



COMMUNITY DEVELOPMENT DEPARTMENT

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December 18, 2018

Si necesita ayuda para comprender esta información, por favor llame 503-588-6173.

**NOTICE OF FINAL LAND USE DECISION Class 3 Site Plan Review / Class 2 Driveway Approach
Permit Case No. SPR- DAP18-15 for property located at
2500-2600 Boone Road SE - 97306**

YOU ARE HEREBY NOTIFIED that the City Council of the City of Salem adopted Order No. 2018-09 at their December 10, 2018 session, adopting finding **reversing** the Planning Administrator's decision and **denying** the applications. A copy of the Order is attached.

Any person with standing may appeal the City Council decision by filing a "Notice of Intent to Appeal" with the Oregon Land Use Board of Appeals (LUBA), **not later than 21 days** after **December 18, 2018**. An appeal of a land use decision must conform to the procedures and requirements of LUBA. Anyone with questions regarding filing an appeal with LUBA should contact an attorney or LUBA. The address and telephone number for LUBA is 775 Summer Street NE, Suite No. 330, Salem, Oregon 97301-1283, phone number 503-373-1265.

The complete case file, including findings, conclusions, modifications, and conditions of approval, if any, is available for review at the Community Development Department, 555 Liberty St SE, Room 305, Salem OR 97301. If you have any further questions, you may contact the City of Salem Planning Division at 503-588-6173.

Lisa Anderson-Ogilvie, AICP
Deputy Community Development Director & Planning Administrator

Attachment: Order

BEFORE THE CITY COUNCIL OF THE CITY OF SALEM

IN THE MATTER OF DENIAL OF)	ORDER NO. 2018-09 SPR-DAP18-15
A CONSOLIDATED APPLICATION FOR)	
CLASS 3 SITE PLAN REVIEW AND)	
CLASS 2 DRIVEWAY APPROACH PERMIT)	
CASE NO. SPR-DAP 18-15;)	
)	

This matter coming regularly for hearing before the City Council, at its December 10, 2018 the City Council, having received evidence and heard testimony, makes the following findings, and adopts the following order reversing the decision of the Planning Administrator in Class 3 Site Plan Review and Class 2 Driveway Approach Permit Case No. SPR-DAP 18-15, and denying the applications.

PROCEDURAL FINDINGS:

- (a) On June 6, 2018, W. Josh Wells, P.E. of Westech Engineering Inc., on behalf of the applicant and property owners M&T Partners & Pacific Realty Associates, represented by Matt Oyen and Shari Reed, filed an application for a Class 3 Site Plan Review and Class 2 Driveway Approach Permit proposing to develop the Kuebler Gateway Shopping Center with new buildings, including Costco Wholesale, a retail fueling station, and four new retail shell buildings for property approximately 20.6 acres and located at the 2500-2600 Block of Boone Road SE.
- (b) The applicant granted one 30-day extension of the state-mandated local decision deadline.
- (c) On October 23, 2018 the Planning Administrator issued a decision approving the applications.
- (d) On November 7, 2018, a timely appeal was filed by Karl G. Anuta.
- (e) On November 7, 2018, a second timely appeal was filed by the South Gateway Neighborhood Association.
- (f) On November 13, 2018, at a regularly scheduled meeting, the City Council was provided the notices of appeal on the applications pursuant to SRC 300.520(f)(3) and SRC 300.1050(a). The City Council voted to assume jurisdiction of the appeals and review of the Planning Administrator's decision.
- (g) On December 10, 2018, City Council held a public hearing, took public testimony, closed the public hearing, and voted to reverse the decision of the Planning Administrator, and deny the applications.
- (h) No party made a request to keep the record open or continue the hearing. The applicant did not request an opportunity to submit final written argument.

SUBSTANTIVE FINDINGS:

The City Council adopts the following as findings for this decision:

- (a) The Class 3 Site Plan Review and Class 2 Driveway Approach Permit for development of the Kuebler Gateway Shopping Center, as proposed, fails to comply with the criteria for approval of a Class 3 Site Plan Review set forth in SRC 220.005(f)(3)(A).
- (b) The findings, attached hereto as exhibit 1, are incorporated to this decision as if set forth herein.
- (c) The City Council DENIES the consolidated applications for a Class 3 Site Plan Review and Class 2 Driveway Approach Permit.

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE CITY COUNCIL OF THE CITY OF SALEM, OREGON:

Section 1. The Planning Administrator's decision for Class 3 Site Plan Review and Class 2 Driveway Approach Permit Case No. SPR-DAP18-15 is hereby reversed, and the consolidated applications are denied.

Section 2. This order constitutes the final land use decision and any appeal must be filed with the Oregon Land Use Board of Appeals within 21 days of the date that notice of this decision is mailed to persons with standing to appeal.

