

**BEFORE the HEARING EXAMINER for the
CITY of LYNNWOOD**

DECISION

FILE NUMBER: CUP-009921-2022

APPLICANT: Three In One Petro, LLC
ATTN: Reda Mikhail
19406 Hwy 99
Lynnwood, WA 98036

TYPE OF CASE: Conditional Use Permit to convert the enclosed building portion of a gas station into a convenience store

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: August 1, 2022

INTRODUCTION ¹

Three In One Petro, LLC (“Mikhail”) seeks a Conditional Use Permit (“CUP”) to convert the enclosed building portion of a gas station into a convenience store.

Mikhail filed the CUP application on January 27, 2022. (Exhibits 1, PDF 2; 2 ²) The Lynnwood Development and Business Services Department (“Planning”) deemed the application to be complete as of March 7, 2022. (Exhibit 6) Planning issued a Notice of Application on March 25, 2022. (Exhibit 7)

The subject property is located at 19406 Hwy 99. Its Assessor’s Parcel Number is 00585300000700 (“Lot 7”). (Exhibit 1, PDF 1)

The Lynnwood Hearing Examiner (“Examiner”) viewed the subject property via Google Earth: Aerial imagery dated August 31, 2020; Street View imagery dated May 2019, April 2022, and July 2022.

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. In this case, the Exhibits are in one single PDF document with page numbering from 1 to 186. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Examiner held an open record hearing on July 26, 2022. The hearing was conducted remotely using the “Zoom” platform due to assembly restrictions attendant to the current COVID-19 pandemic. Planning gave notice of the hearing as required by the Lynnwood Municipal Code (“LMC”). (Exhibit 8)

The following exhibits were entered into the hearing record during the hearing:

Exhibits 1 - 9: As enumerated in Exhibit 1, the Planning Staff Report

Section 1.35.025 LMC requires that decisions on project permit applications be issued within 120 calendar days after the application is found to be complete; subsection 1.35.025(A) LMC lists four exclusions from the 120-day count, one of which is an extension mutually agreed upon by Planning and the applicant. The open record hearing was held beyond the 120th day. (Exhibit 1, PDF 4) Mikhail agreed to waive the timeline. (Exhibit 9)

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. Parcel 007 is *State Plat* Lot 7, less the northeasterly 50 feet of that lot. It is a triangular parcel bordered on its southeast by Hwy 99, on its west by 60th Avenue W, and on its northeast by the northeasterly 50 feet of Lot 7 which, in 1959, was segregated from the remainder of Lot 7 and conveyed as a part of Lot 6. (Exhibits 2 & 4, PDF 24 & 29)

During the 1959 conveyance, an ingress, egress, and parking easement was created over the northeasterly 50 feet of Lot 7:

SUBJECT TO AND TOGETHER WITH a non-exclusive easement [encumbering the northeasterly 50 feet of Lot 7] to be used for parking and for ingress and egress in conjunction therewith, and to run for the benefit of the property herein conveyed and also for the benefit of the balance of said Lot 7 in said plat.

(Exhibit 2, PDF 24; all-caps in original)

Lot 6 plus the northeasterly 50 feet of Lot 7 will be referred to herein as “Lot 6” and the remainder of Lot 7 will be referred to herein as “Lot 7”. Lot 6 is currently owned by Virginia and James Douglas (“Douglas”); Lot 7 is currently owned by Mikhail.

2. Lot 7 contains 13,504 square feet (“SF”) or approximately 0.31 acres. Lot 7 is zoned General Commercial (CG). (Exhibit 1, PDF 1) Service stations (full-service and self-service) are currently

listed as a Conditional Use in the CG zone. [LMC 21.46.100, Table 21.46.01³] Convenience stores are also currently listed as a Conditional Use in the CG zone (except within the “controlled area”).⁴ [LMC 21.46.100, Table 21.46.10]

3. Lot 7 has historically contained a full-service gas station consisting of a building covering 1,312 SF with two pump islands, each covering four gas pumps. The building contained service bays and support areas for the gas station. A large dumpster enclosure was located along the west side of the building and vehicles in various stages of repair were parked around the site. There are one or more windowless, storage floors above the ground floor. (Exhibit 4, PDF 29; and testimony)
4. Mikhail has purchased Lot 7 and has closed the automobile service aspects of site operations. Mikhail desires to remodel the first floor of the building into a convenience store while maintaining the self-serve gas station business. The conversion will expand the first floor by 644 SF to facilitate placement of (staff only) walk-in coolers and food preparation areas. Mikhail proposes to create three parking stalls between the building and Hwy 99. A rebuilt, smaller trash enclosure will be located between the building and 60th Avenue W. The gas pump islands will remain unchanged. (Exhibits 3, PDF 26 – 28; 4, PDF 29 – 32)

