

**NARRATIVE FOR A PRECAUTIONARY DETERMINATION OF
LEGAL NONCONFORMING STATUS REVIEW APPLICATION
TO SUPPORT A PRECAUTIONARY NONCONFORMING
SITUATION REVIEW APPLICATION
City of Portland, Oregon**

Application Date: October 9, 2025

Request: As a precaution¹, the applicant requests re-establishment of its nonconforming drive-through use at the subject property. The subject property has been a Dairy Queen with a drive-through window since 1968. In July 2018, applicant filed a building permit application to rebuild the building for the same use – a Dairy Queen restaurant with a drive-through window. There is no sit-down seating at this restaurant. It is a drive through and mobile order facility only.

A demolition permit for the old building was issued on October 14, 2019, and final inspection performed and approved on March 12, 2024. Covid intervened, and associated building permit no. 2018-210965-000-00-CO was issued on October 11, 2022. Revised plans were submitted on April 26, 2023, and the City approved them on April 17, 2025 – less than five months ago. Since then, construction on the approved building has been delayed while the City reviews a public works permit application that applicant submitted in 2021. That review is now, finally, almost completed, and applicant expects the public works permit needed to begin construction will be issued this month. Once the permit is issued, the building will be constructed promptly.

¹ As explained later, this application is precautionary because the use of the subject property for a quick-service restaurant with a drive-through window has been continued as a matter of law while applicant has had a City of Portland building permit to construct the building with the drive-through window. There has been no period of more than three *continuous* years in which the nonconforming drive-through window was not maintained, as the City's code defines the maintenance of a nonconforming situation to include having a building permit. That means that there was no period in which the drive-through window was discontinued. That means the nonconforming driveway can not be lost. The City has continuously interpreted its code to mean the above – that the maintenance of the building permit for the restaurant with drive-through window maintained that nonconforming situation. Accordingly, even if the current pending building permit were to expire that would simply start the 3-year clock and no extension would be required. However, in an abundance of caution, applicant files this application to seek a two-year extension on the fiction that the drive through was discontinued for the requisite 3 continuous years – contrary to the City's longstanding interpretations otherwise. However, please understand that this application is expressly filed without waiver of any rights to the use of a drive-through on the subject property, to include that the drive-through use has not been discontinued, rather has been continuous since at least October 11, 2022, that there has been no continuous 3-year period of discontinued use, that the applicant has a vested right to the nonconforming drive through window, and that applicant is entitled to have the City perform inspections under the existing renewed building permit for said restaurant with drive through window.

Property Address: 5605 SE Division Street
Portland, OR 97206

Property Description: T1S, R2E, Section 06, Tax Lot 12200

Current Zoning: CM2
Commercial/Mixed Use 2

Site Area Approximately 9,360 sq ft

Applicant / Owner: Akum Investments Group
12870 SW FARMINGTON RD
PO Box 682
Beaverton, Or 97075
Phone: 503 866 3969
Email: mohangrewal@yahoo.com

Applicants' Legal Representative: Wendie Kellington
Kellington Law Group, PC
4500 Kruse Way, STE #340
Lake Oswego, OR 97035
Phone: 503-636-0069
Email: wk@klgpc.com

Introduction

The subject property has been a Dairy Queen with a drive-through window since approximately 1968. *See* Exhibits 8–10. In July 2018, applicant filed building permit application # 2018-210965-000-00-CO to rebuild the building for the same use – a Dairy Queen restaurant with a drive-through window. *See* Exhibit 2. PCC 33.130.260 expressly allows existing drive-through facilities to be rebuilt. PCC 33.130.260 expressly identifies the “standard evidence” that can “prove that the use has been maintained over time” as that in PCC 33.258.038(B). PCC 33.258.038(B) identifies building permits as such evidence.

