

**RESOLUTION NO. 1069**

**A RESOLUTION LIMITING THE HEARING ON APPEAL OF 93PC28 BY McDONALD'S CORPORATION AND CAPITAL REALTY CORPORATION TO THE RECORD AND SETTING THE HEARING DATE FOR ARGUMENT ONLY FOR DECEMBER 6, 1993.**

WHEREAS, Capital Realty Corp. is the developer of multi-phase commercial planned development known as the Town Center Market, which is a commercial complex within a greater planning area designated by the City's Zone Code 4.186, Planned Development Standards, (1)(c)(12) Town Center; and

WHEREAS, as a matter of record, Capital Realty Corp. had applied for and received a Stage I Preliminary Development Plan approval for its development which provided conceptual quantitatively accurate representatives of its development, including a boundary survey and a tabulation of the land area to be devoted to various uses. Stage I preliminary approval is commonly referred to as a Master Plan approval. In addition, the zoning code provides that the planned development, Town Center, contains recommended uses in groupings of Central Commercial (CC), Service Commercial (SC), Food and Sundries (FS), Fast Food Service (FF), Office Professional (OP), Office for General Use (OG) and High Density Units (APT). The Code also provides for a Town Center Map generally locating the group uses within the Town Center area. This map is commonly referred to as the Town Center Master Plan. The Stage I - preliminary approval of the Capital Realty Development plan can only occur if it is found to conform to the Town Center Master Plan. The Stage I - Master Plan for the Capital Realty development is, in effect, the same as the Town Center Master Plan for the same area. To the extent it seeks an amendment to its Stage I - Master Plan, i.e., a change of a location of a recommended use previously established in its Master Plan from CC to FF or FS, it is also seeking an amendment to the Town Center Master Plan; and

WHEREAS, the Wilsonville Code further provides that a specific site development be reviewed as a Stage II - Final approval. In its 93PC28 application, McDonald's Corporation sought to amend the Stage I - Capital Realty Master Plan (Town Center Master Plan) from CC to FF and to obtain a Stage II - Final Approval for a McDonald's Restaurant. Capital Realty participated as a proponent of the McDonald's application; and

WHEREAS, McDonald's Corporation, by and through its attorney, Mark Whitlow, and Capital Realty Corporation, by and through its representative, Don Weege, have filed timely appeals to the City Council of the Planning Commission's Decision of October 15, 1993, 93PC28, which denied the McDonald's application for a Stage II Site Development permit and Stage I - Master Plan Amendment; and

WHEREAS, in each appeal, both McDonald's Corporation and Capital Realty request the appeal hearing before the City Council be heard de novo; and

WHEREAS, W.C. 4.017 Appeal Procedures (4) Scope of Review provides:

"(a) At its discretion the hearing body may limit an appeal or review to a review of the record and a hearing for receipt of oral arguments regarding the record, or may accept new evidence and testimony.

"(b) The reviewing body shall issue an order stating the scope of review on appeal to be one of the following:

- "1) Restricted to the record made on the decision being appealed.
- "2) Limited to such issues as the reviewing body determines necessary for a proper resolution of the matter.
- "3) A de novo hearing on the matter"; and

WHEREAS, W.C. 4.017(6) Review Consisting of Additional Evidence or De Novo Review provides the following objective standards for the City Council in exercising its discretion to limit the hearing to the record or to hear additional evidence or de novo review:

"(a) The reviewing body may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing if it is satisfied that the additional testimony or other evidence could not reasonably have been presented at the prior hearing. The reviewing body shall consider all of the following in making such a decision:

- "1) Prejudice to the parties.
- "2) Convenience or availability of evidence at the time of the initial hearing.
- "3) Surprise to opposing party.
- "4) The competency, relevancy and materiality of the proposed testimony or other evidence"; and

WHEREAS, the City Council finds that both McDonald's Corporation and Capital Realty Corporation requests for a de novo hearing failed to establish that the additional testimony of a traffic expert could not have been presented to counter the D.K.S. report,

especially since the record reflects that a representative of Kittleson traffic consultants was available on behalf of the applicant at the Planning Commission meeting, that he was introduced by Capital's representative, was available to testify and indicated he had no comment. There is no evidence presented that the D.K.S. report was not timely made available to the applicant or that the applicant did not have a fair, full and meaningful opportunity to present contrary evidence. Moreover, there is no specific showing that applicant was surprised by the D.K.S. report, that the D.K.S. report resulted in prejudice to the applicant other than what any competent, relevant or material evidence against an applicant's position might be. Even assuming that the proposed traffic expert testimony would be competent, relevant and material, as to matters of fact, the McDonald's specifications of error 1-4, and Capital's specification No. 1 pertaining to traffic, assert erroneous application of standards, misapplication of the facts to the standards and an illegal moratorium resulted, all of which are appropriately matters of argument about legal conclusions, rather than a dispute over the facts upon which a conclusion is based; and

