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CITY OF PHOENIX
Technical Memorandum

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To: City of Phoenix Planning Commission

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Subject: Similar Use Determination Appeal

CRITERIA DISCUSSION

As discussed in CSA's Notice of Appeal letter, similar use determinations are issued as a code interpretation under Chapter 4.8 of the Phoenix Land Development Code. This code section includes no specific criteria for resolving similar use determination requests. CSA's opinion is that the Planning Commission is free to interpret the code provided the interpretation is reasonable. CSA's opinion is that the Planning Commission has the discretion to permit the requested use as a similar use.

STAFF DENIAL DISCUSSION

As discussed in the Notice of Appeal letter, the Staff's denial of the similar use determination request is not precedential on the Planning Commission in anyway. Nevertheless, the Applicant has a few observations the Commission may wish to consider:

- Staff's denial of the similar use request references a general zoning inquiry that occurred over a month before the similar use determination request was filed. Applications must be decided on the materials and evidence in the applicable record. Moreover, the specific use proposed is ***not listed in any*** of the City's zoning districts. Thus, the proper answer to a general zoning inquiry for the proposed use is that a similar use determination will be required because the use is unlisted.
- At its essence, the Staff denial concludes the use is not a warehouse and distribution use and concludes the use would be allowed in the Light industrial zone because the use is a repair shop which is a listed use in Light Industrial but not in the General Industrial zone.
 - Determining the proposed use is not a warehouse and distribution use is something the Applicant already knows and with which they agree - hence the similar use determination request before the Commission.
 - Categorizing the proposed use to be a permitted use as a repair shop in the Light Industrial zone might be a legally defensible interpretation, but the proposed use and a repair shop are quite different land uses. Repair shops involve making repairs for the ***firm's customers***. Silhouette does not make repairs to customer's vehicles or equipment as any part of its core business activities.

SIMILAR USE DETERMINATION APPROACH CSA RECOMMENDS

Because the City has no specific similar use determination criteria to apply, the code provides the Planning Commission little guidance on the proper manner to consider such a request. For this reason, CSA recommends an approach often used in other jurisdictions that do have specific criteria for similar use determinations (also referred to as unlisted uses).

First, most jurisdictions typically examine whether the use is specifically prohibited in the zoning district. Second, jurisdictions typically examine whether the use is specifically allowed in another zoning district; LUBA has found a listing in one zone but not another does not categorically prohibit the use being allowed as a similar use in another zone, but jurisdictions can interpret the code in that manner if they choose. For example, if a city has one zone that lists restaurants with drive throughs and then restaurants as separate uses and another zone that lists restaurants but is silent on restaurants with drive throughs, a city



may allow a restaurant with the drive-throughs in the one zone but not the other. In such instances, the nature of the use differences is usually specific and explicit.

If the use is not specifically prohibited nor is it specifically allowed in another zoning district, a similar use determination is often required and jurisdictions typically consider three main elements:

- Comparing the operational characteristics of uses allowed in the zone to the operational characteristics of the proposed similar use.
- Comparing the typical physical development forms/patterns that are built for permitted uses versus the physical development that would be expected for the proposed similar use.
- Comparing the expected intensity of externalities/potential impacts on the surrounding properties between uses that are allowed in the zoning district and the proposed similar use.

An example of a zoning code that takes CSA's recommended approach to similar use determinations (also referred to as unlisted use determinations) is attached to this memo. Jackson County's criteria for unlisted use determinations is set forth in JCLDO 6.2.3(B); this section of the JCLDO is attached.

CSA recommends and requests the Planning Commission take the general approach described in this section and apply it to the subject similar use determination request.

IS THE USE SPECIFICALLY PROHIBITED?

In CSA's view the use is not specifically prohibited. The list of permissible uses in the General Industrial zone is very short. For non-public/institutional employment uses, there are only five permitted uses and only two of those are outright permitted (the other two require a CUP). The only use that is expressly prohibited is mini-warehouse use which is expressly distinguished from warehousing and distribution uses. The proposed Silhouette use is not a mini-warehouse use and could not reasonably be confused with a mini-warehouse use which rents individual storage spaces to off-site customers.

IS THE USE SPECIFICALLY ALLOWED IN ANOTHER ZONE?

The nature of the use is quite unique but is similar to a general contractor use. General contractors typically involve a mix of office spaces, work vehicles, shop space for maintenance of company vehicles and equipment, and similar uses all for the purpose of efficiently meeting requirements for customer contracts. CSA's reading of the code is that the proposed use is not specifically identified or allowed in the zoning code anywhere.

OPERATIONAL CHARACTERISTICS COMPARISON

Warehouse and light manufacturing uses typically have employee vehicles coming and going from the site, large vehicles coming and going, raw materials being delivered and handled, repair of company equipment onsite like forklifts and manufacturing equipment. Moreover, the permitted use that appears most similar to the proposed use is a public works yard. That is basically what Silhouette does. Silhouette does public works (in significant part for the government), but instead of the Forest Service or BLM doing the work directly out of a government owned public works yard they contract with Silhouette to do the work for them.

In CSA's view the operational characteristics of a light manufacturing or warehousing and distribution facility are not especially different from the use characteristics that Silhouette will have. The main difference would be expected to be fewer semis for Silhouette but with more small work vehicles leaving in the morning and entering in the late afternoon. The operational characteristics of Silhouette are expected to be virtually identical to a public works yard.

In CSA's opinion, the operational characteristics of the proposed Silhouette use is similar to other uses permitted in the General Industrial zone.