The city has in numerous final decisions that it has conveyed to the applicant and induced the applicant to rely upon, determined that these provisions mean what they say – that the maintenance of the building permit for the restaurant with a drive the drive through maintains the nonconforming drive through use. Some examples of the same are attached in Exhibit 1. Once the city made those final land use decisions that an approved building permit maintained the nonconforming drive through window, the City was and is prohibited from later collaterally attacking that decision and from asserting instead that the building permit no longer has the effect of maintaining the nonconforming use. *Doney v. Clatsop County*, 142 Or App 497, 503, 921 P2d 1346 (1996); *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500-501 (2004) (issues that were conclusively resolved in a final discretionary land use decision ***cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision); *Pilz v. City of Portland*, 41 Or LUBA 461, 467 (2002) (same). Similarly, *Holland v. City of Cannon Beach*, 154 Or App 450, 926 P2d 701 (1998), prohibits a local government from changing its position with respect to how standards apply during the proceedings on a permit application. The court of appeals has explained that inconsistent interpretations of local

standards may be reversible. *Alexanderson v. Clackamas Cnty.*, 126 Or App 549, 552, 869 P2d 873, 874 (1994), *rev den*, 319 Or 150 (1994); *Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 207, 868 P2d 24, 25 (1994).

A demolition permit for the old building was applied for on October 11, 2019, was issued on October 14, 2019, and final inspection for that permit passed on March 12, 2024.² During the Covid-19 pandemic the building permit application slowly wended its way through the City's approval process, and associated building permit no. 2018-210965-000-00-CO was issued on October 11, 2022. A revised plan set was submitted to the City on April 26, 2023, the City took the plan set under review on August 3, 2023, and the building permit for the revised plans was issued on April 17, 2025. At no time before then, could the applicant have broken ground and even then the applicant could not proceed because they were still waiting for the City to approve the infrastructure plans that had been under review for more than 5 years. That building permit is valid and has remained active at all times since it was issued on October 11, 2022. Exhibit 2.

Under the City code, and as that code has been applied to these specific building permits by the City's Planning Supervisor, the building permits "continue" the drive-through use. Consequently, the use is not "discontinued," and has not been "discontinued" at any time since October 11, 2022. The drive-through use has been *continued* during that time, and there has not been a period of more than three years continuous discontinued use at any time since the restaurant was first converted to a Dairy Queen on July 1, 1968. On September 17, 2025, for the first time, the City changed its position and decided otherwise – that unless the building and drive through window were constructed in the next 24 days (by October 11), applicant's right to the drive-through window would be lost. Exhibit 3. For the first time, on September 17, 2025, the City stated it would not honor the building permit for the restaurant with drive through window and would not allow it to be extended, but rather only converted to a wholly different kind of building – a restaurant without a drive through window.

The determination was made notwithstanding that it is a complete reversal of the city's prior decisions for this permit and this property, notwithstanding that the applicant has paid more than \$252,000 in city SDC fees, more than \$340,000 total to the City on just these two building permits, and invested nearly \$600,000 in permit fees and other costs to develop the drive through window on the subject property, and notwithstanding that to this day, the applicant cannot in fact begin construction because the day after the City department still reviewing the infrastructure plans for the project that were submitted more than 5-years ago gave the go-ahead for certain project elements to be constructed, the City put a hold on all permit activity. Exhibits 6, 7, 11. The City's reversal of its longstanding position is the sole reason why this application to reestablish a discontinued nonconforming situation is filed and because the applicant strongly believes that the City is wrong, is the reason that this application is precautionary. *Deschutes County v. Pink Pit, LLC*, 306 Or App 563 (2020) (explaining precautionary applications are effective and allowable); *Recovery House VI v. City of Eugene*, 150 Or App 382, 386–88 (1997) (same).

² Demolition Permit application #. 2019-239458-000-00-CO; IVR # 4471309. See Exhibit 2.

Applicable Legal Standards

This is a precautionary application to re-establish an allowed drive-through use for an additional two-year period pursuant to PCC 33.258.050(E)(1),³ which provides that a “nonconforming use that has been discontinued for more than 3 continuous years may request re-establishment through a nonconforming situation review.” The City advises that the applicable standards require a Determination of Legal Nonconforming Status Review under PCC 33.258.075 as well as a nonconforming situation review as provided in PCC 33.258.080. Under the latter, the request *will be approved* if the review body finds that the applicant has shown that all of the following approval criteria are met, under the former the legal status will be certified if the standards are met. Both are satisfied here, as demonstrated below.

