

1 **BEFORE THE HEARING EXAMINER FOR THE CITY OF BURLINGTON**

2 Phil Olbrechts, Hearing Examiner

3

4 RE: Chick-Fil-A	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION\
5 Conditional Use Permit	
6 File No. CUP 2-24	

7

8 **INTRODUCTION**

9 Chick-Fil-A requests conditional use permit approval for a Chick-Fil-A restaurant to
10 be located at 680 Hwy 20 & 808 Nevitt Rd. The application is approved subject to
conditions.

11 This application is highly extraordinary in that the Applicant and City have been unable
12 to workout differences on five recommended staff conditions. Since the conditions are
likely not of great public interest they are addressed in footnotes at the end of the
13 decision. To maintain some semblance of brevity the associated legal analysis is
abbreviated but sufficiently detailed to identify the legal road map of the decision for
14 any judicial appeal.

15 The hearing only drew hearing comment from one nearby business owner over
concerns about left turn lane queuing capacity at the Nevitt Rd/SR 20 intersection.
16 The Applicant's traffic engineer provided a compelling response to that concern. The
traffic engineer used trip generation estimates based specifically upon Chick-Fil-A
17 numbers, which is commendable given that Chick-Fil-As generate far more traffic than
the general ITE¹ fast food category. The engineer reconfigured the turn lanes on Nevitt
18 Road to provide a left turn southbound on Nevitt Road into the Chick-Fil-A driveway.
The engineer then modelled queuing lengths based upon the high traffic counts for
19 Chick-Fil-As and found that the reconfigured lanes on Nevitt provided for adequate
queuing capacity in the left turn lanes of the Nevitt/SR 20 intersection and Nevitt Road
20 turning left onto the Chick-Fil-A site. Given the absence of any engineering or other
evidence to the contrary, the findings of the Applicant's traffic engineer are found
21 determinative and it is concluded that the project has been adequately designed to
22 accommodate left turn movements into the project site.

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25 ¹ ITE is an acronym for the Institute of Transportation Engineers. The ITE Trip Generation Manual is
universally used in traffic reports to estimate trip generation for various types of uses such as fast food
establishments.

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ORAL TESTIMONY

A computer-generated transcript has been prepared of the appeal hearing to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. Since the transcript is computer generated, it is not 100% accurate, but does provide a useful indication of what testimony was presented during the hearing.

EXHIBITS

Attachments 1 - 24 listed the revised Exhibits list dated March 28, 2025, were admitted into the record. The Applicant's March 28, 2025 request for revised conditions of approval was entered as Exhibit 25² during the hearing. An April 9, 2025 post-hearing revised staff report is admitted as Exhibit 26 and the Applicant's April 17, 2025 response entered as Exhibit 27.

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicant is Don Ikeler, Chick-Fil-A, 105 Progress, Irvine, CA 92618.
2. Hearing. A hybrid public hearing on the applications was held on March 28, 2025, at 10:00 am. The hearing was left open through April 18, 2025 for the Applicant and City staff to workout differences on recommended conditions of approval.

Substantive:

3. Site/Proposal Description. The Applicant has applied for a conditional use permit for a proposed development of a 4,986 square foot (SF) Chick-fil-A restaurant with indoor seating and a drive-through window. The existing site is occupied by a 10-room motel that will be removed with the project. The project will involve demolishing existing buildings, clearing, grading, and the installation of related landscaping, stormwater, and utility improvements. The site consists of two separate parcels with a total area of approximately 3 acres (130,680 sq. ft.).

² The March 28, 2024 conditions was erroneously numbered Ex. 24 during the hearing and has been corrected in this decision to Ex. 25.

1 4. Characteristics of the Area. The surrounding area is comprised of a wide
2 variety of uses including residential, gas stations, other drive-through restaurants, I-5
3 freeway, and other retail stores. The property is bounded to the north by State Route
4 20, to the east the I-5 freeway, to the south by McDonalds, and to the west by Nevitt
5 Road.

