

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

**DECISION <sup>1</sup>**

FILE NUMBER: CUP-004079-2016

APPLICANT: Dayton Hudson Corp. <sup>2</sup>  
ATTN: Steve Hauser  
50 South 10<sup>th</sup> Street, #400  
Minneapolis, MN 55403

TYPE OF CASE: Conditional Use Permit as a vehicle to terminate four old “Special Use Permits”

STAFF RECOMMENDATION: Approve

EXAMINER DECISION: TERMINATE the Special Use Permits

DATE OF DECISION: September 26, 2016

**INTRODUCTION <sup>3</sup>**

Dayton Hudson Corp. (Target Stores) seeks a Conditional Use Permit (CUP) as a vehicle to terminate four old “Special Use Permits”.

Target Stores filed the CUP application on July 27, 2016. (Exhibit 2 <sup>4</sup>) The Lynnwood Community Development Department (CDD) deemed the application to be complete on August 1, 2016. (Exhibit 3)

The subject property is located at 18305 Alderwood Mall Parkway.

The Lynnwood Hearing Examiner (Examiner) viewed the subject property on September 22, 2016.

The Examiner held an open record hearing on September 22, 2016. CDD gave notice of the hearing as required by the Lynnwood Municipal Code (LMC). (Exhibit 14)

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<sup>1</sup> This Decision memorializes and expands upon an oral decision rendered on the record at the close of the open record hearing.

<sup>2</sup> Doing business as Target Stores.

<sup>3</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>4</sup> 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. 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 following exhibits were entered into the hearing record during the hearing:

- Exhibit 1: Departmental Staff Report
- Exhibits 2 - 15: As enumerated in Exhibit 1 at p. 2

No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.

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. In 1987 the City Council zoned an area, including the 11.8 acres comprising the subject property, to Planned Commercial Development (PCD). (Exhibit 15.4, Finding of Fact 5) Under former LMC 20.33.020 an SUP was required before Target Stores could construct two retail buildings on the subject property (known as Target Plaza), a large building for its sole use and a smaller multi-tenant building. (Exhibit 15.4, Findings of Fact 6 and 7)

On March 2, 1987, Target Stores applied for the required SUP (87-SUP-0003); the City Council approved the requested SUP on April 13, 1987. (Exhibit 15.4)

On September 17, 1987, Target Stores applied for a second SUP to change certain aspects of the multi-tenant building (87-SUP-0008); the City Council approved that SUP on November 9, 1987. (Exhibit 15.3)

On May 4, 1989, Target Stores applied for a third SUP, this one to allow a wall sign on the rear of the Target store (89-SUP-0004); the City Council approved that SUP on June 12, 1989. (Exhibit 15.2)

On January 5, 1998, Target Stores applied for a fourth SUP, this one to enlarge the Target store (98-SUP-0001); the then Examiner approved that SUP on April 6, 1998.<sup>5</sup> (Exhibit 15.1)

Thus, Target Plaza, which is fully developed in accordance with the SUPs, is now subject to the four SUPs.

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<sup>5</sup> By 1998 the City had switched to a Hearing Examiner system for handling quasi-judicial land use applications. (Official notice)

2. In or around 1994 the City reenacted the zoning code as Title 21 LMC and repealed Title 20 LMC. (Official notice) In 2003 the City repealed the SUP process. (Exhibit 1, p. 6, § VIII.A)

In 2009 the City Attorney advised CDD that modifications to approved SUPs would be best addressed through the CUP process. (*Ibid.*)

3. The event which triggered the current application is Target Stores' desire to revamp the exterior sign package on its building. (Exhibits 10 and 11) The proposed sign package complies with all current sign regulations applicable to commercial uses in the PCD zone. (Exhibit 1)
4. Lynnwood's State Environmental Policy Act (SEPA) Responsible Official issued a threshold Determination of Nonsignificance (DNS) for the current proposal on August 1, 2016. (Exhibit 13) The DNS was not appealed. (Exhibit 1, p. 6, § VII)
5. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK<sup>6</sup>

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]

### 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

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<sup>6</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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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

The City has no vesting regulations for land development applications. “Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, \_\_ Wn. App. \_\_ (Div. I, 2014)]

In the 1950s, the [state] supreme court first adopted the common law vested rights doctrine [for building permit applications]. ... In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications. They included conditional use permit applications, grading permit applications, shoreline substantial development permit applications, and septic permit applications.

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added ... RCW 19.27.095(1) and RCW 58.17.033(1) respectively ... [which] only refer to building permit applications and subdivision applications. ...

Most recently, in *Town of Woodway v. Snohomish County*, the [state] supreme court reiterated that "[w]hile it originated at common law, the vested rights doctrine is now statutory."

[*Potala*, Slip Opinion 6 – 8 and 11] "With these points in mind, [the *Potala* court held] that the filing of [an] application for [a] shoreline substantial development permit, without filing an application for a building permit, [does] not vest rights to zoning or other land use control ordinances." [*Potala*, Slip Opinion at 12] The *Potala* court "express[ed] no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions [were] not before [it]." [*Potala*, Slip Opinion at 25] Therefore, whether the vested rights doctrine still applies to CUPs is debatable.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

#### 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.

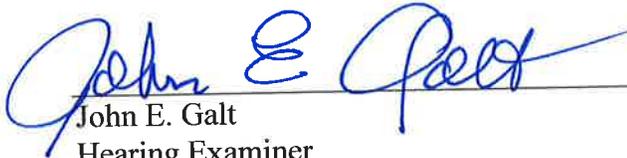
### **CONCLUSIONS OF LAW**

1. This is a rather unusual application: It is fundamentally a request to terminate the development restrictions imposed on the subject property by a type of permit which is no longer a part of the City Code. Target Stores cannot file an application to modify the SUP because the SUP process was eliminated from the LMC more than 10 years ago. Thus, the present CUP application.
2. The four SUPs are serving no beneficial purpose and should be terminated. All of their development requirements were fulfilled years ago. The requested revised sign package is fully compliant with current code. No justification exists to continue to treat the Target Plaza differently from current requirements associated with the PCD zone. There is no need for an actual CUP since nothing that Target Stores wants to do requires a CUP under the PCD zone.
3. 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 **TERMINATES** Special Use Permits 87-SUP-0003, 87-SUP-0008, 89-SUP-0004, and 98-SUP-0001 which shall hereafter be of no further force or effect.

Decision issued September 26, 2016.

  
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John E. Galt  
Hearing Examiner

## HEARING PARTICIPANTS <sup>7</sup>

Jennifer Steen

Chanda Emery

## NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Community Development 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."

<sup>7</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.