PCC 33.258.075 Determination of Legal Nonconforming Status Review

PCC 33.258.075(D)(1)

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

The drive through window is a lawful nonconforming use. In this regard, the subject property has been operated as a Dairy Queen with a drive-through window since July 1, 1968. The standard evidence exists in this regard and the applicant will provide it, and provides some here but will submit additional information.

In 1968, the property was zoned C2, and that there were no restrictions on drive through windows at that time. See 1964 City zoning code for the C-2 zone Exhibit 4. Under that 1964 code, “Restaurant, tea room or café” were “Group 5 uses”. Exhibit 4, p 3. Nothing in that code prohibited drive through windows.

2. The legal status of the nonconforming situation will be certified if the review body finds that:

* * *

- b. The nonconforming situation has been maintained over time.

The building’s former shape is shown on the images below:

³ “**Loss of nonconforming use status.** 1. Discontinuance. If a nonconforming use is discontinued for 3 continuous years, the nonconforming use rights are lost. If a nonconforming use ceases operations, even if the structure or materials related to the use remain, the use has been discontinued. If a nonconforming use changes to another use without obtaining all building, land use, and development permits that would have been required at the time of the change, the legal nonconforming use has been discontinued. A nonconforming use that has been discontinued for more than 3 continuous years may request re-establishment through a nonconforming situation review. Re-establishment of a nonconforming use that has been discontinued for 5 or more continuous years is prohibited.”



The below aerial image from 1975 (attached as Exhibit 9), shows the same building shape and the area where the drive through window was in place then:



The attached declaration from Dairy Queen Executive Director of the Pacific Northwest, Fred Baden states that Dairy Queen's records show that the building was established as a DQ in

1968 and there are no records that the building to include its drive through, ever changed. Exhibit 12.

As the Willamette Week reported in 2016, “This Division drive-thru has barely changed in 47 years.” Exhibit 10, p. 5-6.

Regardless, there is no dispute that the drive through was on the subject property in 1997 and the City codes through at least 1997, either expressly allowed or did not prohibit drive through windows. *See* Exhibit 5 (excerpts from 1997 zoning code, section 33.130.260 A allowing Drive-Through Facilities outright in the CG zone, and applicable zoning map showing subject property designated by comprehensive plan for maximum potential zoning at CG). The use was lawful when established.

The building was used continuously as a Dairy Queen with a drive through until late October, under a demolition permit issued on October 14, 2019, the building was torn down to make way for replaced Dairy Queen building, also with a drive-through, that had a pending permit application. *See* Exhibit 2; *see also* building plans and permit documents (these documents are in the City’s possession and incorporated in full by this reference). The drive-through use was continued when the City issued a building permit for the new drive-through use on October 11, 2022. As explained above and for brevity not repeated, the City interpreted its code to mean that maintenance of the building permit for the drive through was adequate to demonstrate that the drive through had been maintained and was therefore continued. The explanation in this regard above, it hereby incorporated to include that the application spent hundreds of thousands to dollars on permits, City transportation SDCs for a quick service restaurant with a drive through, and other expenses that are exclusively referable to replacing the building with the drive through window. That permit has been active ever since.

Nonconforming Situation Review –

PCC 33.258.080(B)(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”

The nonconforming situation to be continued is one that has been on the property since 1968. There was only a lapse in the maintenance of the drive through window from the end of October 2019 while the drive through window had been removed under a City demolition permit, until the time of an October 11, 2022 building permit that the City determined maintained the drive through window thereafter. That building permit has been continuously maintained ever since. The applicant has always been clear it intended to reestablish substantially the same drive through window - to the extent of paying significant transportation SDCs to the City for a quick service restaurant with a drive through window and other fees exclusively referable to the building permit for that use. Exhibit 7. These fees are exclusively referable to a restaurant with drive through window because the subject Dairy Queen is and long has been a drive through and walk up service restaurant. There is no indoor seating that has been or will be provided.