6 5. Adverse Impacts. The proposal is not found to create any significant
7 adverse impacts. An MDNS³ was issued for the proposal on March 7, 2025. Pertinent
8 impacts are addressed as follows:

- 9 a. Critical Areas. There are no critical areas⁴ located at the project site, although
10 the staff report doesn't make any explicit findings on this issue.

11 The staff report identifies no critical areas at the project site and none are
12 apparent from the record. The SEPA checklist, Ex. 13, states that there are no
13 wetlands or streams on the project site. The geotechnical report for the proposal
14 doesn't expressly identify any features that qualify as geological hazardous
15 areas. However, it does reference groundwater suggestive of an aquifer as well
16 as some slopes that could qualify as steep slopes. Nonetheless, staff's role in
17 the review process is to ascertain the presence of critical areas and if any are
18 present to ensure that those areas are protected as required by the City's critical
19 areas ordinance. In the absence of any compelling evidence that staff has erred
20 in its evaluation of critical areas, it is determined that no critical areas are
21 present on the project site.

22 Floodplains are one type of protected critical area. The application included a
23 Letter of Map Amendment (LOMA) issued by the Federal Emergency
24 Management Agency (FEMA) removing the site from the regulatory
25 floodplain. Because of the LOMA the site is no longer in the regulatory
floodplain and therefore exempt from the City's flood development regulations
and habitat assessment requirements. However, the City still requires that all
building, regardless of whether or not they are located in the regulatory
floodplain, be constructed with a finished floor elevation at least one foot above
the base flood elevation (BMC 14.15.430.B.1).

- 26 b. Lighting. The proposal will not create any significant adverse lighting impacts.

27 ³ An "MDNS" is a Mitigated Determination of Nonsignificance. An MDNS is a determination that an
28 environmental impact statement is not necessary for a proposal because as mitigated it will not create
29 any probable significant adverse environmental impacts.

30 ⁴ Critical areas are environmentally sensitive areas governed by the Washington State Growth
31 Management Act, Chapter 36.70C RCW. Critical areas are protected by critical area regulations
32 incorporated into a city's zoning code. Critical areas include wetlands, streams, habitat conservation
33 areas, geologically hazardous areas, aquifers and frequently flooded areas.

1 The Applicant submitted a lighting plan, Ex. 5, that shows that the fixture type will
2 be pole top mounted and wall mounted. The lighting plan shows where the lighting
3 will be placed and that fixture height will not exceed 14 feet. Staff have found that
4 the plan complies with City lighting standards. A SEPA mitigation measure further
requires that outdoor lighting fixtures be directed downwards and screened,
hooded, or optically focused so the light source is not visible beyond the property
boundaries and that direct light not shine into residential units.

5 c. Stormwater. The proposal will not create any significant adverse stormwater
6 impacts.

7 Stormwater review will be conducted during building permit review. BMC
8 17.70.135B adopts the Washington State Department of Ecology's Stormwater
9 Manual for Western Washington. The Manual adopts all known, available and
10 reasonable methods of stormwater prevention, control and treatment (AKART).
See RCW 90.52.040 and RCW 90.48.010. In addition to protecting water quality,
these standards also require that the proposal not generate off-site flows that exceed
those generated by the predeveloped forested condition of the project site.

11 Staff recommended conditions of approval focus upon an 80% limit on impervious
12 surface and the inclusion of low impact development measures to mitigate against
13 stormwater impacts.

14 Given the requirements of the stormwater manual and staff recommended
15 conditions of approval, the proposal is found to adequately mitigate against
16 stormwater impacts.

17 d. Aesthetics. The proposal will not create any significant adverse aesthetic impacts
18 due to conformance to the City's landscaping and refuse screening requirements.