The existing trash enclosure does not meet the required 25-foot setback from 60th Street W. The replacement enclosure will be smaller (178 SF v. 348 SF), but will still not meet the 25-foot setback. (Exhibit 1, PDF 9 & 10) Whether the existing enclosure is nonconforming cannot be determined from the evidence in this record.⁵

5. Mikhail’s plans depict 12 parking spaces along the “back” side (northeasterly side) of the building in addition to the three spaces previously described. The 12 spaces are within the 1959 parking easement area. In addition, the pump islands as currently laid out and as will remain provide eight stacking spaces. (Exhibit 3, PDF 29)
6. Chapter 21.18 LMC contains parking regulations. Gas stations are required to provide “One [on-site parking space] per service island + stacking lane requirements + required parking for grocery store, auto repair or other uses on site (if any)”.⁶ [LMC 21.18.800, Table 21.18.01] Convenience stores are required to provide one on-site parking space per each 200 SF of gross floor area. [LMC 21.18.800, Table 21.18.09] After the expansion, the convenience store will have 1,956 SF of floor area, requiring 10 on-site parking spaces (1,312 SF existing footprint + 644 SF addition = 1,956 SF after expansion; $1,956 \text{ SF} \div 200 \text{ SF} = 9.78$ spaces which rounds up to 10 spaces).

³ The Planning Staff Report incorrectly states that service stations are “permitted outright” in the CG zone. (Exhibit 1, PDF 7)

⁴ The “controlled area” are CG-zoned parcels generally in the area of 212th Street SW and Hwy 99 in which “adult establishments” are allowed. [LMC 21.46.120] Lot 7 is nowhere near the “controlled area.”

⁵ To be nonconforming, the enclosure would have had to be built at a time when the required setback, if there was any, was less than the actual setback of the structure. If it was built after the 25-foot setback requirement was enacted, it would simply be an illegal structure, not a nonconforming one.

⁶ Planning’s Staff Report incorrectly states in one place that “one parking space” is required for accessory uses to a gas station, like a convenience store, but corrects that error later on the same page. (Exhibit 1, PDF 9, §§ vi and vii)

7. The building on Douglas' Lot 6 was a restaurant for many years. Currently Douglas rents it to the operator of an automobile repair business which is located on the next lot to the northeast along Hwy 99. The tenant parks vehicles both within the building and outside on Lot 6. While Douglas is fully supportive of Mikhail's proposed change of use (auto repair to convenience store) and believes it will constitute a significant improvement for the general area, Douglas is concerned that the non-exclusive parking easement not become completely tied to Lot 7's use to the exclusion of Lot 6's use. (Testimony)
8. Planning testified that it finds nothing in the shared parking provisions of LMC 21.18.900 that would necessarily prevent Douglas from also using some of the 12 parking spaces. (Testimony) The provisions within LMC 21.18.900 are complex and provide the opportunity for Planning to reduce parking requirements if evidence supports such an action.
9. Mikhail's proposal is categorically exempt from the State Environmental Policy Act ("SEPA") threshold determination process pursuant to WAC 197-11-800. (Exhibit 1, PDF 4)
10. No testimony or evidence was entered into the record by the general public in opposition to the application.
11. Planning's Staff Report addresses all criteria for approval of a CUP. (Exhibit 1) Other than the minor errors previously mentioned, the record contains no challenge to Planning's analysis and conclusions. Therefore, subject to the previous corrections, Exhibit 1's analysis and conclusions are incorporated herein by reference as if set forth in full.
12. Planning recommends approval of the CUP subject to 11 conditions. (Exhibit 1, PDF 12 – 15) Mikhail has no objection to any of the recommended conditions. (Testimony)
13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁷

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A CUP is a Process I application which is subject to an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [LMC 1.35.100, .168, and .175 and 21.24.050]

⁷ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

Review Criteria

The review criteria for CUPs are set forth at LMC 21.24.100 and .150:

... In considering any conditional use permit, the hearing examiner shall prescribe any conditions that he/she deems to be necessary to or desirable for the public interest, and where appropriate may stipulate that the permit is temporary and establish an expiration date. However, no conditional use permit shall be granted unless it is found:

A. That the use for which such a permit is sought will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and

B. Will be in harmony with the general purpose of [the zoning code].

The hearing examiner may allow relaxation of the development standards of this title if he/she finds that alternative amenities, improvements, proposed location of uses or structures, or other features incorporated into the proposal are in harmony with the general purpose of this title and would provide equal or better protection to the public interest than would the standards proposed to be relaxed.