WHEREAS, Capitol's further assertion that the Planning Commission's determination is inconsistent with its other decisions and that it wishes to open this hearing to present each decision would mean that the City would have to have a full and complete transcript of several hearings to determine if the assertion was accurate or decided on other grounds. This matter is before the City Council for the first time. The issues are adequately framed for argument without being overwhelmed in transcript records and cumulative information. The relevance, competence and material of several other Planning Commission matters to the specific issues raised are not found to be persuasively established as being necessary to fully and fairly hear the appeal. There is no prejudice to the appellants; and

WHEREAS, McDonald's specifications 5 and 6 and Capital's specification No. 2 of their appeals assert errors based on absence of boundary information and failure to have objective criteria or, alternatively, to make findings relative to denial of an amendment to the Stage I master development plan (which would amend the Town Center Master Plan). These asserted errors are not errors based on factual dispute, but are based on the absence of criteria or misapplication of criteria to either facts or to an absence of facts. Additionally there is no showing that additional evidence would be relevant, competent or material to the issues raised as errors. The applicant carries the burden of persuasion on the issue of amending the Stage I master plan to meet the Town Center Master Plan, and the appeal failed to set forth any reason of prejudice, surprise or lack of availability to it to present evidence in support of its position, traffic expert evidence or otherwise. To the extent the

phrase "reasons above" as used in the McDonald's appeal reference traffic expert evidence, the record reflects that the Kittleson traffic expert was available and the applicant chose not to present this evidence.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

1. Based on the above recitals, it is ordered that the appeal hearing on 93PC28 be limited to the record; that argument on the record is granted and is set for the regularly scheduled City Council Meeting of December 6, 1993; and that no new evidence shall be introduced by any party.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof this 15th day of November, 1993, and filed with the Wilsonville City Recorder this same date.

  
GERALD A. KRUMMEL, Mayor

ATTEST:

  
VERA A. ROJAS, CMC/A&E, City Recorder

SUMMARY of Votes:

Mayor Krummel	<u>AYE</u>
Councilor Carter	<u>AYE</u>
Councilor Hawkins	<u>ABSENT</u>
Councilor Lehan	<u>AYE</u>
Councilor Van Eck	<u>ABSENT</u>

# BOGLE & GATES

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October 28, 1993

**VIA HAND DELIVERY**

City Council  
City of Wilsonville  
8445 SW Elligsen Road  
Wilsonville, OR

RECEIVED  
OCT 28 1993  
CITY OF  
WILSONVILLE

Re: 93PC28/McDonald's Restaurant;  
Appeal of Planning Commission Decision of October 15, 1993

Dear Mayor and Council Members:

This office represents the McDonald's Corporation ("McDonald's") regarding the above matter. This letter constitutes McDonald's appeal of the Wilsonville Planning Commission decision of October 15, 1993, denying McDonald's land use application for a Stage II Site Development Permit and modification of the Wilsonville Town Center Master Plan to develop a McDonald's restaurant. For the reasons recited at the conclusion of this letter, McDonald's requests a de novo hearing before the City Council.

**GROUND'S FOR APPEAL**

The Planning Commission exceeded its jurisdiction, misconstrued or failed to follow the applicable law, or made findings not supported by substantial evidence in the whole record in one or more of the following particulars:

1. The Planning Commission erroneously applied Subsection 4.139(4)(b) of the City of Wilsonville Development Code (the "Code"), which requires that only the "traffic generated by the development" be considered in determining compliance with the traffic standard set forth therein. Evidence submitted at the hearing established that the proposed McDonald's restaurant will not generate substantial traffic to the site, all of which is capable of being accommodated with a level of service D or better as required by said section.

2. In the alternative, to the extent that Subsection 4.139(4)(b) requires that all traffic, even beyond that generated by the development, be measured against the applicable traffic standard, the Planning Commission misinterpreted that subsection by measuring the level of service on the west bound lane group on Wilsonville Road instead of cumulatively through the intersection of Wilsonville Road and Town Center Loop West. Other applications approved by the City have been approved on a cumulative measurement approach. The Planning Commission should have reviewed the McDonald's application by measuring the level of traffic service cumulatively through the intersection of Wilsonville Road and Town Center Loop West. If the Planning Commission had correctly applied that measurement standard, it would have found that the proposed restaurant can be accommodated safely and without congestion in excess of level of service D as defined in the Highway Capacity Manual published by the National Highway Research Board on existing arterial or collector streets.

