

The applicant states the hours of operation for the proposed food court will extend from 7:00 am to 10:00 pm, and that the Commercial Parking lot was available for parking 24 hours a day. As such, the hours of operation for the food court are less than what could have occurred at the Commercial Parking lot, and the proposed food court will have no increased detrimental impacts in terms of hours of operation on the surrounding area.

<u>Vehicle Trips to the Site and Impact on Surrounding On-Street Parking</u>
PBOT reviewed the proposed food court proposal for conformance with the vehicle trip and on-street parking impacts, and provides the following response:

"Assuming that the findings related to the Determination of Legal Nonconforming Status Review are that the parking lot was the "last legal use" of the subject site, PBOT will compare the transportation-related impacts associated with the parking lot versus those related to the current food cart use on the site. It must be noted that PBOT's standard practice for calculating vehicle trip generation in association with various uses, is to refer to the Institute of Transportation Engineers (ITE) Trip Generation Manual. However, in this case, neither the "last legal use" on the site as a parking lot nor the proposed food cart use has data available from the ITE manual to refer to. Therefore, PBOT requested that the applicant gather and supply various types of information to assist in our analysis of the transportation-related impacts."

"According to information supplied by the applicant, the previous parking lot (use) was comprised of approximately 100 spaces (based on City documentation). A reference to the oldest aerial photography available through City GIS database resources reveals that the number of parking spaces in the subject parking lot was approximately 70 spaces. Using the figure identified in the City's documentation of 100 spaces, it can be projected that such a parking lot could generate a minimum of 200 vehicle trips (one car parked in one space is the equivalent to two vehicle trips [one trip arriving to the site and one trip departing the site]). This trip generation assumes a 100% usage of the parking lot and doesn't include the potential for multiple vehicles using the same space throughout the course of the day."

"With regard to the proposed food cart use on the site, in order to determine the estimated trip generation, the applicant was requested to gather information from the respective cart operators with regard to the manner their patrons arrived at their carts. Since the carts have been operating on the site for some time, the applicant has been able to observe the timeframes when there have been the highest levels of activity at the site. Accordingly, the applicant had the cart operators conduct their customer surveys during the lunch and dinner time hours on a weekday, and on one day during the weekend. Based on the collected surveys, 56% of the cart patrons arrived to the site by means other than single-occupancy vehicle (walking, biking, transit). To break it down further, in terms of the above referenced trip generation factor, 83 patrons arrived by driving to the site. This figure therefore translates to 166 vehicle trips generated by the proposed use which is at most, 83% of the trips potentially generated by full use of the previous parking lot. It can be reasonably concluded, therefore, that the proposed use will not have a net increase in vehicle trips to the site (as compared with the "last legal use" on the site). Though not directly related to this analysis, it should be pointed out that a mode split of greater than 50% in relation to a retail establishment is a goal very infrequently achieved by said establishments. This figure may be used to argue that the proposed use is not automobile-oriented."

"To address the on-street parking impacts related to the food cart use on the site, PBOT had the applicant conduct an on-street parking survey to determine (on-street) parking supply and demand. It must be noted, that part of the site has been retained as a parking lot with 23 (on-site) parking spaces available to patrons of the food carts. PBOT directed the applicant to take an accounting of the available on-street parking supply in an area surrounding the subject site within a reasonable walking distance to the subject site. Using standard practices for identifying the number of on-street parking spaces, including a specific length and taking into account driveways, fire hydrants and corner ramps, the applicant identified 85 spaces. During the two-day survey (conducted between 11:30 am-1:30 pm and 5:00 pm-7:00 pm), the applicant found that there were between 3-7 vehicles parked in

the on-site parking lot. The applicant also surveyed that there were between 36-47 vehicles parked within the identified on-street parking "area". This data equates to an on-street parking demand rate of between 42%-55%, which demonstrates that there is ample on-street parking supply to serve the food cart patrons as well as the surrounding uses in the area. (NOTE: It must be assumed that the parked vehicles counted by the applicant during the surveyed periods belonged to patrons of the food carts as well as to residents of the surrounding area.)"

