



# LYVER ENGINEERING AND DESIGN

7950 SE 106th, Portland, Oregon 97266

Ph: 503.705.5283 Fax: 503.482.7449 TroyL@Lyver-EAD.com www.Lyver-EAD.com

May 3rd, 2022

**Reference:** Phelps Industrial/ Light Manufacturing Bldg  
9289 SE 58th Drive, Milwaukie, OR 97206  
**LU application #VR-2021-012;DEV-2021-006**

**LEAD Project No:** 19-042

**Subject:** Applicants Final Statement

Herein the applicant provides their final statement prior to the May 24th public hearing process appealing to the Planning Commission for approval of the proposed land use application. Based on the staff review of the applicant's combined applications for variances and parking modification, the criteria have been satisfied. See Planning Commission Staff Report dated 4/5/22 Item 5.1 page 5 to page 8 under "Key Issues", staff discusses at length the various criteria including but maybe not limited to:

- *Are the proposed variances and parking modification reasonable and appropriate?* Staff analysis illustrates how the applicants have met the criteria through the alternative analysis (page 6); avoiding or minimizing impacts to surrounding properties (page 6-7); has desirable public benefits (page 7); responds to the existing built or natural environment in a creative and sensitive manner (page 7); and, impacts from the proposed variance will be mitigated to the extent practicable (page 7).

As part of the Staff Report under "Conclusions" on page 8, staff makes the following recommendations:

1. *Approve the variances*
2. *Approve the parking modification, and*
3. *Adopt the attached Findings and Conditions of Approval.*

Under the "Code Authority and Decision-Making Process" on page 8, Staff identifies the various Code sections that are applicable, including MMC c12.16, MMC 19.309, MMC 19.600, MMC 19.700, MMC 19.906 and MMC 19.911. Based on its review of the application materials, staff concludes that the applicant has met the required burden by suitably addressing all of the above Code sections.

Comments received from the Milwaukie Engineering Department and TriMet indicate that comments have either been incorporated into the Findings under 19.700, Chapter 12, or, in the case of TriMet, comments are related to the site when improvements are made.

Attachment 1 within the Staff Report of 4/5/22 beginning on page 12 includes the staff statement that *“Subject to approval of the requested variance, the Planning Commission finds that the proposal complies with the applicable standards of the M zone.”* On page 14 staff states *“The Planning Commission finds that the applicant has adequately addressed the criteria for a parking modification to allow for the required accessible space to be provided on-site, with non-accessible spaces provided on-street.”*

Regarding MMC 19.606.2, Landscaping, staff finds that *“As conditioned, the Planning Commission finds that the applicable standards of MMC 19.606.2 are met.”* This pertains to Perimeter Landscaping (19.606.2.C) as well (page 15). It should be noted that the reduction in perimeter landscaping is in direct correlation to the required reduction of space between the intersection, the driveway and the northern property line as discussed by traffic engineer Mike Ard. One can not be increased without negatively impacting safety sight distance.

With regard to the “discretionary relief criteria” (19.911.4.B.1) staff has determined that the applicant meets these criteria including:

- (a) The applicants alternative analysis provides, at a minimum, an analysis of the impacts and benefits of the variances proposed as compared to the baseline Code requirements.”* While also noting that *“The alternative to the variance would be to not develop the site, given the multitude of constraints.”*
- (b) The proposed variances avoid creating adverse impacts for surrounding properties. . . . This criterion is met.* This includes a finding that the proposed variances avoids or minimizes impacts to surrounding properties, has desirable benefits, and the proposed variance responds to the existing built or natural environment in a creative and sensitive manner.
- (c) Impacts from the proposed variance will be mitigated to the extent possible.* This criterion does not require that the proposed development may have impacts on the surrounding properties, but those impacts are mitigated to the extent possible. This criterion does not require that there be NO impacts, only that any impacts be mitigated to the extent possible, which the applicant has done for every issue. It is noted in the Staff Report that “The Planning Commission finds that these criteria are met.”

For other criteria and requirements, staff finds that the applicant has met the standards for *“Street & Sidewalk Excavations, Construction and Repair”, “Access Requirements and Standards” including Access, Accessway Location, Accessway Design, Accessway Size, as well as Clear Vision at Intersections.* As part of staff review, no adverse comments were received from Milwaukie Engineering, Clackamas County or TriMet. For all of these criteria and requirements, staff finds that “as conditioned”, the standards and requirements are met.

With regard to the Johnson Creek Blvd. (JCB) Improvement Project, Clackamas County staff identified only the “trellis” as being a possible conflict. At the south facing walls “screened” conception city staff noted they had no idea when/if JCB would even be improved. As such the trellis potential was seen with optional

ground, wall, or roof mounted plantings as the preferred design option holding the alternative lower window, stepped facade, or material and color facade design options as secondary. However, because the JCB project has yet to enter the final design phase, this issue can be best managed between Clackamas County, City of Milwaukie and the applicant during the building permit process.

*(c) MMC 19.708, Transportation Facility Requirements, including Access Management, Clear Vision, Development in Non-Downtown Zones, as well as Street Design Standards, Sidewalk requirements and Standards* have all been satisfactorily addressed, with staff noting that “as conditioned”, these standards are met.

Staff notes that on Dec. 10, 2021, Milwaukie Building Division, Milwaukie Engineering Department, Clackamas County Fire District #1, and Lewelling Neighborhood District Association were all notified in writing of the applicant’s proposal and NONE of those agencies or organizations provided any negative comments to the Planning Department.

