

City of Portland, Oregon Bureau of Development Services Office of the Director

FROM CONCEPT TO CONSTRUCTION

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September 26, 2013

Ibrahim Mubarak Right 2 Dream Too 4635 NE Garfield Avenue Portland, OR 97211

T.B. Dame President Williams/Dame & Associates, Inc. 1308 NW Everett Street Portland, OR 97209

Re:

Lot 7, Station Place

Portland, OR

Gentlemen:

You each requested a Tier 3 zoning confirmation letter to verify that a proposed use of property located at NW Lovejoy Court and NW Station Way and known as Lot 7, Station Place, is permitted by the applicable zoning (Attachments A-C). Your letters have been assigned BDS numbers PR 13-206922 ZCL (Right 2 Dream Too) and PR 13-207594 ZCL (Wiliams/Dame). Taken together, your requests ask seven specific questions as follows:

- 1. Does the EXd [zone] permit overnight rest areas, campgrounds or campsites as permitted, conditional or limited uses? If there is no such use listed under permitted, conditional or limited uses, is the use contained in the list of examples under PCC 33.920?
- 2. Is a campsite or rest area a Group Living, Short-Term Housing or Mass Shelter use as those terms are currently defined by the code?
- 3. If a use is not on the permitted, conditional or limited use list for the EXd zone and it is not in the list of examples in the EXd zone, can I develop the use without a land use review?
- 4. Does the design overlay in this zone require design review for a campsite or rest area? Under what circumstances would design review be required for a use that includes tents and utility connections?

- 5. There is a previous Central City Parking Review approval on this site and the approval allocates 65 parking spaces on the site to specific lots and uses. The CCPR does not allow those parking spaces to be used for camping. Does the change in use from parking to camping require an amendment to that land use approval? If so, please describe that approval process?
- 6. Lastly, if the use is not allowed by the code, can I simply enter a Use Agreement or Good Neighbor Agreement as an alternative to the code?
- 7. What zoning code regulations apply to the fence made of doors?

Consistent with ORS 227.160(2)(b), this letter is the Bureau of Development Services' recommended response to your requests. This letter is a recommendation only and is not a final determination. Since there is great public interest in the proposed use of Lot 7 by Right 2 Dream Too, the Commissioner in Charge of BDS has directed me to prepare a recommended response to your requests and submit that response to the City Council for review and final approval. Only when the Council affirms and adopts this proposed recommendation will there by a final response to your zoning confirmation requests. My recommendation is limited to addressing only the zoning code (Title 33) and does not address compliance with other city code titles.

My response first describes the site and your proposed use of it and then addresses the relevant questions and zoning code sections considered in my analysis. My recommendation is that the proposed rest area with tents to be located on Lot 7 should be classified as a Community Services use that is permitted outright in the EXd zone without any required land use review or building permit and, as a result, should be considered camping that is specifically authorized by the city code. Other permits, such as electrical and plumbing permits, may be required, but these require no land use review. If the rest area will include either a new fence or relocating the "fence made of doors" from Right to Dream Too's existing site, the fence may trigger design review or an adjustment, as discussed below in Section II.D.

I. Background

A. Property Information

The relevant information concerning the property is as follows:

- o Location: Lot 7 is located at NW Lovejoy Court and NW Station Way under the NW Lovejoy ramp at the west end of the Broadway Bridge (See Attachment C)
- o Tax Account #: R533589
- o Property Owner: Portland Development Commission (PDC)
- o Site Area: 25,519 sf
- o **Zoning Designations:** Central Employment (EX) zone with a Design (d) Overlay zone, Central City Plan District, River District Subdistrict, North Pearl Subarea

B. Current Use of the Property

Lot 7 is currently fenced and improved with an existing paved parking lot.

C. Proposed Use/Activity at the Site

The information available to me about the nature and operation of Right 2 Dream Too's proposed rest area is based on Right 2 Dream Too's description of the proposed rest area/tent camp contained in Attachment D. I understand the proposed rest area on Lot 7 will be substantially similar in nature and operation to the rest area located at Right to Dream Too's current site.

