



HATHAWAY LARSON

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March 26, 2018

VIA MAIL & EMAIL

Christina Robertson-Gardiner
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RE: CD 18-01 – Lithia Subaru

Dear Christina:

I am writing to supplement the Applicant's narrative to respond to the issue you raised in our recent call about whether expanding the existing parking structure constitutes an intensification of the use. The use of the site is, and has been for many years, a retail automobile dealership. Lithia is not proposing to add any uses to the site.

You indicated that Lithia Subaru's proposed expansion of the existing parking structure could allow more inventory to be stored on site and that could be viewed as an expansion or intensification of the nonconforming use. We explained in our initial application narrative, under the cases decided in Oregon, expanding the existing structure cannot be deemed an expansion of the use. It does not allow for any activity not currently being conducted on site. It does not introduce any new uses on the site. It does not expand the footprint of any of the buildings.

Your comments suggest that that because the proposed parking deck could allow for additional vehicle inventory, it could be viewed as an intensification of the use. In the context of a nonconforming retail use, we do not believe that is a reasonable conclusion. The term intensification comes from the root term intensify. In all contexts, the term intensify is an active term. It means to do something. The Cambridge American Dictionary defines intensify to mean make something stronger or more extreme, to become stronger or more extreme. The term is consistent with the concept of adding an activity to a nonconforming use that was not present before. Adding another nonconforming activity would intensify the existing nonconforming use. It would make it greater. Changing how or where an existing activity is done on the site does not intensify the use.

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It appears that perhaps you view any expansion of an existing structure that could increase the sales as an expansion of the underlying use. We do not believe that in the context of a nonconforming retail use situation, the possibility of expanded sales is an appropriate measuring stick for the intensity of the use. Most, if not all, retail uses strive to increase sales. If increasing sales is the definition of intensifying the use, nonconforming retail uses could not work to increase sales without the risk of being accused of intensifying the nonconforming use. If taking action that could increase sales constitutes an intensification of a retail use, every time a nonconforming retail use hired a new sales person to meet increased demand, it would be an intensification of the nonconforming use. Also, as we will explain more below, having capacity for more inventory does not equate more sales.

Initially, I want to point out that the code text supports the conclusion that an expansion to a nonconforming structure is not automatically an intensification of the use. OCMC 17.58.030 addresses nonconforming uses. That section states that legal nonconforming uses may not be expanded. OCMC 17.58.040 addresses nonconforming structures. That section permits expansions of nonconforming structures. The code text gives no indication that that the section allowing expansions of nonconforming structures is limited to situations where the use within the structure is deemed conforming. In many cases, if a structure is nonconforming, the use within the structure will also be nonconforming. In fact, one could argue that any use within a nonconforming structure is nonconforming. If an expansion of a nonconforming structure always equates to an expansion or intensification of the nonconforming use within the structure, it is difficult to imagine when a request to expand any existing structure could be approved. Thus, we believe that the City should interpret the code to allow expansions of structures associated with nonconforming uses without the expansion being deemed an expansion of the use.

Lithia Subaru's request demonstrates that expanding a nonconforming structure often has no relationship to the intensity or scope of the underlying use. The proposed expansion of the existing parking structure is not for the purpose of expanding sales, increasing inventory or intensifying the use. Lithia is seeking to expand the existing structure to add customer convenience, customer and employee safety, and efficiency in operations. In any retail automobile dealership, customers arrive at the main operations building, which contains the sales office and cashier's office, for a variety of reasons. Customers may have an appointment to test drive a number of vehicles, looking toward purchasing a new vehicle. They may arrive at the dealership to pick up a new vehicle they purchased, or to pick up a vehicle that they had serviced. In each situation, the dealership must have a safe convenient location for the customer to get to the vehicles in question.

In a situation where a customer arrives to test five vehicles, they will meet a sales representative in the main building. Currently, Lithia Subaru does not have a convenient location immediately near the sales office where the sales representative can have vehicles waiting for the customer. There is limited space in the below grade existing structure, but to get to this space, the customers have to walk out of the building and through a driveway down to the lower parking area. Because space is limited in the existing structure, often the sales representative must walk the customer across Main Street to one of the surface lots. With vehicles coming and leaving the site, that is neither convenient nor safe.

The same is true when a customer arrives to pick up a new vehicle or one that Lithia Subaru serviced. In those cases, the customer meets the sales representative or service advisor in the main building. Particularly in the case of a new purchase, the Lithia representative will escort the customer to the vehicle for some basic presentation on the vehicle and to make sure it is clean and ready to release. Currently, as noted above, Lithia Subaru lacks a safe, convenient place for that action to occur.