3. The Planning Commission also erroneously measured traffic level of service by including previously approved developments not yet constructed. Absent the inclusion of such approved but unbuilt developments, the Planning Commission would have concluded that the level of traffic service was sufficient to support the proposed McDonald's restaurant (i.e., at level of service D or better).

4. The Planning Commission's decision illegally imposes a moratorium on construction or land development in violation of ORS 197.520. If the level of traffic service as measured by the Planning Commission is inadequate to support McDonald's proposed restaurant, it is also inadequate for all other proposed uses in the Wilsonville Town Center as well. The Planning Commission will be unable to approve any further development permit applications for the Wilsonville Town Center until the Wilsonville interchange is reconstructed and approved at some time in the future. As such, Wilsonville is illegally imposing a moratorium on future commercial development in the Wilsonville Town Center.

5. The Wilsonville Town Center Planned Development Master Plan (the "Master Plan") fails to adequately delineate the boundaries or include a tabulation of the land area devoted to the various uses approved for development in the Wilsonville Town Center. Absent specific identifiable boundaries for the various uses permitted by the Master Plan, the Planning Commission erred in requiring a modification of the Master Plan and lacked the authority to deny McDonald's application to develop a fast food restaurant within the Wilsonville Town Center, a use specifically permitted by the Master Plan.

6. In the alternative, to the extent such modification of the Master Plan is required, the Code contains no objective review criteria for modifying or amending the Master Plan, in violation of ORS 227.173. Further, even if such criteria did exist, the Planning Commission failed to follow the applicable provisions of Section 4.012(3) of the Code, as well as ORS 227.173, by denying the Stage II Site Development Plan and the requested modification to the Master Plan without preparing findings of fact and a resolution including:

a) a statement of the applicable criteria against which the proposal was tested, and of the Planning Commission's interpretation of what would be required to achieve compliance with the criteria and standards;

b) a statement of the facts which the Planning Commission found establishing compliance or noncompliance with each applicable criteria and assurance of compliance with applicable standards; and

c) the reasons for its conclusion to deny the application.

### **REQUEST FOR DE NOVO HEARING**

Pursuant to Section 4.017 of the Code, McDonald's requests a de novo hearing before the City Council, for the reason that the DKS traffic study and report, which the City required to be paid for by McDonald's, improperly characterized the statistical data regarding McDonald's proposed use and development of the site and related off-site traffic impacts. McDonald's wishes to retain an independent traffic consultant in order to provide additional, pertinent information not presented in the prior report regarding the traffic data and its proper interpretation and application to the proposed restaurant, and to more clearly evidence the fact that McDonald's will not generate significant traffic to the site, which material evidence was not reasonably available at the prior hearing and will not result in prejudice or surprise to the parties, in accordance with Subsection 4.017(6)(a) of the Code. Further, a de novo hearing is necessary to allow McDonald's to establish that, for the reasons above-stated, no modification to the Master Plan is necessary or required to develop a fast food restaurant on McDonald's site and that no objective decision criteria exists against which any such requested modification is reviewed.

Respectfully Submitted,

BOGLE & GATES



Mark D. Whitlow

MDW:rgm

[44/MCDS/WLSN/COUNCL-L.004]

BOGLE & GATES



RECEIVED  
OCT 28 1993  
CITY OF  
WILSONVILLE

October 28, 1993

City of Wilsonville  
Attention: Mr. Wayne Sorenson,  
Planning Director  
8445 S.W. Elligsen Road  
Wilsonville, OR 97070

Re: Appeal of Planning Commission Decision/  
93PC28 McDonald's Restaurant

Gentlepersons:

Capital Realty Corp. ("Capital"), having appeared before the Wilsonville Planning Commission in support of the above-referenced application hereby appeals the decision of the Planning Commission dated October 15, 1993, denying the McDonald's Corporation (McDonald's) land use application for Stage II Site Development approval and modification of the Wilsonville Town Center Master Plan to develop a McDonald's restaurant. Capital hereby joins in all the issues raised and requests made by McDonald's in its notice of appeal, and adds the following grounds for appeal and reasons for a de novo hearing:

1. Grounds for Appeal.

The traffic findings are erroneous in one or more of the following ways (in addition to those ways specified in the McDonald's notice of appeal):

- (i) The McDonald's project does not generate traffic in excess of allowable capacity within the Town Center infrastructure (any LOS degradation is a result of problems at the I-5 interchange and is not related to the proposed use); and
- (ii) Until this hearing, the Planning Commission has consistently interpreted the same traffic conditions, based on the same staff recommendations, not to be a basis for denial and has approved applications on that basis.

[16428-0003/PA933000.051]



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October 28, 1993  
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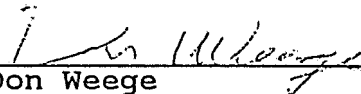
2. Request for De Novo Hearing.