The proposed use/activity of Lot 7 is for a temporary rest area with tents for overnight shelter for people experiencing homelessness. The rest area/tent camp is expected to be at this location for up to one year, with 100 people staying there at any given time. Individuals may be located at the site for one night or longer. The rest area will be managed by Right 2 Dream Too, a nonprofit corporation. The rest area will be self-governed by individuals staying there and these individuals may volunteer to assist each other with various activities, such as sharing food, clothing, and information about accessing social services. There will be no employees at the site. No buildings are proposed. There will be portable toilets, water service, gray water disposal, electrical service, and a solid waste disposal area. It is unknown whether the use will include the existing fence made of doors that is located on Right 2 Dream Too's current site at NW 4th and Burnside.

II. Code Analysis

A. Introduction

Analyzing how the zoning code applies to the proposed use of Lot 7 requires consideration of several questions including: (1) What is the appropriate zoning use classification for the proposed temporary rest area? (2) Once the appropriate zoning use classification is determined, is this use classification allowed, conditionally permitted, or prohibited in the EXd zone? (3) Does the proposed rest area involve development that is subject to design review? (4) Are there any relevant land use reviews that preclude your use of the site or must be modified before your use of the site begins? Each of these questions is addressed below.

One code section to consider at the outset is PCC 33.700.070.C. It is part of a code section entitled "General Rules for Application of the Code Language" and states:

Situations where the code is silent. Proposals for uses, development, or land divisions where the Code is silent or where the rules of this section do not provide a basis for concluding that the proposal is allowed are prohibited. The Planning Director may initiate an amendment to Title 33 to add a new use category, or make other amendments, as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments.

This language requires me to consider whether the code is truly silent about classifying the proposed use of Lot 7 and whether the rules in PCC 33.700.070 lead to a conclusion that the proposed rest area is prohibited. My answer to both questions is "no."

The zoning code does not purport to list every possible type of use or development that might occur in the City. Subsection G of "this section" (33.700.070) underscores this feature of the code and states:

Applying the code to specific situations. Generally, where the code cannot list every situation or be totally definitive, it provides guidance through the use of descriptions and examples. In situations where the code provides this guidance, the descriptions and examples are used to determine the applicable regulations for the situation. If the code regulations, descriptions, and examples do not provide adequate guidance to clearly address a specific situation, the stated intent of the regulation and its relationship to other regulations and situations are considered.

This language strongly suggests the code is "silent" only when code language offers no guidance through descriptions, examples, or a stated intent to assist me in determining which regulations apply to a particular situation. This language is reinforced by the code's description of the City's method for determining what use category to assign to a particular use. Subsection 1 of PCC 33.920.030 states: "Uses are assigned to the category whose description most closely describes the nature of the primary use" and Subsection 2 identifies the factors to be "considered to determine what use category the use is in."

As discussed below, the use category descriptions in the zoning code provide enough descriptions and examples to guide me in determining the appropriate use category for the proposed rest area even though the words "rest area" or "campsite" do not appear in the code. As a result, the code is not silent about the proposed use. The language of Subsection G is one of the "rules of this section" referenced in Subsection C. Together with PCC 33.920.030.A.1 and 2, Subsection G tells me how to analyze the nature of the proposed rest area for purposes of determining the appropriate use category. Therefore, PCC 33.700.070.C is not a basis for concluding this use is prohibited by the zoning code.

B. Appropriate Use Category

The purpose of PCC Chapter 33.920 (Description of the Use Categories) is as follows:

This Chapter classifies land uses and activities into use categories on the basis of common functional, product, or physical characteristics. Characteristics include the type and amount of activity, the type of customers or residents, how goods or services are sold or delivered, and certain site factors. The use categories provide a systematic basis for assignment of present and future uses to zones. The decision to allow or prohibit the use categories in the various zones is based on the goals and policies of the Comprehensive Plan.

This purpose statement indicates that the use category descriptions in Chapter 33.920 are not intended to identify or list every possible use that could be assigned to each use category. The

reference to "present and future uses" underscores the nonexclusive nature of the uses described or listed as examples in each category. Rather, the chapter provides a way to consider the key features of a use and decide with which use category it shares functional, product, or physical characteristics. A use is not prohibited merely because the description and examples in a use category do not enumerate it specifically.