19 A minimum of 15 percent of the site must be landscaped (BMC 17.81.060.C). The
20 site has a total area of approximately 46,740 square feet, meaning a minimum of
21 7,011 square feet of landscaping must be provided. The preliminary landscaping
22 plan submitted with the application depicts landscaping buffers located around the
23 perimeter of the site, along the street frontage and shows parking lot landscaping as
well. However, on the plans there is no calculation showing that at least 15 percent
of the site will be landscaped so it is hard to tell if it meets the minimum. A
condition of approval requires that the civil plans be revised to show a calculation
table stating the percentage of landscaping that is being proposed.

24 Applicant and City disagree as to whether a Type 3 landscape buffer must be
25 installed along the eastern side of the project site because it arguably adjoining
freeway right of way. As determined in Footnote 8, adopted by this reference, the

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project site is not considered to adjoining freeway right of way and thus landscaping on that basis is not required.

In accordance with BMC 17.81.110.A, all loading, storage, and outdoor service areas such as trash enclosures must be screened from view. Trash requires a type I buffer which includes a buffer width of five feet and a physical screening with either a solid site obscuring fence or wall that has a minimum height of six feet (BMC.17.81.110.1). The current plans show where the trash enclosure will be on the site and also show adequate details of the trash enclosure and the buffer screening and show that it will be covered and connected to sewer, therefore complying with the code.

- e. Parking. The proposal will not create any significant parking impacts. The Applicant has proposed 75 parking spaces. This exceeds the maximum parking allowance for the project site. The Applicant has sufficiently demonstrated that 75 parking stalls is necessary for the project site.

As noted during the hearing, Chick-Fil-As tend to be significantly more busy than typical fast food establishments, which creates both greater trip generation and parking demand than other fast food establishments. Ironically the Applicant was placed in a position of having to argue for additional parking because the City’s parking standards place upper limits on the number of parking stalls. The City’s parking code (BMC 17.85.060.B) limits parking to a maximum of 120 percent of the total requirement. This limitation may be waived if a traffic and parking study is submitted showing the need for additional parking.

The Applicant has provided a fairly thorough parking analysis, Ex. 25, based upon average parking at other Chick-Fil-A locations and estimated trip generation specific to Chick-Fil-A restaurants. As determined in Footnote No. 9, the Applicant’s parking analysis is sufficient to justify a need for the 75 proposed parking stalls as required by City code, BMC 17.85.060.B5.

- f. Traffic. The proposal provides for adequate mitigation against additional demand upon traffic facilities.

The Applicant has generated a couple traffic reports assessing compliance with the City’s level of service (LOS⁵) standards, Ex. 14 and 24. The Applicant has also worked with the Washington State Department of Transportation (WSDOT) to coordinate improvements to SR 20. The adopted LOS for City and state roads is LOS D. As demonstrated in Table 4 of the Applicant’s revised traffic study, Ex.

⁵ LOS standards are essentially congestion standards that set limits on intersection delay found acceptable by the City Council. LOS levels are graded similar to school grades with LOS A being minimal delays down to LOS F with long delays.

1 24, intersections materially affected by the proposal will still operate within
2 adopted LOS standards after project completion.

3 As outlined in the Overview section of this decision, left turn lanes will have
4 adequate queuing capacity after project completion. The findings made in the
5 Overview section are adopted by this reference as they pertain to left turn queuing
6 impacts.

7 Applicant and staff disagree about what design standards apply to the access road
8 for the project site proposed for a WSDOT parcel adjoining the project site to the
9 east. As outlined in Footnote 7, the access road to the project site located on
10 adjoining WSDOT property must conform to the City's access road design
11 standards as governed by BMC 12.28.150.

12 Applicant and staff disagree on whether pedestrian crossings of the project drive
13 thru aisles required raised pedestrian pathways. As outlined in Footnote 6, adopted
14 by this reference, the two northernmost pedestrian crossings must be raised.

15 Proportionate share impact to the City's overall road network is mitigated by the
16 payment of traffic impact fees as regulated by Chapter 15.12 BMC. Traffic impact
17 fees come due during building permit review.