The proposed expansion of the parking structure will provide a much safer and more convenient location for Lithia Subaru to have vehicles in the examples above. When a customer arrives to test drive a number of different vehicles, the sales representative can, in advance, have the vehicles brought over to a location immediately outside the main building. They can walk out the door to the vehicles without having to cross busy streets or driveways. The same is true when a customer arrives to pick up a vehicle after a purchase or after service.

As we explained above, increasing sales in a retail context is not a good indication of whether a use is more or less intense. However, even if you consider the level of sales or revenue, it is incorrect to assume that expanding the parking structure for convenience will increase operations, sales or inventory. Retail automobile dealerships acquire sites that have a good location and sufficient size for their operations. They do not simply look to acquire the largest site they can find, so they can have massive inventories. Having large inventories that one cannot sell is a poor business strategy. Because the size of a dealership has little to do with the sales volume, it is not a prudent economic decision to simply acquire as much property as possible. The factors that influence sales volume, are demand for the product, the level of service and general economic conditions.

A dealership with 200,000 square feet can sell more vehicles than a dealership with 100,000 square feet, if the dealership is in a good location, is run effectively, and there is a demand for the vehicles in their platform. Simply having more vehicles on site does not in any way mean the dealership can sell all of those vehicles. If that were the case, every dealership in Oregon would be significantly larger. It is important to keep in mind that dealerships pay for their inventory. No dealership is going to increase inventory simply because they have space for more inventory. They will maintain inventory based upon the demand for the product and the market factors that impact sales. Assuming no changes in the size of a dealership, inventory is going to fluctuate up and down based upon those market conditions. No dealership is going to add inventory just because they have space.

Like any retail business, sales will fluctuate depending on the market and other forces. Many retail automobile dealerships will lease property on a short term basis to accommodate increase demands. To avoid the consequences of losing a lease, other dealerships like Lithia, purchase additional property to accommodate fluctuating sales and rises in demand. Acting to meet demands as sales fluctuate cannot be deemed an overall intensification of the use. In one period, a dealership may use the leased property to have more inventory and in another period, it may leave that space vacant because sales are down. In light of the nature of retail business in general, using inventory levels and sales volume to define whether a use has intensified is not a workable policy.

Specific to Lithia Subaru, it has maintained the same dealership size for a number of years. Its capacity for inventory has not changed appreciably. Yet, its inventory has fluctuated based upon market factors; its sales have gone up and down in those years based upon the same market conditions and the related demand for its product. In determining the amount of inventory to maintain, Lithia Subaru, like all retail dealerships, factors in the costs of maintaining its inventory against the demand for the product and expected sales. Thus, even if the proposed expansion to the existing structure may add capacity for vehicles and sales is used to define intensity, it will not necessarily result in any intensified use of the dealership.

If increasing inventory on occasions to meet market demands is, in and of itself, an intensification of a nonconforming dealership, every time a nonconforming dealership added inventory to meet a period of higher demand, they would be deemed to be expanding and intensifying the nonconforming use. Lithia does not believe that the City intended its nonconforming use regulations to operate in such a manner. Rather, because inventory is going to increase and decrease at times, it is not appropriate to use inventory capacity as the measuring stick for the intensity of the use at a retail dealership.

Another example also bears out some possible inconsistency in a position that the expansion of the structure is an intensification of use. The nonconforming use regulations apply to the use on the subject site. They restrict expansions of the use on that site. Lithia Subaru, or any similarly situated non-conforming dealership, could increase inventory and sales to meet a market demand by leasing property nearby for more vehicles on a short-term basis. They would not have to seek any land use approval. They would not be adding any new use or making any changes to the nonconforming site. Thus, they would not trigger any issue over expansion of the use on the site under the code. The use on the nonconforming site would not have been expanded or changed in any way. Yet, the business's inventory will have increased temporarily. However, in another situation, a dealership could request approval to expand an existing structure on site with no actual impact on inventory or sales, and would arguably run afoul of the nonconforming use regulations because the dealership acted to address a possible need for inventory to meet a period of high demand.

For the reasons above, Lithia Subaru's proposed expansion of an existing nonconforming structure is not an expansion of the its use of the site, nor an intensification of that use.

Thank you.

Very truly yours,

HATHAWAY LARSON LLP



Christopher P. Koback

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