Exhibit 1: Findings for SPR-DAP18-15

ADOPTED by the City Council this 17th day of December, 2018.

ATTEST:


City Recorder

Checked by: Aaron Panko

Criteria and Findings for Class 3 Site Plan Review and Class 2 Driveway Approach Permit for proposed development of the Kuebler Gateway Shopping Center for property approximately 20.6-acres in size, located at the 2500-2600 block of Boone Road SE.

DECISION

The Class 3 Site Plan Review and Class 2 Driveway Approach Permit are **DENIED** subject to the applicable standards of the Salem Revised Code, conditions of approval from previous land use actions, and the findings contained herein.

PROCEDURAL FINDINGS

1. On June 6, 2018, W. Josh Wells, P.E. of Westech Engineering Inc., on behalf of the applicant and property owners M&T Partners & Pacific Realty Associates, represented by Matt Oyen and Shari Reed, filed an application for a Class 3 Site Plan Review and Class 2 Driveway Approach Permit proposing to develop the Kuebler Gateway Shopping Center with new buildings, including Costco Wholesale, a retail fueling station, and four new retail shell buildings for property approximately 20.6 acres and located at the 2500-2600 Block of Boone Road SE.
2. The applicant granted one 30-day extension of the state-mandated local decision deadline.
3. On October 23, 2018 the Planning Administrator issued a decision approving the applications subject to conditions of approval.
4. On November 7, 2018, a timely appeal was filed by Karl G. Anuta on behalf of John Miller and Lori Meisner.
5. On November 7, 2018, a second timely appeal was filed by the South Gateway Neighborhood Association.
6. On November 13, 2018, at a regularly scheduled meeting, the City Council was provided the notices of appeal on the consolidated applications pursuant to SRC 300.520(f)(3) and SRC 300.1050(a). The City Council voted to assume jurisdiction of the appeals and review of the Planning Administrator's decision.
7. On December 10, 2018, City Council held a public hearing, took public testimony, closed the public hearing, and voted to reverse the decision of the Planning Administrator, and deny the applications.
8. No party made a request to keep the record open or continue the hearing. The applicant did not request an opportunity to submit final written argument.

FINDINGS APPLYING TO THE APPLICABLE SALEM REVISED CODE CRITERIA FOR CLASS 3 SITE PLAN REVIEW AND CLASS 2 DRIVEWAY APPROACH PERMIT

Background

Previous land use history for the subject property is included below:

Comprehensive Plan Change and Zone Change Case No. 06-06 (CPC/ZC06-06). This decision approved a change to the Comprehensive Plan Map designation for the eastern most 18.4 acres of the subject property from Developing Residential to Commercial, and changed the zoning from RA (Residential Agriculture) to CR (Retail Commercial) subject to conditions of approval.

Zone Change Case No. 09-03 (ZC09-03). This decision approved a change to the zoning designation for the western most 9.96 acres from RA (Residential Agriculture) and CO (Commercial Office) to CO (Commercial Office) and CR (Retail Commercial).

Site Plan Review and Urban Growth Area Development Permit Case No. 12-11 (SPR-UGA12-11). Approved development of the Salem Clinic and medical office building, and an Urban Growth Area Development permit for the subject property. The application depicted three phases of development: UGA Phase 1, UGA Phase 2, and UGA Future Phase. UGA Phase 1 applied to the Salem Clinic development that has already been completed. UGA Phase 2 and UGA Future Phase apply to the subject property. All conditions of approval from SPR-UGA12-11 have been completed except for the following:

- Condition 9: As a condition of building permit for UGA Phase 2 or UGA Future Phase, complete all remaining mitigating street improvements required as a condition of approval for ZC09-03 and specified in CPC/ZC06-6.

Analysis of Class 3 Site Plan Review Approval Criteria

SRC 220.005(f)(3) states:

An application for Class 3 Site Plan Review shall be granted if:

- (A) The application meets all applicable standards of the UDC;
- (B) The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately;
- (C) Parking areas and driveways are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians; and
- (D) The proposed development will be adequately served with City water, sewer, stormwater facilities, and other utilities appropriate to the nature of the development.

Criterion 1:

The application meets all applicable standards of the UDC.

The applicant is requesting to develop a new retail shopping center, including four proposed retail shell buildings, a 168,550 square foot building for Costco Wholesale, and a retail fueling station with up to 30 pump positions. The following is a summary of applicable use and development standards for the subject property.