18 g. Utilities. The proposal will be served by adequate utilities. The project site has
19 historically accommodated a motel with full utility service and there is no reason
20 to conclude that utilities could not meet the demand of a Chick-Fil-A. The staff
21 report notes that utilities including public water, sewer, and fiber optic
22 communications are available adjacent to the development site

23 **CONCLUSIONS OF LAW**

24 **Procedural:**

25 1. Authority of Hearing Examiner. Conditional use permits are classified as
"type III" permits. Type III permit decisions must be made by the City Hearing
Examiner (BMC 14A.05.060.C.7).

Substantive:

2. Zoning Designation. The parcel is zoned MUC-2.

3. Review Criteria and Application. Conditional Use Permits must be
consistent with all of the criteria enumerated in BMC 14A.05.080. For purposes of
clarity the applicable criteria have been addressed individually below

Conditional Use Permit Criteria

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2 *BMC 14A.05.080.a: The use will have no more adverse effect on the health, safety or*
3 *comfort of people living or working in the area, and will be no more injurious,*
4 *economically or otherwise, to property or improvements in the surrounding area, than*
5 *would any use generally permitted in the district. Among matters to be considered are*
6 *traffic flow and control, access to and circulation within the property, off-street parking*
7 *and loading, refuse and service areas, utilities, screening and buffering, signs, yards*
8 *and other open spaces, height, bulk and location of structures, location of proposed*
9 *open space uses, hours and manner of operation, and noise, lights, dust, odor, fumes*
10 *and vibration.*

11 4. Criterion Met. The criterion is met for the reasons identified in Finding of
12 Fact No. 5.

13 *BMC 14A.05.080.b: The proposal is in accordance with the goals, policies and*
14 *objectives of the comprehensive plan*

15 5. Criterion Met. The criterion is met for the reasons identified in pages 12-
16 13 of the revised staff report.

17 *BMC 14A.05.080.c: The proposal complies with all the requirements of this title*
18 *(zoning code).*

19 6. Criterion Met. The criterion is met for the reasons identified at page 13 of
20 the staff report.

21 *BMC 14A.05.080.d: The proposal can be constructed and maintained so as to be*
22 *harmonious and appropriate in design, character, and appearance with the existing or*
23 *intended character of the general vicinity and provides a high quality of development.*

24 7. Criterion Met. The criterion is met. Under the City's revised zoning
25 regulations, the proposed use will be permitted outright on the site and similar uses are
permitted in the surrounding area. As such the use is consistent with the existing and
intended character of the area.

BMC 14A.05.080.e: The proposal will not adversely affect the public infrastructure.

8. Criterion Met. The criterion is met for the reasons identified in Findings of
Fact 5c, e, f and g.

DECISION

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2 As conditioned below, the conditional use permit conforms to all required criteria for
3 approval of the proposed development of a 4,986 square foot (SF) Chick-fil-A
4 restaurant with indoor seating and a drive-through window. The conditions necessary
5 to assure compliance and required by this Decision are as follows:

General Conditions:

- 6 1. This approval shall not be construed to authorize any development or site
7 modifications beyond those described in the application and shown on the approved
8 plans. The approved plans shall be the plans and other project documents attached
9 to, or referenced in, this decision.
- 10 2. Except as otherwise required by the conditions of approval identified in this
11 decision and the associated SEPA threshold determination, all work, construction,
12 and development activities shall conform to the approved plans. The approved
13 plans shall be the plans and other project documents attached to, or referenced in,
14 this decision. Minor modifications necessary to implement any changes requested
15 by the Building Official, Fire Marshall, or City Engineer are permitted when
16 necessary to ensure compliance with established regulatory requirements.
- 17 3. This approval shall expire two years from the date of approval. The date of approval
18 for this decision shall be the date the Hearing Examiner's decision is signed.
- 19 4. This permit does not authorize the location, design, construction or installation of
20 any signs. No signs may be installed unless authorized by a sign permit.
- 21 5. The property owner, developer, and all contractors shall be responsible for
22 complying with all applicable laws and regulations pertaining to erosion control
23 and water quality, including obtaining a Washington State Department of Ecology
24 Construction Storm Water General Permit. Any additional erosion control or
25 construction management practices prescribed by the City Engineer or Building
Official shall be immediately implemented.