"However, to further analyze the data collected of the surveyed patrons who arrived to the subject site by vehicles during the survey periods, the vast majority of patrons who drove to the site did so during the lunch time hours (11:30-1:30). Of the 83 patrons who drove to the site, 69 did so during the 11:30-1:30 time frame; 14 did so during the 5:00-7:00. This is a critical distinction because the evening/late evening time frames (after 6:00 pm) are considered to be the highest on-street parking demand periods in residential areas. It can be reasonably concluded therefore, that based on the applicant's surveyed data, the vast majority (approx 83%) of the patrons who drove to the site and parked their vehicles, did so during non-peak demand periods for on-street parking."

"Based on the analysis provided above, PBOT has determined that the proposed food cart use on the subject site will result in no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area, taking into account the trip generation and on-street parking factors."

Based on the findings of PBOT, as the proposed food court use will not have increased detrimental impacts on the surrounding area related to traffic and onstreet parking as compared to the previous Commercial Parking use), this portion of the approval criterion is met.

# Noise, Vibration, Dust, Odors, Fumes, Glare and Smoke

Based on observations of the site, and testimony received even from adjacent neighbors, the proposed food court does not create detrimental impacts associated with noise, odors or fumes. Regarding noise, the operation of the food carts themselves does not appear to generate any significant noise. There is limited noise associated with customers talking on the site, either as they order food or when sitting in the tented seating area. This level of noise is not any higher than what could be expected in a Commercial Parking lot, with customers going to and from cars, and the noise of cars coming to and from the parking lot. In any case, the observed level of noise in the food court is not of a level that would have a detrimental impact on the surrounding area. There is no activity that occurs on site that would create vibration or dust. Regarding odors, BDS staff noticed only limited food odors permeating from the site, but not at a level that would be considered detrimental to the surrounding area.

Lighting is kept to a minimum on the site, with lighting largely limited to that emanating from the food carts themselves, a downward facing light hanging inside the tent, and ornamental "holiday" lights strung overhead. Two pole mounted light standards (approximately 15 feet in height) are located along the west edge of the site. One of these poles has two light fixtures, one oriented eastward toward the food court area, and one oriented northward. Given the proximity of the north-facing light fixture to the adjacent residential building, the north facing fixture casts glare on the adjacent residence, thereby having the potential to adversely impact residents during evening hours.

Regarding smoke, City records indicate a code complaint was filed in June 2011 regarding smoke being emitted from one of the carts and blowing into an adjacent residence. The record indicates the smoke problem was abated and the responsible food cart tenant vacated site. Smoke was not detected from any of the carts during two BDS staff visits, and no additional code complaints have been filed.

Based on these findings it is determined that the proposed use will not result in increased detrimental impacts over the existing use as far as issues with noise, vibration, dust, odors, fumes and smoke, and the criterion is met for these factors. As for glare, the north-facing light fixture located on the west edge of the site does have a detrimental impact on adjacent residents during evening hours, and the criterion is not met for this factor. A condition of approval could require that this light fixture be shielded or relocated so that it does not cast glare on the adjacent residence. However, as the requested Nonconforming Situation Review is being denied (see Approval Criterion B.2, below), such a condition is unnecessary.

#### Potential for Increased Litter

The applicant states that the owner's property management company will manage litter removal from the site, and that food cart owners are required to keep the area around their carts free of litter. BDS staff observation of the site found the site and surrounding area (within a half block radius of the site) to be free of litter. Garbage cans were seen around the site for use by customers, and a garbage dumpster is also maintained on-site. This criterion is met as it relates to litter.

Amount, Location and Nature of Outside Displays, Storage or Activities
The proposed food court will not contain display areas, but will contain storage areas and outdoor activity areas that were not present with the former Commercial Parking use. The storage areas consist of the fenced area used for the dumpster/recycling area, as well as a fenced area used for portable restrooms. The exterior activity area includes the food carts themselves, the aisles around the food carts where customers maneuver, as well as the tented seating area.