PCC 33.920.030.A.1 directs that uses should be assigned to the category whose description "most closely describes the nature of the primary use." Subsection A.2 contains a list of factors that are considered "to determine what use category the use is in" as follows:

- The description of the activity(ies) in relationship to the characteristics of each use category;
- The relative amount of site or floor space and equipment devoted to the activity;
- Relative amounts of sales from each activity;
- The customer type for each activity;
- The relative number of employees in each activity;
- Hours of operation;
- Building and site arrangement;
- Vehicles used with the activity;
- The relative number of vehicle trips generated by the activity;
- Signs;
- How the use advertises itself; and
- Whether the activity would be likely to be found independent of other activities on the site.

Many of these considerations do not apply in determining the appropriate use category for the proposed rest area. There is no equipment, sales, customers, employees, vehicle trips, or advertising via signs associated with the rest area. The most relevant considerations are comparing the activities of the rest area with the characteristics of possible use categories, the site arrangement, and how the use will operate. These considerations are discussed below.

Among the use categories listed in the zoning code, the proposed rest area could be considered a potential fit under three of these categories: Community Services, Retail Sales and Service, and Group Living. Based on the analysis below, the Community Services Use category best describes the proposed rest area. Within the Community Services Use category, I consider whether the rest area is Short-Term Housing or a Mass Shelter and conclude that it does not match the characteristics of either of these facilities as defined in the zoning code. For the reasons explained in Attachment F, the rest area is neither a Retail Sales and Service nor a Group Living use.

1. Community Services Use Category

PCC 33.920.420 sets out the following description of community services uses:

A. Characteristics. Community Services are uses of a public, nonprofit, or charitable nature generally providing a local service to people of the community.

Generally, they provide the service on the site or have employees at the site on a regular basis. The service is ongoing, not just for special events. Community centers or facilities that have membership provisions are open to the general public to join at any time, (for instance, any senior citizen could join a senior center). The use may provide mass shelter or short term housing where tenancy may be arranged for periods of less than one month when operated by a public or non-profit agency. The use may also provide special counseling, education, or training of a public, nonprofit or charitable nature.

- **B.** Accessory uses. Accessory uses may include offices, meeting areas, food preparation areas, food membership distribution, parking, health and therapy areas, daycare uses, and athletic facilities.
- C. Examples. Examples include libraries, museums, senior centers, community centers, publicly owned swimming pools, youth club facilities, hospices, ambulance stations, drug and alcohol centers, social service facilities, mass shelters or short term housing when operated by a public or non-profit agency, vocational training for the physically or mentally disabled, crematoriums, columbariums, mausoleums, soup kitchens, park-and-ride facilities for mass transit, and surplus food distribution centers.

D. Exceptions.

- 1. Private lodges, clubs, and private or commercial athletic or health clubs are classified as Retail Sales And Service. Commercial museums (such as a wax museum) are in Retail Sales And Service.
- 2. Parks are in Parks And Open Areas.
- 3. Uses where tenancy is arranged on a month-to-month basis, or for a longer period are residential, and are classified as Household or Group Living.
- 4. Public safety facilities are classified as Basic Utilities.

Analysis: In terms of characteristics, the proposed rest area provides a local service (a temporary place to rest and sleep overnight in tents under the shelter of a bridge ramp) for homeless people in the Portland community. This service will be provided on Lot 7 on an ongoing basis for one year and not just for special events. The customers (i.e., those who will use this service) similar to those utilizing the services provided in a number of the examples listed in PCC 33.920.240.C. Right 2 Dream Too has no employees, but individuals staying at the rest area may volunteer their time without payment. These volunteers may help others at the site with sanitation, food, clothing, and pursuing social services with appropriate social service agencies. These volunteer activities can be considered charitable in nature. Right 2 Dream Too is not a public agency. There are no membership requirements and any member of the public may seek to use this rest area on a temporary basis. All of these characteristics are consistent with the characteristics of a Community Services use. Right 2 Dream Too has not indicated that the rest area will offer formal counseling, education, or training of a public, nonprofit or charitable nature, which are possible and permissive elements of a community service use, but not required.