Grading Permit and Site Development:

- 6 A grading permit is required prior to beginning any clearing, filling, excavation,
7 building, construction, or other site development work.
- 8 7. Prior to the issuance of a grading permit civil engineering plans shall be submitted
9 to, and reviewed by, the City Engineer for compliance with applicable stormwater,
10 site development, and engineering requirements. A storm-water plan shall be

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included with the civil plans and the plans shall include LID measures. The civil engineering plans must include the following specific information:

- a. Vicinity map legal description, survey notes, sheet index, legend, list of contacts, and signature blocks.
- b. Details sheet depicting ADA compliant ramps, aprons, and sidewalks.
- c. Waterline plan and profile.
- d. Sanitary sewer plan and profile.
- e. Site grading and drainage plan.
- f. Waterline specifications.
- g. Fiber optic conduit and vaults along all street frontages, connecting to any adjacent fiber optic conduit and vaults, and connecting to each building.
- h. Provide a stormwater report and plans showing where and how LID techniques have been incorporated into the proposal.
- i. Update the table on the plans to show the correct amount of interior parking spaces along with the correct amount of parking lot landscaping.
- j. Plans must be revised to show raised pedestrian crossings across the queuing lanes⁶. The crossings that must be raised are the two northernmost crosswalks in the drive thru aisles depicted in the Ex. 2 site plan.

⁶ The Applicant requests that this requirement only apply to the proposed pedestrian crossing located at the northwestern portion of the project site. The requirement is found to apply to the two northernmost crosswalks depicted in the Ex. 2 site plan.

In Ex. 27 the Applicant provides a compelling definition of “queuing lane” as “*a lane (or lanes) where customers or people may queue or wait for their food or service.*” This definition is consistent with the common meaning of the term. Under that definition the two driveway aisles of the project site qualify as queuing lanes. The site plans, Ex. 2, show one crosswalk crossing both lanes and three others just crossing the interior drive thru lane. Finding No. 15 of the staff report finds only two pedestrian crossing of the queuing lanes.

From the revised staff report and the Applicant’s April 17, 2025 response it appears that Applicant and staff agree that the northwest crossing qualifies as one of the two crossings. It’s entirely unclear from Ex. 2 what the other crossing is, given that there are three other crossings depicted as opposed to just one as indicated in Finding No. 15 of the staff report. Given the lack of clarity in the staff report as to what staff considers to be the queuing lane, as best as can be ascertained from staff’s conclusion that there are just two crossings, the other crossing is construed as the second northernmost crossing. Such

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- k. The southernmost pedestrian access point (extending from Nevitt Road along the southern edge of the building) shall be extended to east to connect with the sidewalk installed along the western edge of the WSDOT access road⁷.
 - i. A sidewalk, with a minimum width of five feet, shall be provided along the western edge of the WSDOT access road. This sidewalk shall be connected to the east-west pedestrian path bisecting the parking lot and shall be extended to connect with any existing pedestrian access points on adjacent sites.
 - ii. The southernmost pedestrian access point (extending from Nevitt Road along the southern edge of the building) shall be extended to east to connect with the sidewalk installed along the western edge of the WSDOT access road.
 - iii. The civil engineering plans submitted with the grading permit application shall include design specifications for the proposed access road to the east of the development site in the WSDOT ROW. The design specifications shall be consistent with the requirements identified in BMC 12.28.150 for access streets and the applicable construction standards in Chapter 12.28 BMC.

an interpretation would apparently be consistent with the Applicant position that the portions of the drive thru lane after pick up are not part of the queuing lane. Unfortunately, the site plan and building elevations are not clear as to where precisely the pick up area is located. It's possible that one or both bottom crossings are at or immediately before the pick up area. However, given the staff report's findings and lack of any information to the contrary, the top two northernmost drive thru crossings must be construed as crossing the queuing lanes. BMC 17.50.070.C.5 requires that they be raised so they should be raised as identified in Condition 7j.