Capital requests a de novo hearing for the following reasons (in addition to the reasons specified in the McDonald's notice of appeal). Capital seeks to present competent, relevant and material evidence regarding (i) policy matters that were not formally raised in this proceeding except by the decision which constituted the apparent basis for the denial and which should be considered by the City Council in hearing this matter; and (ii) other recent land use decisions in the Town Center area. Such further testimony and evidence would assist the City Council in fully and fairly addressing the matters at issue. If the City Council does not grant the request for a de novo hearing, Appellants request the right to submit additional evidence, for the reasons stated above.

Thank you for your consideration of this matter.

Very truly yours,

CAPITAL REALTY CORP.

  
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Don Weege

RECEIVED  
OCT 28 1993  
CITY OF  
WILSONVILLE

October 28, 1993

City of Wilsonville  
Attention: Mr. Wayne Sorenson,  
Planning Director  
8445 S.W. Elligsen Road  
Wilsonville, OR 97070

Re: Appeal of Planning Commission Decision/  
93PC30 Shari's Restaurant

Gentlepersons:

Shari's Management Corporation ("Shari's"), the Applicant in the above-referenced matter, and Capital Realty Corp. ("Capital"), the owner of the subject property, (collectively, "Appellants") hereby jointly appeal the decision of the Wilsonville Planning Commission dated October 15, 1993, denying Shari's land use application for Stage II Site Development approval and modification of the Wilsonville Town Center Master Plan (the "Master Plan") to develop a Shari's restaurant.

1. Basis for Appeal. Appellants' appeal the decision on the grounds that the Planning Commission erroneously interpreted and applied the City of Wilsonville Development Code (the "Code") with respect to its findings on traffic and its denial of the requested modification to the Wilsonville Town Center Master Plan changing the overlay zone from CC to FS for the subject property.

(a) Traffic.

The traffic findings are erroneous in one or more of the following ways:

- (i) The findings are based on interpretation of LOS by lane group rather than by intersection;
- (ii) The findings are based on inclusion of projected traffic from previously approved, unconstructed developments;

- (iii) The Shari's project does not generate traffic in excess of allowable capacity within the Town Center infrastructure (any LOS degradation is a result of problems at the I-5 interchange and is not related to the proposed use);
- (iv) Until this hearing, the Planning Commission has consistently interpreted the same traffic conditions, based on the same staff recommendations, not to be a basis for denial and has approved applications on that basis; and
- (v) Denial of this application on the traffic findings illegally imposes a moratorium on construction or land development, because no new commercial project can satisfy the traffic requirements as interpreted by the Planning Commission in this decision.

(b) Modification of Master Plan.

A modification of the Master Plan is requested in order to amend the Master Plan overlay zone designation for the subject property from CC (Central Commercial) to FS (Food and Sundries). The Master Plan, however, does not adequately delineate the boundaries of the various overlay zones. Since the Shari's restaurant is a use specifically permitted by the Master Plan and the overlay zones are not adequately delineated, Applicant should not be required to obtain this approval at all. If such a modification is found to be required, denial of the request is erroneous in one or more of the following ways:

- (i) The Code fails to provide objective criteria, as required by law, for approving or denying such a request; and
- (ii) The Planning Commission failed to apply criteria and make findings, as required by law, to support the denial.

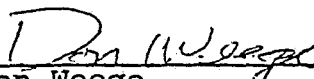
City of Wilsonville  
October 28, 1993  
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2. Request for De Novo Hearing. Appellants request a de novo hearing before the City Council to present competent, relevant and material evidence regarding (i) traffic (including testimony countering the interpretation given the DKS traffic report); (ii) policy matters that were not formally raised in this proceeding except by the decision which constituted the apparent basis for the denial and which should be considered by the City Council in hearing this matter; and (iii) other recent land use decisions in the Town Center area. Such further testimony and evidence would assist the City Council in fully and fairly addressing the matters at issue. If the City Council does not grant the request for a de novo hearing, Appellants request the right to submit additional evidence, for the reasons stated above.

Thank you for you consideration of this matter.

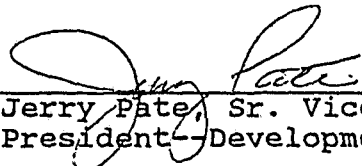
Very truly yours,

CAPITAL REALTY CORP.

  
\_\_\_\_\_  
Don Weege

CAPITAL REALTY CORP.  
101 SW Main, Suite 905  
Portland, OR 97204

SHARI'S MANAGEMENT  
CORPORATION

  
\_\_\_\_\_  
Jerry Pate, Sr. Vice  
President--Development

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