This approval criterion requires the applicant to demonstrate that these storage and exterior activity areas will result in "no net increase in overall detrimental impacts (over the impacts of the last legal use or development) on the surrounding area." While it is clear that the proposed use does introduce new storage and activity areas onto the site that did not exist previously, it is less obvious whether these areas have a detrimental impact on the surrounding area. The applicant argues that none of this new activity is inherently more impactful on neighboring properties than Commercial Parking, which allowed for the coming and going of cars at all hours. BDS agrees with the applicant that theses areas, while new to the site, do not result in a net increase in detrimental impacts on the surrounding area. While the appearance of the storage and activity areas may not be consistent with the desired character of a Multi-Dwelling residential zone, this particular criterion does not focus on appearance. Issues of appearance are addressed in Approval Criterion B.2, below. Instead, as evidenced by the findings above, these activity and storage areas have no adverse impact on such factors as increased hours of operation, vehicle trips, parking, noise, vibration, dust, odor, fumes, smoke, and litter.

The criterion is met as it relates to the amount, location and nature of outside displays, storage or activities.

#### Summary

The applicant has demonstrated that with the one exception of glare, the proposed Retail Sales and Service activity, limited to the operation of a food court, will have no net increase in detrimental impacts on the surrounding area when compared to the existing Commercial Parking use. Regarding glare, a condition of approval that requires the light standard along the west edge of the site to be shielded, or be oriented away from the adjacent residence, would address this impact. However, as the request to establish the food court is denied based on the finding in Approval Criterion B.2, such a condition is unnecessary. Because of the potential impact associated with glare, this criterion is not met.

- 2. If the nonconforming use is in an OS or R zone, and if any changes are proposed to the site, the appearance of the new use or development will not lessen the residential character of the OS or R zoned area. This is based on taking into account factors such as:
  - a. Building scale, placement, and facade;
  - b. Parking area placement;
  - c. Buffering and the potential loss of privacy to abutting residential uses; and
  - d. Lighting and signs; and

**Findings:** The site is located in a High Density (RH) residential zone. Based on the findings below, it is determined that proposed changes on the site to accommodate the proposed food court use will lessen the residential character of the residentially zoned area.

- Proposed changes to the site include placing 14 to 16 trailers to be used as food carts throughout the site; a 400 square foot tent that covers an outdoor seating area; lighting in the form of light posts and overhead "holiday" lights; free standing signs advertising the food court; signs affixed to the perimeter fence; a fenced enclosure for garbage and recycling; and a fenced enclosure for portable toilets.
- In determining whether these proposed changes lessen the "residential character of the residentially zoned area," it is necessary to define what is "residential character" and to identify the boundaries for the "residentially zoned area." For purpose of this criterion, the "residentially zoned area" (Residential Area) will include properties located in the RH zone (the same zone as the subject site), within a one block radius of the site. Identifying the "residential character" will be guided by the existing development within the Residential Area, as well as the desired character of the Residential Area. The "desired character" is defined in Zoning Code Section 33.910.030 as, "The preferred and envisioned character (usually of an area) based on the purpose statement or character statement of the base zone, overlay zone, or plan district. It also includes the preferred and envisioned character based on any adopted area plans or design guidelines for an area." Consistent with this definition, BDS will consider the purpose statement of the RH zone, as well as the preferred and envisioned area of the Kerns Neighborhood Action Plan, adopted by City Council in 1987.
- Existing development in the Residential Area, is characterized predominantly by a mixture of single-dwelling and lower-density (two to four story) multi-dwelling uses. The only exception to this use pattern is the nonconforming Commercial

Parking use on the subject site and the adjacent lot to the south; a two-story nonconforming commercial building (which appears to be offices) directly across NE 20<sup>th</sup> Avenue; and two, one-story office buildings located at NE Couch Street and NE 18<sup>th</sup> Avenue. No Retail Sales and Service use was identified within the boundaries of the Residential Area.

The applicant argues that the mobile food carts located in an existing surface parking lot is consistent with the Commercial Parking use that existed on the site. The applicant also states that the existing character of the area is not residential per se, but mixed in use. BDS does not find that a Retail Sales and Service use that includes up to 16 food carts arrayed around the lot, a large pole tent, portable toilets, and an array of signage is consistent with the appearance of a Commercial Parking use. The changes associated with the Retail Sales and Service/food court use unquestionably lessen the residential character of the surrounding Residential Area when compared to the former parking lot. Additionally, a surface parking lot is something that is frequently seen in a multi-dwelling residential. A food court is not something that is seen, or expected, in a residential area.

The applicant's description of "the area as being mixed-use is correct if including surrounding properties not located in a residential zone. The approval criterion specifically requires assessing the impact of the proposed use solely on the "residential" character of the "R zoned area." As described above, the "R zoned area" is predominantly residential, and introducing a food court into this area will only lessen its residential character.