⁷ In Ex. 27 the Applicant requests that the condition be revised to clarify that the access road shall be private instead of public. That request is denied.

The staff report notes that the design standards for private and public access roads are virtually identical. The Applicant doesn't identify how regulations differ between private and public access roads. Chapter 12.28 BMC, which governs street design standards, doesn't appear to differentiate between public and private road standards except to require street permits only for streets located within public right of way. See BMC 12.28.090A. If some interpretation of Chapter 12.28 BMC could be made that it's design standards only apply to public streets, then in the absence of any design standards for private streets its design standards would apply anyway as the most analogous standards available to ensure safe circulation as required by the safety requirement of Conditional Use criteria BMC 14A.05.080.a.

- 1 8. No grading permit shall be approved or issued until a final landscaping plan has
2 been submitted to, and approved by, the Community Development Department.
3 The final landscaping plan shall be consistent with the following:
- 4 a. The landscaping plan shall demonstrate compliance with all applicable
5 landscaping code requirements including but not limited to the requirements of
6 this permit.
 - 7 b. Perimeter landscaping strips must be provided along the north and south site
8 boundaries. The perimeter landscaping strips shall be at least five feet wide and
9 include at least one tree for every 30 linear feet.
 - 10 c. Provide a calculation table stating the percentage of landscaping that is being
11 proposed as well as the impervious surface coverage.
 - 12 d. On the calculation table, provide the number of required street and perimeter
13 trees.
 - 14 e. Show dimensions for the 10-foot street frontage landscaping strip and the 5 foot
15 in width perimeter landscaping strip.
 - 16 ~~f. Provide more details of the type III buffer to the east, must show that it is 10
17 feet in width along with the details of the 6-foot fence or wall and how many
18 trees are required and will be provided.⁸~~
 - 19 g. Provide in the calculation table to number of trees that will be provided in
20 replacement of the significant tree removals.
 - 21 h. Demonstrate how landscaping areas have been used to manage stormwater.

22 ⁸ Staff recommended Condition No. 8f is stricken because the project site is not found to adjoin freeway
23 right of way. Table 17.81.110.C-1 in the Burlington municipal code shows that a Type III buffer is not
24 required in the MUC zone when the adjacent zone is PFT-2. Table 17.81.110.C-1 requires a Type III
25 buffer when the adjoining property is freeway right of way. The adjoining parcel to the east is not a
freeway right of way but rather a separately owned WSDOT parcel zoned PFT-2 and used for an access
road to the project site. Although a freeway access road could conceivably be a part of freeway right of
way, the access road on the WSDOT parcel connects to SR 20 as opposed I5 freeway. In the absence of
any additional evidence in the record on the characterization of the WSDOT parcel, it's function as an
access road and its connection to SR 20 disqualifies it as freeway right of way. It is instead construed
as state right of way or a separate WSDOT parcel. This interpretation is found consistent with the
purpose of Type III screening, since the access road itself will serve as a buffer to the I5 freeway to the
east.

1 9. A demolition permit is required prior to demolishing any building or structure. No
2 grading permit shall be issued until the approval has been obtained from the
Northwest Clean Air Agency.

3 ~~10. Prior to the approval of a grading permit application, a revised transportation report~~
4 ~~shall be submitted. In addition to addressing any other requirements identified in~~
5 ~~this decision, the revised transportation report shall demonstrate why any additional~~
parking spaces in excess of the parking limit established by BMC 17.85.060.B are
needed.⁹

6 11. Written authorization from WSDOT shall be provided stating that the access road
7 off of State Route 20 may be used for this project is needed in order for the grading
8 permit to be issued. The authorization shall specifically address access rights,
9 authorization to conduct construction activities, and long-term maintenance
responsibilities.