[LMC 21.24.100]

In determining findings, the hearing examiner shall take into account the character and use of adjoining buildings and those in the vicinity, the number of persons residing or working in such buildings or upon such land, traffic conditions in the vicinity, compliance with any special conditional use criteria for that specific use set forth in [Chapter 21.24 LMC] and all factors relevant to the public interest.

[LMC 21.24.150]

A “consistency determination” is also required for every project application. A consistency determination follows four steps set forth at LMC 1.35.070. Consistency criteria are:

1. Type of land use permitted at the site, including uses that may be allowed under certain circumstances if decision criteria are met;
2. Density of residential development (if applicable); and,
3. Availability and adequacy of public facilities (for those facilities identified in the comprehensive plan, if the plan or the city’s development regulations provide for funding of these facilities).

[LMC 1.35.070(A)]

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

In 2014 the State Supreme Court flatly declared: “While it originated at common law, the vested rights doctrine is now statutory.” [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)] The *Potala* court rejected a contention that the filing of a complete shoreline substantial development permit application vested development rights because no statutory provision established vested rights for shoreline permits. [*Supra*, at 196-206]

CUPs are not the subject of any state vesting statute. If Lynnwood had a local vesting ordinance applicable to land use applications, the Examiner would be obliged to follow it as enacted. [*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)] But the City has no such local ordinance. Thus, the Examiner must follow the most current case law.

Under the most current case law, there is no vesting for CUP applications because there is no statutory provision providing vesting for such applications.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [LMC 1.35.155]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. The request complies with CUP criterion LMC 21.24.100(A). As Douglas and Mikhail both say, replacing the old car repair activities with a new, modern, clean convenience store will be an improvement for the neighborhood. The visual blight of partly-repaired vehicles stored on the small site, the noise and odors associated with vehicle repair, and the chemicals and equipment used in vehicle repair will all be gone.
2. The request complies with CUP criterion LMC 21.24.100(B). The “general purpose of the zoning code” is to

avoid[] or abat[e] public nuisances. This title also intends to promote the protection and promotion of the quality of the natural environment and the health, safety,

morals, and other aspects of the general welfare of present and future inhabitants of the city of Lynnwood in accordance with the comprehensive plan and state law, judicial decisions, and Central Puget Sound Growth Management Hearings Board decisions regarding land use regulations. To these ends, it is the intent of these regulations to implement the city of Lynnwood comprehensive plan and the future land use plan map.

[LMC 21.04.015] As just stated, the change of use will eliminate annoying noises, odors, and visual blight. The new use is retail, fully in compliance with the goals and purposes of the Comprehensive Plan.

3. Section 21.24.100 LMC allows the Examiner to “relax[] the development standards of this title if he/she finds that alternative ... location of uses or structures ... are in harmony with the general purpose of this title and would provide equal or better protection to the public interest than would the standards proposed to be relaxed.” The Examiner elects to employ that authority regarding the setback of the new trash enclosure.

The old enclosure, by all accounts, is (was) an eyesore. Mikhail proposes to replace the old structure with a new, smaller enclosure. But to be a practical enclosure, it must be big enough to enclosure a trash dumpster. The proposed location is the only practical location on Lot 7 for a trash enclosure. The smaller enclosure will improve the current situation and will not harm the neighborhood. The Examiner concludes that the new size/location will provide protection for the public equal to that required by the code.

4. The request complies with CUP criterion LMC 21.24.150. Lot 7 is located in an intensely developed commercial area. Converting an auto repair facility into a convenience store will be compatible with the area and improve the visual appearance of Lot 7.
5. The proposal passes the “consistency” test: A convenience store is permitted as a Conditional Use in the CG zone; density is not applicable as this is not a residential use; and adequate utilities are available to serve the proposal.
6. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Conditions 4.a, 4.b, 4.e, and 4.f will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
7. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner’s site view, the Examiner **GRANTS** the requested Conditional

Use Permit to convert the enclosed building portion of a gas station into a convenience store **SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued August 1, 2022.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS⁸

Glen Merkel
Virginia Douglas

Kirk Rappe

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Lynnwood Development and Business Services Department a written request for reconsideration within seven calendar days following the issuance of this Decision in accordance with the procedures of LMC 1.35.168. Any request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. See LMC 1.35.168 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record (See LMC 1.35.148.) with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of LMC 1.35.175 and the Land Use Petition Act [Chapter 36.70C RCW]. See LMC 1.35.175 for additional information and requirements regarding judicial appeals.

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

⁸ The official Parties of Record register is maintained by the City’s Hearing Clerk.