The hours of operation of the drive through window and walk up service will be the same as they were when the Dairy Queen was previously in operation 10:30 am until 10:30 pm 7 days a week.

Concerning vehicle trips to the site and circulating within the site, the Building Permit plans currently under review by the City include a traffic and circulation plan that PBOT and PBP have both modified and approved. The approved access and circulation plan is based upon a Transportation Impact Analysis for the site performed by ETRC, Massoud Saberian for the project. The TIA concluded that the site as designed can function appropriately. To better accommodate traffic, the City requested that and the applicant designed as the city requested and as reflected in the pending building permit for the proposal, two drive-through lanes served by the single drive through window rather than one lane, to increase the capacity to accommodate more vehicles. Specifically, the design as requested by the City will accommodate 10 vehicles at a time plus a waiting area lane that will accommodate 5 additional vehicles to enable them to pull into that lane in the event that customers need to pull into such areas to wait for their order. The Applicant has paid the transportation SDCs for a quick service restaurant with drive through window to mitigate for general transportation impacts.

The proposal has no impact on street parking and has no need for or plan for on street parking. The proposal is a drive through and walk up restaurant, only. There is no on site sit down seating and so no reasons for customers to park at the site at all. The proposal, as the design has been approved by the City, has adequate on-site parking for the facility's employees, who are the only people who will have any reason to park at the site. The proposal includes adequate loading areas for deliveries on the site, as has already been determined by the City of Portland PBOT and planning staffs when they approved the pending building permit plans. The loading areas are shown on the approved building plans.

Lighting proposed for the site and approved by the City, is the same as it always was, and will be shielded to avoid glare. The proposal will not generate any remarkable noise – the drive up window speakers are well within City noise limits. And they are the same type of speaker that was always provided for the site. Fumes from idling vehicles is managed by the fact that cars passing through the drive through, from start to finish, are in and out over a period of about 3-4 minutes, maximum. When vehicles pull into the waiting area, a sign will direct patrons to

turn off their motors. Fumes in this regard are in many ways self limiting because gasoline is expensive. There will be no dust because the area where vehicles circulate is paved. The use does not create vibrations or emit smoke.

The proposal will vastly improve the litter situation in the area. When the proposal is developed as per the approved Building Plans, all litter will be cleaned up by onsite employees, and the area will not be an attractive place for discourteous people to dump trash.

The proposal will have no outdoor storage or displays.

PCC 33.258.080(B)(2): The subject zone is not OS, R or IR and so (2) does not apply.

PCC 33.258.080(B)(3) If the nonconforming use is in a C, E, I, or CI 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.

Presumably this standard applies to C-2 zones, and not just a “C” zone.

The appearance of the proposed use will be more attractive and favorable than the same structure that it replaces. Per City direction, the proposed site has two stories, an appropriate footprint and a design that City planning staff had a significant hand in crafting and have approved. The proposal will not in any way detract from the desired function or character of the C-2 zone. The function of the zone in the subject area is to support C-2 commercial uses. The Dairy Queen proposed is an allowed C-2 use that serves the function of the C-2 zone. C-2 zone expressly allows existing drive through facilities. The proposed drive through is an allowed replacement of an existing one. The proposal is consistent with the character of the zone in the area. Across Division Street from the proposal is Franklin High School which the site serves via a cross walk and its walk up window. There is a Plaid Pantry store to the subject property’s west. To the subject property’s east are coffee shops and restaurants. There is also an Astro gas station and a car repair shop. The proposal will not detract from the desired function and character of the zone.

The proposal meets all applicable standards. Per PCC 33.258.080, it is respectfully submitted that the proposal “will be approved.”

Very truly yours,



Wendie L. Kellington
Kelly F. Huedepohl
Kellington Law Group, PC
P.O. Box 2209
Lake Oswego, OR 97035
(503) 636-0069
wk@klgpc.com

kh@klgpc.com

WLK:wlk

CC: Client

Lauren King, City Attorney