• The purpose statement for the Multi-Dwelling Residential zones is included in Zoning Code Section 33.120.010.A and B. Generally, the purpose of the Multi-Dwelling use regulations are to create and maintain higher density residential neighborhoods. The use regulations allow nonresidential uses but not to such an extent as to sacrifice the overall residential image and character. While the subject site is already in nonresidential use, it is limited to a surface parking lot, again, an element that visually is not inconsistent with the appearance of a Multi-Dwelling zone. There is nothing in the Multi-Dwelling use regulations that would allow something comparable to a free-standing Retail Sales and Service use having the appearance of the proposed food court. Such a use only detracts from the intent of preserving the residential character and image of the zone.

The applicant notes that the RH zone does allow Retail Sales and Service in the RH zone if approved as a Conditional Use (Zoning Code Section 33.120.100.B.2), thereby making the argument that Retail Sales and Service is not a use that is entirely out of character with the zone. However, Retail Sales and Service uses are allowed in the zone under very limited circumstances. Such uses are allowed only when part of a multi-dwelling development, and limited to a maximum of 20 percent of the building's total floor area. Additionally, the site must be located within 1,000 feet of a light rail station. For the subject site, the proposed Retail Sales and Service use will be the only use on the site, and will not be an insignificant accessory use to a primary residential use. Additionally, the site is not located within 1,000 feet of a light rail transit station.

• Unlike some neighborhood plans, the *Kerns Neighborhood Action Plan* does not include a specific preferred and envisioned character statement for the neighborhood or specific areas within the neighborhood. Instead, the Plan contains a series of goals, policies and objectives focusing on various topic areas

such as Neighborhood Quality and Livability, Land Use, and Business and Industry. Some of the goals polices and/or objectives relevant to this land use review include:

- Strengthen Kerns as a vital neighborhood and as an exciting and enjoyable place to live and work by creating and taking advantage of its location and residential and employment opportunities.
- Encourage new investment opportunities while minimizing displacement of existing commercial activities and residents.
- Maintain and enhance the quality of existing diverse housing types.
- Recognize unique opportunities to develop new housing including ownership alternatives such as condominiums and cooperative buildings.
- Encourage the retention of residentially zoned land for residential use.
- Maintain a healthy and viable environment for new and existing businesses that provide local and regional jobs and services.

More specifically, for the area bounded by NE Sandy Boulevard, E. Burnside Street and NE 32<sup>nd</sup> Avenue (within which the subject site is located), the Plan includes the following policies and objectives:

- Maintain the developed residential area for residential use.
- Protect the fragile residential area bounded by NE 20<sup>th</sup> Avenue, NE Sandy Boulevard, and E. Burnside Street from further commercial encroachment.

Based on the relevant goals and policies of the Plan, and particularly those in the specific area in which the site is located, the desire is to strengthen commercial uses and employment opportunities in areas where appropriate (i.e. nonresidential areas), while maintaining and protecting residential uses and neighborhoods. While the site on which the Retail Sales and Service/food court use is proposed is already in a non-residential use, it is residentially zoned and changing the use from Commercial Parking to a Retail Sales and Service use will promote an activity whose appearance is even less residential than the previous use. Staff finds that this change is not supportive of the overall goals and policies of the Plan, and particularly the area-specific objective to protect the fragile residential area

#### Summary

The changes associated with converting a surface Commercial Parking lot to a Retail Sales and Service use (food court) is found to lessen the residential character of the residentially zoned area in which the site is located. This criterion is not met.

3. If the nonconforming use is in a C, E, or I zone, and if any changes are proposed to the site, the appearance of the new use or development will not detract from the desired function and character of the zone.

**Findings:** As the site is not in a Commercial, Employment or Industrial zone, this criterion is not applicable.

## **DEVELOPMENT STANDARDS**

Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of

Title 33 can be met, or have received an Adjustment via a land use review prior to the approval of a building or zoning permit.