A Community Service use <u>may</u> take the form of a mass shelter or short term housing, but is not required to take either of those two forms. The proposed rest area is neither a mass shelter nor short-term housing as the code defines those terms. A "Mass shelter" is defined as follows:

A structure that contains one or more open sleeping areas, or is divided only by non-permanent partitions, furnished with cots, floor mats, or bunks. Individual sleeping rooms are not provided. The shelter may or may not have food preparation or shower facilities. The shelter is managed by a public or non-profit agency to provide shelter, with or without a fee, on a daily basis. (33.910.030)

The definition refers to a structure, furnished with cots, floor mats or bunks. The zoning code defines a "structure" as: "Any object constructed in or on the ground. Structure includes buildings, decks, fences, towers, flag poles, signs, and other similar objects. Structure does not include paved areas or vegetative landscaping materials." The examples given are all things that are semi-permanent. The tents individuals will erect at the rest area are temporary in nature and are not "structures" as defined in the Zoning Code. As a result, the individuals at the rest area will not be occupying a structure, which is an essential element of a "mass shelter." The portable toilets are temporary in nature and are not structures. Additionally, Right 2 Dream Too will not provide furnishings such as cots, floor mats or bunks, nor will there be an open sleeping area or areas divided by partitions. Right 2 Dream Too is a nonprofit corporation and will manage the site, but is not a public agency. Based on these considerations, the proposed rest area has none of the characteristics of a "mass shelter."

Lot 7 is surrounded on three sides by a chain link fence. The fence made of doors may be moved from Right 2 Dream Too's current site to the proposed site to separate the rest area on a portion of Lot 7 from the existing parking spaces on the remainder of the lot. Since a fence is a structure, I considered whether the proposed rest area surrounded by fences is "a structure that contains one or more sleeping areas" that is characteristic of a mass shelter. My determination is that it is not.

Multiple temporary tents on the site are not like a single open sleeping area or multiple sleeping areas separated by non-permanent partitions that are characteristic of a mass shelter. The standards for mass shelters in PCC Chapter 33.285 refer to a building and floor area, and differentiate between indoor and outdoor activities. The concept of a "structure" that contains sleeping areas separated by non-permanent partitions expressed in the definition of a "mass shelter" is more characteristic of a shelter in a building, like the Portland Rescue Mission, than a site with a collection of tents surrounded by a fence. Additionally, the tents do not function solely as sleeping rooms, but as a place that individuals use for other daily activities as well. After considering all of these factors, my recommendation is that the presence of a fence surrounding the rest area does not convert it into a mass shelter.

For similar reasons, the rest area is not "short-term housing," which the code defines as:

A structure that contains one or more individual sleeping rooms, and where tenancy of all rooms may be arranged for periods of less than one month. The short term housing facility may or may not have food preparation facilities, and shower or bath facilities may or may not be shared. The facility is managed by a public or non-

profit agency to provide short term housing, with or without a fee. Examples include transitional housing, and emergency shelter where individual rooms are provided. Where individual rooms are not provided, the facility may be a mass shelter. (PCC 33.910.030)

The definition refers to a structure, rooms, food preparation facilities, and bath facilities, and assumes there is a building. The proposed rest area does not include a building, individual sleeping rooms, or the type of facilities mentioned in the definition of short-term housing. Right 2 Dream Too has not indicated that individuals must make reservations or be referred to the site in order to use the rest area, nor is there any indication that parking will be required, which are among the standards for short-term housing in PCC Chapter 33.285. The proposed rest area lacks many of the key characteristics of short term housing and my recommendation is that it is not a short-term housing facility.

The zoning code lists certain kinds of uses that are "exceptions" and are not considered to be a Community Services Use. One exception is for "uses where tenancy is arranged on a month-to-month basis, or for a longer period." This type of use is considered to be residential in nature and falls under the Household Living or Group Living use categories. The proposed rest area does not include arranging tenancy, whether on a month-to-month basis or longer. Individuals may use the rest area for overnight sleeping as necessary. The length of time individuals may stay at the rest area may vary from one day to several weeks or longer. As a result, the proposed rest area does not fit within this exception and is not considered to be a Household Living or Group Living use.