10 Building and Occupancy Conditions:

11 12. No final occupancy or final building permit inspections shall be approved for any
12 residential unit until documentation has been provided showing the finished floor
13 elevations of the unit is one foot or more above the base flood elevation. This
14 documentation can be provided in the form of a letter from a licensed surveyor.
This is a City of Burlington requirement and not a requirement of the National
15 Flood Insurance Program. Therefore, formal FEMA flood elevation certificates are
not required.

16 13. The landscape irrigation system and all required landscaping shall be installed prior
17 to final occupancy approval. The landscaping and landscape irrigation system shall
be consistent with the landscaping plan required by this decision.

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19 ⁹ Findings 31-34 of the staff report show some extensive back and forth between Applicant and City
20 staff over the data necessary to establish the waiver to parking stall maximum requested by the Applicant.
21 The staff report concludes in Finding 34 that the Applicant submitted a revised traffic report that “may”
22 be sufficient to justify the 75 stalls proposed by the Applicant. Despite finding that the Applicant “may”
23 have provided sufficient data to justify the increased parking, Condition No. 10 recommended by staff
24 still requires additional information. Staff should have resolved one way or the other by the time of
25 hearing whether additional parking study is needed. The parking study provides a fairly sound
justification for additional parking by using ITE parking data for fast food establishments and then
inflating that figure by 70% to account for the 70% higher trip generation that has been demonstrated
for Chik-Fil-A establishments specifically. Ideally the Applicant should have collected parking data
from other Chik-Fil-A’s to prove its case, but the correlation between parking and trip generation is fairly
reasonable. Given the ambiguous position of City staff on the adequacy of the revised traffic report, the
data presented is sufficient given the absence of any evidence to the contrary. Further parking analysis
is not found necessary to justify the additional parking spaces.

- 1 14. All clearing, grading, storm-water improvements, and utilities shall be consistent
2 with the civil engineering plans approved by the City Engineer and no final
3 occupancy shall be granted until the civil improvements have been inspected by the
4 City Engineer.
- 5 15. No final occupancy or final building permit inspection shall be approved until civil
6 engineering “as-built” drawing have been submitted to, and approved by, the City
7 Engineer. No as-built drawings will be approved until the City Engineer has
8 inspected the site and verified compliance with the approved civil plans, the
9 conditions of the approved grading permit, and the conditions of this permit. All
10 infrastructure shown on the approved civil plans, including but not limited to fiber
11 optic conduit and vaults, public and private street improvements, pedestrian access
12 and crosswalk improvements, utilities, and storm-water management
13 improvements.
- 14 16. The trash enclosure screening shall be installed prior to final occupancy approval.
- 15 17. Civil engineering “as-built” drawings shall be submitted to, and approved by, the
16 City Engineer.
- 17 18. Prior to final occupancy approval a licensed surveyor shall survey the location and
18 boundaries of any right-of-way improvements located outside of the existing
19 established public right-of-way. Any additional right-of-way necessary to
20 accommodate the required frontage or right-of-way improvements shall be
21 provided to the city through a fee simple conveyance or by conveying a public
22 access and utility easement. A licensed surveyor shall prepare legal descriptions
23 and visual illustrations for the conveyance documents. The additional right-of-way
24 shall be conveyed to the city prior to final occupancy.
- 25 19. All fire and life safety requirements identified by the Building Official and Fire
Marshal shall be fully addressed.
20. Building plans shall include design details for the proposed awnings. Awning
design details must show how the awnings will be designed to establish a well-
defined building wall ~~at~~ within or at the maximum setback line, by including vertical
supports and screening within or at the setback line¹⁰.

¹⁰ In Ex. 27 the Applicant asserts that City staff should be bound by comments made during permit review that the proposal had qualified to maximum setback standards via BMC 17.60.090.D.3. Absent issuance of a final land use decision, statements made by permitting staff are generally not binding if they conflict with the BMC.