#### CONCLUSIONS

The applicant is requesting two separate land use reviews: a Determination of Legal Nonconforming Status Review for a Commercial Parking use; and a Nonconforming Situation Review to change a Commercial Parking use to a Retail Sales and Service use limited to a food court. Regarding the Determination of Legal Nonconforming Status Review, the applicant has demonstrated that a Commercial Parking use was a legal use when established, and has continued over time without a lapse exceeding three continuous years. This documents that Commercial Parking is a legal conforming use on this residentially zoned site.

As for the Nonconforming Situation Review, the first approval criterion requires demonstrating that the proposed use will have no net increase in detrimental impacts on the surrounding area when compared to the impacts associated with the last legal use on the site. The applicant has demonstrated with one exception that the proposed use will have no increase in detrimental impacts on the surrounding area when compared to the existing Commercial Parking lot. The one exception is glare associated with a exterior light fixture located at the west side of the site. The positioning of this light casts glare on the adjacent residential development.

The second approval criterion for the Nonconforming Situation Review requires demonstrating that any changes to the site will not lessen the residential character of the residentially zoned area. Based on the existing character of development in the residentially zoned area, in combination with the desired character of the residential area (as defined by the base zone and the adopted *Kerns Neighborhood Action Plan*), it is found that the proposal for a food court will lessen the residential character of the residentially zoned area.

#### ADMINISTRATIVE DECISION

**Approval** of a Determination of Legal Nonconforming Status Review (33.258.075) that establishes Commercial Parking as a legal nonconforming use on the site; and

**Denial** of a Nonconforming Situation Review (33.258.080) to convert the Commercial Parking use to a Retail Sales and Service use limited to the operation of a 16-cart food court.

Staff Planner: Douglas Hardy

Decision rendered by: \_\_\_\_\_\_ on October 13, 2011.

By authority of the Director of the Bureau of Development Services

Decision mailed: October 14, 2011.

**About this Decision.** This land use decision is **not a permit** for development. Permits may be required prior to any work. Contact the Development Services Center at 503-823-7310 for information about permits.

**Procedural Information.** The application for this land use review was submitted on May 25, 2011, and was determined to be complete on **September 6, 2011**.

Zoning Code Section 33.700.080 states that Land Use Review applications are reviewed under the regulations in effect at the time the application was submitted, provided that the application is complete at the time of submittal, or complete within 180 days. Therefore this application was reviewed against the Zoning Code in effect on May 25, 2011.

ORS 227.178 states the City must issue a final decision on Land Use Review applications within 120-days of the application being deemed complete. The 120-day review period may be extended at the request of the applicant. In this case, the applicant did not extend the 120-day review period. Unless further extended by the applicant, **the 120 days will expire on January 4, 2012.** 

### Some of the information contained in this report was provided by the applicant.

As required by Section 33.800.060 of the Portland Zoning Code, the burden of proof is on the applicant to show that the approval criteria are met. The Bureau of Development Services has independently reviewed the information submitted by the applicant and has included this information only where the Bureau of Development Services has determined the information satisfactorily demonstrates compliance with the applicable approval criteria. This report is the decision of the Bureau of Development Services with input from other City and public agencies.

**Conditions of Approval.** If approved, this project may be subject to a number of specific conditions, listed above. Compliance with the applicable conditions of approval must be documented in all related permit applications. Plans and drawings submitted during the permitting process must illustrate how applicable conditions of approval are met. Any project elements that are specifically required by conditions of approval must be shown on the plans, and labeled as such.

These conditions of approval run with the land, unless modified by future land use reviews. As used in the conditions, the term "applicant" includes the applicant for this land use review, any person undertaking development pursuant to this land use review, the proprietor of the use or development approved by this land use review, and the current owner and future owners of the property subject to this land use review.

**Appealing this decision.** This decision may be appealed to the Hearings Officer, which will hold a public hearing. Appeals must be filed **by 4:30 PM on October 28, 2011** at 1900 SW Fourth Ave. Appeals can be filed Tuesday through Friday on the first floor of the Development Services Center until 3 p.m. After 3 p.m. and Mondays, appeals must be submitted to the receptionist at the front desk on the fifth floor. **An appeal fee of \$250 will be charged**. The appeal fee will be refunded if the appellant prevails. There is no fee for ONI recognized organizations appealing a land use decision for property within the organization's boundaries. The vote to appeal must be in accordance with the organization's bylaws. Assistance in filing the appeal and information on fee waivers is available from BDS in the Development Services Center. Please see the appeal form for additional information.