None of the listed examples perfectly captures the nature and operational qualities of the proposed rest area. However, the examples listed in each use category are not intended to be exclusive as the code makes clear. PCC 33.700.070.D.4 states: "Lists of items that state 'including the following,' 'such as,' or similar language are not limited to just those items. The lists are intended to provide examples, but not to be exhaustive of all possibilities." The zoning code also explains that the uses listed in the "example" section of a use category description are generic and it is the actual activity on a site, not what a use calls itself, that determines whether it should be assigned to a particular use category. (PCC 33.920.030.D) Like many of the uses listed in the examples, the rest area/tent camp will offer individuals a place to gather on a temporary basis for a common purpose. Based on consideration of the characteristics of the proposed rest area, I conclude that the Community Services Use category most closely describes the nature of this use.

C. Allowed, Conditionally Allowed or Prohibited Use in the Exd Zone

Lot 7, the site of the proposed rest area, is zoned Central Employment (EX). The use regulations for the EX zone are found in PCC 33.140.100 and Table 140-1. Community Services uses are allowed by right In the EX zone with the exception of short term housing and mass shelters. Under PCC 33.140.100.B.10, short term housing and mass shelters may be allowed by right if they meet the standards of PCC Chapter 33.285 or may be a conditional use. For the reasons explained in Attachment A and in section II.B above, the proposed rest area is not short-term housing or a mass shelter and is not subject to the development standards of PCC Chapter 33.285 or conditional use review. The proposed rest area is a Community Services use that is allowed outright under the EX zoning regulations applicable to Lot 7.

D. Design Review

The Design (d) overlay zone has also been applied to Lot 7, which triggers a requirement for design review for certain types of development activities unless specifically exempted by the "d" overlay regulations. PCC 33.420.041 broadly describes the types of projects or development that require design review "unless exempted by Section 33.420.045." That section then lists a subset of the projects types or development described in PCC 33.420.041 that are exempt from design review.

I considered two potential types of developments that require design review and concluded that the proposed rest area may initially fit one of these circumstances. The first is "new development" under PCC 33.420.041.A, which is defined as "development of a site that was previously unimproved or that has had previously existing buildings demolished." Lot 7 is currently fenced and improved with a paved parking lot. As a result, this site is not "previously unimproved" and there are no existing buildings that will be demolished to make way for the rest area. For these reasons, the rest area will not result in new development that requires design review.

The second type of development I considered that triggers design review is "exterior alterations to existing development" under PCC 33.420.041.B. The Zoning Code defines exterior alterations as:

A physical change to a site that is outside of any buildings. Exterior alteration does not include normal maintenance and repair or total demolition. Exterior alteration does include the following:

- Changes to the facade of a building;
- Increases or decreases in floor area that result in changes to the exterior of a building;
- Changes to other structures on the site or the development of new structures;
- Changes to exterior improvements;
- Changes to landscaping; and
- Changes in the topography of the site.

Locating the proposed rest area on Lot 7 may include changes to exterior improvements, specifically installing a faucet, sink, electrical panel with outlets, solid waste disposal area, and portable toilets. All of these result in physical changes to the site that are outside of a building and can be considered "exterior alterations" to the existing development (the parking lot on Lot 7). Unless exempted by PCC 33.420.045, these exterior alterations require design review.

Additionally, if it is moved from Right 2 Dream Too's existing site, installing the fence made of doors on Lot 7 may constitute an exterior alteration. In the EX zone, a fence along a street lot line may be up to 3.5 feet high within 10 feet of a street lot line or, if the fence is 50% or less sight-obscuring, may be up to 8 feet high within 10' of the street lot line. Fences along all other lot lines may be up to 8 feet high within the required setback, but a fence over 6 feet high requires a building permit. (PCC 33.140.275.B-D) If the fence of doors exceeds 6 feet in height, it requires a building permit and initially triggers a requirement for design review. If the fence is taller than 3.5 feet and within 10 feet of a street lot line, an adjustment may be required, but no design review or building permit.