Comprehensive Plan Change/Zone Change Case No. 06-06:

The Council finds that the record testimony and submittals of the applicant that the City Staff and Council relied on in its approval of Comprehensive Plan Change/Zone Change Case No. 06-06 represented a store that would not have a regional customer base, but rather would be a Community Shopping Center that would provide services for neighborhood residents as well as a market area of several southeast Salem neighborhoods.¹ The Council further finds that the Costco proposed in this application, with a member base of around 80,000 at its present smaller Salem location, is basically a regional facility that draws customers from a great distance, and does not conform to the applicant's prior representations, that were the basis for the Findings made in support of the Comprehensive Plan Change/Zone Change Case No. 06-06, or the conditions attached to that approval.

The Council finds that the applicant represented in the Comprehensive Plan Change/Zone Change Case No. 06-06 in statements by various representatives, that it was not proposing a development that would draw a substantial portion of its customers from beyond the "vicinity" chosen by the applicant that was the basis for its comprehensive plan change to commercial. Council relied on those representations in making its findings to approve that Rezone. The applicant, through Costco, invited Costco members to submit letters of support of their application to Council. Council received hundreds of letters from Costco members, some in support and some in opposition. Most of the comments came from Costco customers beyond Salem and beyond the vicinity chosen by the applicant. This testimony is evidence that the proposed development has a regional market area, which is inconsistent with both the representations made by the applicant in 2006/2007, which were the basis for comprehensive plan change decision.

Prior approval Conditions on the property are, pursuant to SRC 300.820(b), treated as a part of the UDC. As a part of the UDC, those Conditions constitute approval criteria that must be met - per SRC 220.005(f)(3)(A). A **specific** "condition" of approval criteria is **not necessary** where an applicant's promise or statement "is embodied or found on the face of the plan that the decision approves." *Culligan v. Washington County*, p. 8 LUBA No. 2008-038 (Or. LUBA, 2008)

¹ Prior approval Conditions on the property are, pursuant to SRC 300.820(b), treated as a part of the UDC. As a part of the UDC, those Conditions constitute approval criteria that must be met - per SRC 220.005(f)(3)(A). A **specific** "condition" of approval criteria is **not necessary** where an applicant's promise or statement "is embodied or found on the face of the plan that the decision approves." *Culligan v. Washington County*, p. 8 LUBA No. 2008-038 (Or. LUBA, 2008)

Development Standards – CR (Retail Commercial) Zone:

General Development Standards

Natural Resources – SRC Chapter 808

SRC 808 - Preservation of Trees and Vegetation: The City's tree preservation ordinance, under SRC Chapter 808, provides that no person shall remove a significant tree (Oregon White Oak 24 inches or greater in diameter at breast height) (SRC 808.015) or a tree or native vegetation in a riparian corridor (SRC 808.020), unless the removal is excepted under SRC 808.030(a)(2), undertaken pursuant to a permit issued under SRC 808.030(d), undertaken pursuant to a tree conservation plan approved under SRC 808.035, or permitted by a variance granted under SRC 808.045.

The existing conditions plan indicates that there are eight Oregon white oaks (*Quercus garryana*) that are greater than 24 inches in diameter at breast height and classified as significant trees on the subject property; each of the significant trees is designated for removal. The applicant sought an exception to preserving the trees, which exception provides:

*SRC 808.030(a)(2)(L), a tree removal permit is not required for the removal of trees or native vegetation protected under SRC 808.015, SRC 808.020, or SRC 808.025 for the removal of Oregon white oaks (*Quercus garryana*) where the removal is necessary in connection with construction of a commercial or industrial facility.*

In order to qualify for the exemption, the applicant is required to demonstrate that removal is necessary in connection with construction of the proposed shopping center.

Applicant's Argument:

- 1) The applicant argues that removal of eight significant trees is needed to locate the proposed building in the southwest part of the site, because in this orientation, a majority of the customer entrance/exit activity, loading activities, and operation of the fueling station will occur on the north side of the building, thereby significantly mitigating the visibility and noise generated by on-site activities by placing a building between these activities and the residential neighborhood south of Boone Road.

Finding: Conditions of approval were placed on CPC/ZC06-06 to specifically address potential compatibility conflicts with development of the subject property as a shopping center and the surrounding residential area. The following conditions of approval from CPC/ZC06-06 require greater building setbacks, and additional landscaping and screening methods to be incorporated into the street frontage setbacks adjacent to residential uses to mitigate visibility and noise generated by on-site activities.

Condition 9: The developer shall establish a landscaped setback along the street frontages of the project area to provide buffering and screening from the street frontage. Along Kuebler Boulevard, the setback shall be a minimum of five (5) feet in depth from the property line, as required in the CR Zone, Salem Revised Code (SRC) 152.080.

Along Boone Road SE and 27th Avenue SE, the setback shall be a minimum of fifteen (15) feet in depth where the project area lies opposite residential uses.

Condition 11: The developer shall provide landscaping within the street frontage setbacks as required in SRC 132.