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In this case, the Applicant referenced comments resulting from a preapplication conference in which the Community Development Director stated that maximum setback standards didn't apply to the project. Maximum building setbacks in the MUC-2 district are subject to waiver if they meet the waiver standards of BMC 17.60.090.D.3. The BMC doesn't apparently identify who can make BMC 17.60.090.D.3 waiver decisions. Presumably this can be a staff decision because BMC 17.60.090.D.3 may sometimes have to be applied during site plan review and other staff level decision making.

If a final land use decision had been made regarding BMC 17.60.090.D.3, then even if the decision did not conform to its waiver criteria, it would still not be subject to challenge if the appeal period had passed. *See, e.g., Habitat Watch v. Skagit County*, 155 Wn.2d 397, 410-11 (2005)(merits of prior approved special use permit cannot be addressed in subsequent clearing and grading permit application). A permitted decision only qualifies as a final land use decision if it "*leaves nothing open to further dispute and which sets at rest cause of action between parties.*" *Samuel's Furniture, Inc. v. State, Dep't of Ecology*, 147 Wash. 2d 440, 452, 54 P.3d 1194, 1200 (2002), amended on denial of reconsideration, 63 P.3d 764 (Wash. 2003).

The statements made by permitting staff about the applicability of BMC 17.60.090.D.3 don't qualify as a final land use decision because they didn't put the applicability of that waiver to rest. Final land use decisions typically clearly define themselves as such in separate permitting decisions with appeal rights specified at the end. The statements referenced by the Applicant are the opposite. They were contained in a technical memorandum that warned that "*the information in this memo is informal.*" See Ex. 27, App. B. The nature of preapplication review is to provide guidance and not to make final permitting decisions. Staff have issued no final land use decision regarding the applicability of BMC 17.50.090.D.3.

In the absence of any final permitting decision, any statements made by permitting staff that are contrary to code are not binding. *See Concerned Land Owners of Union Hill v. King Cnty.*, 64 Wash. App. 768, 778, 827 P.2d 1017, 1022-23 (1992) (The doctrine of equitable estoppel is inapplicable where the representations relied upon are questions of law rather than questions of fact. Equitable estoppel is not favored as applied to government).

In this case the reasons provided by the City for the exception do not meet the exception criteria. The reasons provided by the City were that the proposal could be maintained as a nonconforming structure and also that requiring conformance would interfere with existing site access. The staff report notes that the existing motel will be removed from the project site. It appears that the proposed building will be an entirely new structure. As such, nonconforming use rights do not apply. See BMC 17.100.080C (nonconforming structures may only be replaced to their original condition). As to interfering with site access, there is nothing to suggest that requiring a single queue lane would have any impact on site access. As far as can be ascertained from hearing evidence on the high volume involved in a Chik-Fil-A operation, the reality of the situation is that no single queue lane would be reasonably feasible for the amount of patronage generated at the project site. A variance request to the setback standard would likely have been the most appropriate means of addressing the maximum setback issue.

City staff have taken the position with Condition No. 20 that an awning encroachment into the maximum setback will satisfy the maximum setback requirement. That appears to be a reasonable means of establishing compliance with the maximum setback requirement. Condition No. 20 is retained to provide for conformance to the maximum setback standard of BMC 17.50.090D2.

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21. Transportation impact fee rates assessed on the building permit shall be calculated based on trip generation rates that are 70 percent higher than the baseline ITE rates, consistent with the revised transportation and parking report submitted by the Applicant dated March 26, 2025.

Dated this 30th day of April 2025.

Phil Olbrechts

Phil Olbrechts,
City of Burlington Hearing Examiner

APPEAL RIGHT AND VALUATION NOTICES

Conditional Use Permits are type III decisions. The Hearing Examiner’s decision may be appealed in accordance with the applicable procedures identified in Title 14A of the Burlington Municipal Code. For information on appeal procedures please contact the Community Development Department.