PHYSICAL DEVELOPMENT COMPARISON

From a physical development perspective, this site is largely already built out which is why Silhouette is interested in the site. It will have employee parking, customer parking, corporate vehicle parking and buildings for storage of materials, equipment storage and repair of company vehicles and equipment. These are all things that light manufacturing typically have and warehouse and distribution as well. In fact, the physical development of the site is quite similar to the Summitt Beverage warehouse and distribution use to the north. From a company vehicle storage standpoint, the Silhouette use would be expected to have less acreage devoted to company vehicle storage than many warehouse and distribution uses. For example, CSA recently worked on the new Amazon warehouse and distribution facility in Central Point has more acres of company vehicle storage the entire proposed Silhouette use.

Again, the proposed use is most similar to a public works yard and the configuration of the facility is not a-typical for a public works yard.

In CSA's opinion the physical development parameters for the Silhouette use are not dissimilar to other uses allowed in the General Industrial zoning district.

EXTERNALITIES/POTENTIAL IMPACTS COMPARISON

From the standpoint of externalities and potential impacts, the General Industrial zone is the City's zone that permits the highest level of externalities as it is the City's heaviest industrial zone. Traffic, noise, glare, chemicals, and similar externalities would not be expected to be any greater for Silhouette than a warehouse and distribution facility, manufacturing facility or a public works yard. If potential impacts were a matter of concern for the Planning Commission, the Planning Commission could also conclude the proposed use is similar to uses permitted as conditional uses and the Planning Commission to interpret the code to allow the use subject to obtaining a conditional use permit.

CONCLUSIONS

It is unrealistic to think that a zoning code will ever anticipate and list all the potential land uses and business types that will ever exist now or in the future. For this reason, the Applicant requests the Planning Commission evaluate the requested similar use determination in a manner typical of other jurisdictions with codes that have more specific criteria for making similar use determinations. Applicant believes it is logical and appropriate to evaluate similar use determination requests according to proposed uses operational characteristics, physical development patterns, and potential for externalities and impacts when compared to uses allowed in the applicable zoning district. The Silhouette's proposed uses are not that different operationally or physically from uses allowed in the General Industrial zoning district. Silhouette's proposed uses are not expected to have meaningfully different externalities and potential impacts than other uses permitted in the General Industrial zoning district.

Silhouette is a major employer in the area and expansion onto the proposed site would be an excellent addition to the City's employment base. CSA and the Applicant respectfully request the Planning Commission approve Silhouette's forest management operations base as a similar use in the General Industrial zone.

CSA Planning, Ltd.

Jay Harland
Principal

Attachment:
Example Unlisted Use Determination Criteria @ JCLDO 6.2.3(B)

**Jackson County, Oregon
Chapter 6**

6.2.3 Unlisted Uses

A. Procedure for Classifying Unlisted Uses

In any zoning district other than Rural Limited Industrial, Limited Use, and Resource zones, where a particular use or class of uses is not identified in Table 6.2-1, such use(s) or class of uses may be permitted through a Type 2 procedure upon a finding by the Director that the criteria of subsection (B) below are satisfied. In addition, the Director may determine that a proposed use is not deemed to be within a classification, whether or not named within that classification, if its characteristics are substantially incompatible with those typical of uses named within the classification (see Section 13.2). In making an unlisted use determination under Section 3.9, the Director may forward to the Planning Commission for review prior to rendering the decision. Any new or similar use that cannot be clearly determined to be in an existing use classification may be incorporated into the zoning regulations by an amendment to the text of this Ordinance, as provided by Section 3.8.

B. Criteria for Approving Unlisted Uses

The following criteria are used to determine what classification an unlisted use is in, where it is permitted, and whether activities associated with it are considered principal or accessory uses. In order to be allowed in a specific zoning district an unlisted use must be found to create no greater impacts on adjacent properties than those already allowed through a Type 3 review. All relevant impacts of an unlisted use must be considered, including but not limited to the following:

1. Whether the proposed use(s) is of the same general character as uses listed in the zoning district. The Director will give due consideration to the intent of the Jackson County Comprehensive Plan and this Ordinance concerning the district(s) involved, the character of the uses specifically identified, and the character of the use(s) in question;
2. Whether the use or activities associated with it are likely to be found independent of other activities on the site;
3. Whether the impacts of the unlisted use are similar in nature, function, and duration to identified listed uses in relation to the following factors:
 - a. Any on-premise processing, including assembly, manufacturing, warehousing, shipping, distribution; and any dangerous, hazardous, toxic, or explosive materials used in the processing;
 - b. The nature and location of storage and outdoor display of merchandise; enclosed, open, inside or outside the principal building; and predominant types of items stored (such as business vehicles, work-in-process, inventory, and merchandise, construction materials, scrap and junk, and raw materials including liquids and powders);
 - c. The type, size and nature of buildings and structures, site area or floor space, and equipment or vehicles devoted to the activity;
 - d. On-premise signs, and how the use will advertise itself;
 - e. The relative number of employees and customers associated with each activity and per shift;

- f. Hours and days of operation;
- g. Transportation requirements, for both people and freight, by volume and type; characteristics of traffic generation to and from the site; relative number of vehicle trips generated by the use; trip purposes and whether trip purposes can be shared by other uses on the site;
- h. Parking requirements, turnover and generation, ratio of the number of spaces required per unit area or activity, and the potential for shared parking with other uses;
- i. The amount and nature of any nuisances generated on the premises, including but not limited to noise, smoke, odor, glare, vibration, radiation and fumes; and
- j. Any special public utility requirements for serving the proposed use, including but not limited to water supply, waste water output, pre-treatment of wastes and emissions required or recommended, and any significant power structures and communications towers or facilities.