Condition 12: The developer shall provide a brick or masonry wall with a minimum height of six (6) feet along the interior line of the landscaped setback along Boone Road SE and 27th Avenue SE, opposite residential uses. The applicant/developer may provide a landscaped berm within the setback in lieu of a wall.

Although the applicant's proposed building orientation may provide additional mitigation to the potential adverse impacts on the surrounding property, it is not clear from the applicant's argument, and Council does not find, that it is "necessary" to remove all the significant trees in order to provide additional mitigation. In this instance, the proposal has significant conditions of approval already mitigating potential adverse impacts on neighboring properties, and the applicant, on the facts of this case, did not meet its burden to show that it was necessary to remove all the significant trees to provide additional mitigation.

Further, the applicant does not address or explain how the exterior wall of a building provides greater visual and/or sound mitigation than a design alternative which preserves existing significant trees.

Applicant's Argument:

- 2) The applicant argues that in addition to the screening of the parking area, loading and fueling station, that the proposed site plan configuration results in more of the improvements facing the more commercial street (Kuebler), the alignment integrates with the existing and proposed improvements to the west, and the layout allows for the most convenient accessibility away from residential streets to the south.

Finding: In addition to the proposed site plan configuration, the applicant has provided five alternative site plan configurations, each of which preserve all or some of the significant trees on the property and that allow for construction of a commercial facility. Each of the alternative plans presented by the applicant does come with potential drawbacks or limitations, however, these alternative plans demonstrate that removal of all the significant trees is not necessary in order to construct a commercial facility on the property.

Applicant's Argument:

- 3) The applicant argues that it is not possible to establish a shopping center that is any smaller than that which is proposed and still have an economically viable project.

Finding: If an applicant cannot demonstrate that an exception in SRC 808.030(a)(2) has been met, an application for a variance to the tree preservation requirements of SRC Chapter 808 may be requested to allow deviation from the requirements of this chapter where the deviation is reasonably necessary to permit the otherwise lawful development of a property. A tree variance shall be granted if either of the following criteria from SRC 808.045(d) is met:

1) *Hardship.*

- a. *There are special conditions that apply to the property which create unreasonable hardships or practical difficulties which can be most effectively relieved by a variance; and*
- b. *The proposed variance is the minimum necessary to allow the otherwise lawful proposed development or activity; or*

2) *Economical use.*

- a. *Without the variance, the applicant would suffer a reduction in the fair market value of the applicant's property, or otherwise suffer an unconstitutional taking of the applicant's property;*
- b. *The proposed variance is the minimum necessary to prevent a reduction in the fair market value of the applicant's property or otherwise avoid a taking of property; and*
- c. *The proposed variance is consistent with all applicable local, state, and federal law.*

The applicant appears to argue that the removal of significant trees is warranted based on the economical use variance criteria in SRC 808.045(d)(2). However, the applicant did not submit a Tree Regulation Variance application with the proposed development request, and did not address each of the applicable approval criteria, therefore, the City cannot apply the Economical Use Variance approval criteria or grant a Tree Regulation Variance for this application.

Further, the applicant, based on its own alternative site plans, has shown that a variety of other configurations are available based on the applicant's desired square footage. In addition, the applicant has not identified any evidence in the record that demonstrates that less commercial space than the maximum permitted for the site is not economically viable.

The City Council finds that the applicant has not demonstrated that the removal of significant trees is necessary in connection with construction of the proposed commercial facility, therefore, removal of significant trees, as provided in SRC 808.020(a)(2)(L), is not allowed. The application proposes the removal of significant trees protected by SRC Chapter 808, and therefore does not comply with all applicable standards of the UDC as required by SRC 220.005(f)(3)(A), and shall be denied.

Finding:

3. Class 2 Driveway Approach Permit Approval Criteria

The proposed driveway approaches rely on the applicant's proposed configuration set forth in their proposed site plan. Because the site plan is denied, review of the proposed driveway approaches is no longer necessary and will serve no purpose.

Conclusion:

Council finds that the applicant has not demonstrated that the removal of significant trees is necessary in connection with construction of the proposed commercial facility, therefore,

removal of significant trees, as provided in SRC 808.020(a)(2)(L), is not allowed as proposed by the applicant. Further, Council finds that the representations made by the applicant in 2006/2007 that the proposed development would be a community shopping center, and not a regional shopping center were relied on by the City when it accepted the applicant's "vicinity" for purposes of reviewing the proposed comprehensive plan change to commercial. The current proposal will have a regional market area and is therefore inconsistent with the representations made by the applicant in 2006/2007, and inconsistent with the comprehensive plan change decision. Therefore the applicant does not comply with the applicable criteria set forth in SRC 220.005(f)(3)(A) and is denied.