The file and all evidence on this case are available for your review by appointment only. Please call the Request Line at our office, 1900 SW Fourth Avenue, Suite 5000, phone 503-823-7617, to schedule an appointment. I can provide some information over the phone. Copies of all information in the file can be obtained for a fee equal to the cost of services. Additional information about the City of Portland, city bureaus, and a digital copy of the Portland Zoning Code is available on the internet at <a href="https://www.portlandonline.com">www.portlandonline.com</a>.

**Attending the hearing.** If this decision is appealed, a hearing will be scheduled, and you will be notified of the date and time of the hearing. The decision of the Hearings Officer is final; any further appeal must be made to the Oregon Land Use Board of Appeals (LUBA) within 21 days

of the date of mailing the decision, pursuant to ORS 197.620 and 197.830. Contact LUBA at 550 Capitol St. NE, Suite 235, Salem, Oregon 97301, or phone 1-503-373-1265 for further information.

Failure to raise an issue by the close of the record at or following the final hearing on this case, in person or by letter, may preclude an appeal to the Land Use Board of Appeals (LUBA) on that issue. Also, if you do not raise an issue with enough specificity to give the Hearings Officer an opportunity to respond to it, that also may preclude an appeal to LUBA on that issue.

#### Recording the final decision.

If this Land Use Review is approved the final decision must be recorded with the Multnomah County Recorder. A few days prior to the last day to appeal, the City will mail instructions to the applicant for recording the documents associated with their final land use decision.

- Unless appealed, the final decision may be recorded on or after October 31, 2011 (the first business day following the last day to appeal).
- A building or zoning permit will be issued only after the final decision is recorded.

The applicant, builder, or a representative may record the final decision as follows:

- By Mail: Send the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to: Multnomah County Recorder, P.O. Box 5007, Portland OR 97208. The recording fee is identified on the recording sheet. Please include a self-addressed, stamped envelope.
- In Person: Bring the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at 503-988-3034 For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

**Expiration of the approval.** The approved Determination of Legal Nonconforming Status Review does not expire. However, note that the loss of nonconforming use status is regulated by Zoning Code Section 33.258.050.D.

**Applying for your permits.** A building permit, occupancy permit, or development permit may be required before carrying out an approved project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed herein;
- All applicable development standards, unless specifically exempted as part of this land use review;
- All requirements of the building code; and
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the City.

#### **EXHIBITS**

NOT ATTACHED UNLESS INDICATED

A. Applicant's Statement

- 1. Documenting a Nonconforming Situation
- 2. Nonconforming Situation Review
- 3. Supplemental Information, submitted August 23, 2011
- 4. Green Castle Traffic and Parking Count Information, dated October 5, 2011
- 5. E-Mail from Kelly Hossaini regarding location of portable toilets, received October 4, 2011
- B. Zoning Map (attached)
- C. Plans/Drawings:
  - 1. Site Plan (attached)
- D. Notification information:
  - 1. Mailing list
  - 2. Mailed notice
- E. Agency Responses:
  - 1. Bureau of Environmental Services
  - 2. Water Bureau
  - 3. Fire Bureau
  - 4. Bureau of Development Services/Site Development Review Section
  - 5. Bureau of Development Services/Life Safety Plans Examiner
  - 6. Bureau of Parks, Forestry Division
  - 7. Bureau of Transportation Engineering and Development Review
- F. Correspondence:
  - 1. E-mail from Joan Hess, sent June 2, 2011, in support
  - 2. Letter from Chuck and Belinda Wilson, dated September 20, 2011, in support
  - 3. Letter from Kimberly Phillippe, dated September 23, 2011, in support
  - 4. Letter from Heather and Ben Waisanen, dated September 24, 2011, in support
  - 5. Letter from the Kerns Neighborhood Association, dated September 22, 2011, in support
  - 6. E-mail from John and Bernice Marcoules, sent September 16, 2011, in opposition
  - 7. Letter from Dave Hill, in opposition
- G. Other:
  - 1. Original LU Application
  - 2. Site History Research

The Bureau of Development Services is committed to providing equal access to information and hearings. Please notify us no less than five business days prior to the event if you need special accommodations. Call 503-823-7300 (TTY 503-823-6868).