Projects or activities that might otherwise be subject to design review under Subsection A may nevertheless be exempted from design review under PCC 33.420.045. One of the listed exemptions in 33.420.045. J is for "[p]roposals where a building or sign permit is not required." A building permit is not required to install a faucet, sink, electrical board, solid waste disposal area, or portable toilets on Lot 7. If the fence made of doors is 6 feet or less in height, it does not require a building permit. As a result, the proposed rest area will not include any structures, buildings or development for which a building or sign permit is required and installation of a faucet, sink, electrical board, portable toilets, and fence less than 6 feet in height are exempt from design review. For these reasons, I conclude that the rest area is not subject to design review.

A development review (DR) permit will be required for the proposed rest area. A DR permit is neither a building permit nor a zoning permit. Its purpose is to provide a review and permitting process for projects in that middle ground where multiple technical codes may be applicable and the project requires more than a single plumbing or electrical permit, but not a building permit. The process provides an opportunity for the different bureaus to ensure a project complies with all of the applicable technical codes and document compliance. For example, the Bureau of Environmental Services will review the proposed rest area for compliance with applicable storm and sanitary sewer requirements. BDS will review the proposal for compliance with any applicable plumbing and electrical codes. The Fire Bureau will check for compliance with any applicable fire code requirements, such as propane tank spacing. Additionally, a plumbing permit will be required for the water service and gray water disposal, and an electrical permit for the electrical service. None of these permits trigger a requirement for design review.

E. Previous Land Use Reviews

You identified a prior Central City Parking Review involving Lot 7: LU 12-179799 PR. This review allocated a total of 65 parking spaces to Lot 7 (40 Residential spaces to serve the Station Place Tower and 25 Growth Parking spaces to serve a future use on Lot 5). There is no minimum parking requirement in the Central City Plan District. (PCC 33.510.265.F.1) The purpose of the Central City Parking Review is to determine whether parking to support particular types of development is allowed at all, while managing the negative effects of parking in the Central City. Thus, the 2012 Central City Parking Review was "permissive" in allowing or allocating 65 parking spaces on Lot 7 to uses on other lots; there is no requirement that Lot 7 be used for parking. In fact, one of the properties that Lot 7 parking is allowed to serve (Lot 5) remains undeveloped.

The 2012 Central City Parking review allows Lot 7 to be used for parking, but does not require that it be used in this fashion and does not preclude use of the lot for other purposes. Information available to me indicates that Lot 7 is currently underutilized for parking. There is not yet any development on Lot 5 for which the 25 Growth Parking spaces are needed. The rest area proposed for Lot 7 will make a portion of the lot temporarily unavailable for use as vehicle parking, but will not eliminate the paved parking pad or spaces and will not prevent the lot from being used for parking in the future. A portion of Lot 7 will retain existing parking spaces and will remain available for vehicle parking. In short, the parking approved in 2012 and the proposed rest area are not mutually exclusive uses and an amendment to the 2012 Central City Parking Review is not required to locate the proposed rest area on Lot 7. Additionally, the proposed rest area is not a change from one type of parking to another, which would otherwise

trigger a Central City Parking Review under PCC 33.510.265.F.7. For these reasons, a Central City Parking Review is not required to use Lot 7 for the proposed rest area.

F. Use Agreement or Good Neighborhood Agreement

My recommended determination is that the proposed rest area is a Community Services use that is permitted outright in the EXd zone without a land use review or design review. This recommended determination eliminates the need to respond to the sixth question listed at the outset of this letter. I note, however, that there is nothing in the zoning code that either requires parties to enter into a Use Agreement or Good Neighbor Agreement to address operation and management of the proposed rest area or that precludes parties from doing so. Such a voluntary agreement is outside the scope of the zoning code.

G. Conclusion

My recommended response to your requests for a zoning confirmation letter is based on information provided by Right 2 Dream Too as well as the Bureau of Development Services' review of zoning regulations and land use case history pertaining to Right 2 Dream Too's site. This information is current, but zoning regulations change over time. These regulations may affect the use and/or development of Lot 7.

Sincerely,

Paul L. Scarlett, Director

Bureau of Development Services

Attachments

- A Zoning Confirmation Request (Right 2 Dream Too)
- B Zoning Confirmation Request (Williams/Dame)
- C-Zoning Map
- D Description of Right 2 Dream Too's Rest Area/Tent Camp
- E Diagram of Site
- F Discussion of Retail Sales and Service and Group Living Use Categories

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