Attachment 2 within the Staff Report of 4/5/22 contains “Conditions of Approval” that have been reviewed by the applicant and found to be acceptable. While some remaining neighborhood concerns are not required to be resolved during land use they will however meet or exceed the requirements during building permits. In doing so it is anticipated that many will benefit surrounding properties as well.

As part of the applicant’s application and follow up materials, the site is zoned M (Manufacturing) which is the primary use category for the site. The site has been zoned M for several years, and is also shown on the Comprehensive Plan as being “Industrial”. The proposed development meets all of the requirements of the M zone. While no specific tenant has been identified for the subject site, once developed, nor is there a requirement in the Milwaukie Code that requires a “tenant” of the completed site be identified.

Similarly, SE 58th Drive north of Johnson Creek Blvd. is designated as “Local Street” which, based on the definition of the Local Street in the Transportation System Plan (TSP), is appropriate. Local streets may carry not just residential traffic but traffic for sites (whether residential, commercial, industrial or institutional). There is no stated limitation on Local Streets NOT being used for site based industrial traffic. In addition, other users of SE 58th Drive north of Johnson Creek Blvd. that are not residential are already using SE 58th Drive for access to their properties. Memos provided to the record by Michael Ard, P.E. dated June 14, 2021 and a rebuttal statement by Mr. Ard dated January 25, 2002 provide true and accurate information regarding traffic, both present and in the future, in the immediate vicinity. Potential conflicts are minimal and can be effectively mitigated.

Other specific issues that were raised regarding the proposed development include concern for the blue spruce located on the adjacent property. This was investigated at length with the city staff, including the city engineer and forester, prior to initial hearing. The conclusion was that the proposed development would not conflict with the continued growth of the tree.

It must be noted that the applicants did, in fact, communicate with the owner of the adjacent property regarding future plans for the site. Carol Phelps testified that she and husband Keith had, in fact, had discussions with Lew Smith about the future of the subject site. In fact, Lew Smith (Smith Rock) rented the subject property from the Phelps for over 15 years and they even discussed the possibility of the Phelps developing the property for Mr. Smith. As such, owners of the adjacent property have no claim that they did not know the site would be developed with an industrial use.

It has been claimed that MMC 19.309.6.F *requires consideration of several characteristics of the proposed use, including noise, lighting, hours of operation, delivery and shipping, and provides that the 'review authority may attach conditions to reduce any potentially adverse impacts to residential properties.'* This requirement does not state that such considerations must be met before any approval is granted. It states only that several characteristics be considered and not used as a standard for approval or denial. These characteristics will be considered at the Development Review/Building Permit stages of the process. Further, some of the issues, while considered by the Planning Commission, need *not be finally decided* in terms of impacts until the building permit stage. Staff has not determined that any of these factors will definitely have an impact on the surrounding properties. The operation will take place within an enclosed building which will maintain within limits any affiliated noise, light and glare, dust and particulate, along with impacts of hours of operation.

It has been claimed, by the proposals opponents, that variances are in "disfavor" to the city and its citizens. Nothing could be further from the truth. If the City of Milwaukie considered variances to be in "disfavor", it is likely that variances would not be allowed anywhere in Milwaukie and under any conditions. Variances are designed for use at such sites as the subject property, which is small, oddly shaped, and difficult to develop. While the variances for reduction in setbacks and landscaping will help to see the site developed, they are the only means by which this site can be developed as proposed.

It must also be noted that the dwelling located on the adjacent property is a "non-conforming use". It is a residential use in an industrial zone. The M zone does not promote residential development, except under certain conditions, and the subject dwelling on the adjacent property does not have any of those "certain conditions". The review process for a dwelling in the M zone is more detailed and restrictive. As such, the applicants are proposing an industrial development in keeping with the M zone. While the dwelling is allowed to continue to exist, it creates the conflicts with the proposed use, not the other way around. The M zone is primarily an industrial zone and should be used that way.

The M zone has a maximum building height of 45 feet which is significantly taller than the 29 foot tall building being proposed by the applicant. The dwelling on the adjacent property is 25 feet away and approximately 20 feet in height. This nine (9) foot difference will not create a situation where the proposed building "overpowers" the dwelling in any meaningful sense. Keeping in mind that the M zone is an industrial zone, the dwelling may need to coexist with industrial uses, just as it is currently doing with the Smith Rock operation going on around the dwelling on the adjacent property.

With regard to traffic, Mr. Ard's two memos state the facts and conclusions regarding site generated traffic. With minimal impacts from site generated traffic projected, the Planning Commission needs to keep in mind that Smith Rock operates on the adjacent property in an industrial manner, creating far more traffic, noise, and dust than anticipated for the future user of the subject site. Further, the Johnson Creek Blvd. Improvement Project will address some of the issues raised regarding traffic, site distances, and other traffic related issues.

The proposed development of this industrial site will not be a "mixed use" just because it contains some office space. This office space will be for administration of the goings on down on the production floor. Administrative office space within the building does not make it a "mixed use" building. It will be an industrial building throughout.

The technical review, by both project professionals and city staff, have been thorough and ongoing in a cooperative fashion since its conception. At no point has a suggestion of said professionals implied that this project could not work within set parameters or should not be approved. We trust that the responses we have provided are sufficient for the planning commission to approve our proposal and look forward to answering any further questions at the May 24th hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Troy D. Lyver". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Troy D. Lyver, PE/SE.  
Lyver Engineering and Design, llc