**CONDITIONS OF APPROVAL
THREE IN ONE PETRO, LLC
CUP- 009921-2022**

This Conditional Use Permit is subject to compliance with all applicable provisions, requirements, and standards of the Lynnwood Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. Prior to any development, all required local, state, and federal permit approvals applicable to the specific proposal must be obtained.
2. The site plans (Exhibit 4) received March 8, 2022 shall be the approved plan with the exception of required changes to meet development engineering or building division requirements during later review.
3. All waste shall be stored in enclosed receptacles. All areas shall be kept free from nuisances, including overflow waste, leaks, or pests.
4. Civil Construction Permit application conditions:
 - a. Using extruded curb on east side of 60th Avenue W to reduce the number of entrance points to the site. Two maximum are allowed.
 - b. Revise ADA crossing at 60th Avenue W to include:
 - i. Revised ADA ramp at 60th Avenue W/Hwy 99, directing pedestrians to west side of 60th Avenue W.
 - ii. Revised ADA ramp near existing ramp on west side of 60th Avenue W
 - iii. 8' crosswalk per city standards.
 - c. Stormwater mitigation shall be analyzed to meet the minimum requirements of the 2019 Washington State Department of Ecology Stormwater Management Manual. Stormwater mitigation may not be required; however, the project must be reviewed against the minimum requirements of the Ecology Stormwater Manual.
 - d. All structures connected to the sanitary sewer shall be fitted with backwater check valves.
 - e. The Permittee shall obtain the required permits for the proposed development. Provide quantiles of civil improvements at permit application
 - i. Earthwork
 - ii. Utility infrastructure (storm, sewer, water)
 - iii. Right-of-way improvements

- iv. Grease Trap (if commercial/warming kitchen is proposed)
 - f. Sanitary Sewer Cleanout (SSCO) at the property line is required. Refer to City of Lynnwood Standard Plans Index.
5. At time of building permit:
- a. The building permit architectural pages will need to be stamped by a Washington State Registered Design Professional (2018 IBC Section 107 Submittal Documents [A] 107.1 General).
 - b. The building permit engineer's drawings and calculations will need to be stamped by a Washington State Structural Engineer (2018 IBC Section 107 Submittal Documents [A] 107.1 General).
 - c. Structural elements carrying tributary live loads from an area with a change of occupancy shall satisfy the requirements of Section 1607 of the International Building Code. Design live loads for areas of new occupancy shall be based on Section 1607 of the International Building Code. Design live loads for other areas shall be permitted to use previously approved design live loads. Exception: Structural elements whose demand-capacity ratio considering the change of occupancy is not more than 5 percent greater than the demand-capacity ratio based on previously approved live loads. 2018 IEBC [BS] 1006.1 Live Loads
 - d. The building permit set must show all floors and connecting stairs. (2018 IBC [A] 107.2.1) Information on Construction Documents.
 - e. The building permit set must show all paths to a public way, including the sidewalk widths and slopes (2018 IBC 1005.4 Continuity and 2010 ADA 403 Walking Surfaces).
 - f. The building permit set must declare if it will be a nonseparated or separated occupancy depending on the choice and options available, the floor-ceiling assembly between the two floors may need to be fire rated (2018 IBC 508.3 Nonseparated Occupancies and 2018 IBC 508.4 Separated Occupancies).
 - g. The building permit site plan must clearly label the property lines and building setback dimensions (2018 IBC [A] 107.2.1 Information on Construction Documents).
 - h. FYI: The north wall that appears to be on a property line may require a one- or two-hour fire rating. (2018 IBC Table 602 Fire-Resistance Rating Requirements for Exterior Walls Based on Fire Separation Distance).
6. All park impact fees shall be paid prior to issuance of building permit.
7. All traffic impact and concurrency fees shall be paid prior to issuance of building permit.
8. Sewer connection charges shall be assessed at the current rates at issue of building permit.

HEARING EXAMINER DECISION

RE: CUP-009921-2022 (Three In One Petro, LLC)

August 1, 2022

Page 11 of 11

9. The public notice board shall be removed within 30-days of the end of the appeal period.
10. Any conditional use permit which is issued and not utilized within two years from the effective date of the permit, or within such shorter period as may be stipulated by the hearing examiner, shall expire. For a conditional use permit to be considered as being utilized, there shall be submitted to the city, by the applicant for the permit, a valid building permit application including a complete set of plans in the case of a conditional use permit for a use which would require new construction. After a use has been established in accordance with the terms of the conditional use permit, a lapse of one year during which the premises are not used for the purposes provided for in the permit shall cause the permit to expire and be of no further consequence. Any conditional use permit approved prior to the enactment of this chapter shall expire two years from the date of approval by the hearing examiner unless the permit has been utilized as provided in LMC 21.24.
11. The applicant or agent of record may request an extension of a conditional use permit that is nearing expiration by applying for a one-year extension under the conditions outlined in LMC 21.14.310.