KELLINGTON LAW GROUP, PC

Wendie L. Kellington
P.O. Box 159
Lake Oswego Or
97034

Phone (503) 636-0069
Mobile (503) 804-0535
Facsimile (503) 636-0102
Email: wk@klgpc.com

September 10, 2020

Via Electronic Mail
(planningcomments@cityofsalem.net
and apanko@cityofsalem.net)
City of Salem City Council
c/o Aaron Panko, Planner III
Case Manager
City of Salem Planning Division
555 Liberty St SE, Rm 305
Salem, Or 97301

RE: Final Written Argument on Remand – Case Number SPR-DAP18-15

Dear Honorable Mayor Bennett and Members of the City Council:

This letter represents the Applicants'[1] final written argument on remand in the above referenced matter. Please include it in the record of this matter.

Executive Summary

A. Summary of LUBA's Remand

LUBA acknowledged that the site review application seeks a "limited land use decision" for a shopping center, and that the shopping center is a use permitted outright in the Commercial Retail (CR) Zone. That alone means that site plan review cannot be used to deny the shopping center. ORS 197.015(12) (a limited land use decision is a use "permitted outright").

LUBA specifically remanded for the City to consider Applicants' vested right to develop the subject 20.6-acre property pursuant to the City's 2007 comprehensive plan change and zone change (2007 CPC/ZC Decision or 2007 Decision). The 2007 Decision approved a 299,000 Gross Leasable Area (GLA) shopping center and imposed numerous conditions to mitigate for a shopping center of that size, including all of its traffic. Applicants propose to construct a significantly smaller shopping center than the 2007 Decision approved and that the Applicants are required by the City to mitigate for. The proposal's site-generated traffic volumes (no matter how you count them), are well within the volumes that Applicants have already mitigated for, as required by the 2007 Decision. It is beyond reasonable dispute that the Applicants have been required to mitigate for all of the impacts, including traffic impacts, for a much larger shopping

[1] Applicants are M & T Partners, Inc. and Pacific Realty Associates, L.P., hereinafter "Applicants" or "PacTrust" for ease of reference.

center. It would be illegal, unfair, and wrong to require that the Applicants mitigate for more impacts than are attributable to their proposed use.

LUBA anticipated that Applicants may have a vested right to approval of their shopping center. As such, LUBA said that on remand, the City need not consider traffic issues raised by the opponents. LUBA also anticipated that if the Applicants have a vested right to approval of their application, the tree issue cannot be used to deny the shopping center as it has been proposed by the Applicants.

B. Summary of the Applicant's Recommendations for the Manner in Which the City Should Respond to LUBA's Remand.

The response to the remand should address all issues raised and be as thorough as possible. If issues raised exceed the scope of LUBA's remand and are not specifically to be addressed in the City's remand decision, then the City's remand should explain that such is the case and why, in its findings.

The City should conclude that the Applicants have a vested right to the approval of their application for site plan review of a shopping center, which application is entirely consistent with the shopping center the City approved in the 2007 Decision. The City should determine that Applicants' vested right means the City's site review standards either cannot be applied at all or cannot be applied to deny the proposed shopping center as it is laid out and reflected in the application. The City should determine that, as a result, it need not, and chooses not to address, opponents' traffic issues, because they are irrelevant since Applicants' vested rights permits a volume of traffic for a shopping center up to 299,000 gross leasable area (GLA), which is greater than the traffic associated with the current proposal. The City should also determine that the tree ordinance cannot be applied to deny the shopping center because the vested right includes the right to develop a shopping center consistent with the general layout of the shopping center that the City expressly determined in the 2007 Decision did not have any natural resources that would affect development approval. 2007 Decision, p. 7.[2]

---

[2] The 2007 Decision states:

> "Further, the Applicant has submitted site plan examples as well as other evidence for the proposed use establishing that the Applicant's proposed use requires a parcel size larger than the 18.4 acres that is the Subject Property because it plans to develop the property in conjunction with the Abutting Property." 2007 Decision, p. 7.

And also states:

> "The Subject Property is primarily a vacant field. *There are no identified significant natural resources on the Subject Property*. Development of vacant urban land is expected. The proposed change will have no significant negative impact on the quality of the land." 2007 Decision, p. 19. (Emphasis supplied.)

Please understand that the City should **also** conclude, in the alternative, that the proposed use meets the city's site plan review traffic standard. That standard asks a modest question: whether "circulation of traffic into and out of the proposed development" is "safe, orderly, and efficient" and negative impacts have been mitigated. UDC 220.005(f)(3)(B). As the Oregon Supreme Court has explained, this type of standard requires evaluation only of access into and out of the development and the adequacy of the streets that immediately abut the development. *Siporen v. City of Medford*, 349 Or 47, 263-65, 243 P3d 776 (2010). There can be no reasonable dispute that the proposal meets that modest standard.

In this regard, the Public Works Director's memoranda dated March 27, 2020 correctly concludes that the conditions imposed by the 2007 Decision demonstrate that the proposed shopping center is already required to provide the facilities necessary to accommodate the shopping center's traffic impacts. Accordingly, the Public Works Director properly determined that, under the express terms of UDC 803.015(d), the site plan review application is exempt from having to provide a new Traffic Impact Analysis of the type contemplated under the City's Administrative Rule/Public Works Standards.[3]

The City should also find, in the alternative, that: (1) the Applicants' proposal to transplant the protected white oak trees (preserving 70% of their root systems in the process), sufficiently establishes that the trees are likely to survive and therefore the City's tree ordinance is either not triggered by the proposed site plan or not violated if it is triggered; and (2) Applicants have demonstrated that it is not possible to develop the shopping center to which the Applicants have a vested right and also maintain the trees in place, meeting the UDC standard for removal of the trees, in any event.

C. Summary of the Applicants' Vested Right

It cannot be disputed that the Applicants have a vested right. Both the City and opponents conceded at LUBA that the Applicants had a vested right. They argued only about what that vested right meant. LUBA explained that if Applicants have a vested right, "the city may not be able to apply site review criteria that would prohibit approval of the application."

The Applicants have vested their right to build the proposed shopping center depicted in their site plan review application, by investing at least $13,367,367 to date to satisfy the 2007 Decision conditions of approval and to take steps to develop the approved shopping center.[4]

Opponents' assertions that the City Council in 2007 did not review proposed site plans as part of the plan and zone change proceedings are contradicted by the 2007 Decision's findings. *See*, Anuta July 28, 2020 letter, p. 3.

[3] While the Applicants' 2018 Kittelson traffic study is captioned a "traffic impact study", the Director correctly concluded its scope was limited has he described, and that a TIA under UDC 803 that met all of the comprehensive standards in the Salem Administrative Rules ("SARs") was unnecessary.

[4] *See*, Request for Remand Proceeding Exhibit G (PacTrust June 15, 2020 letter) (listing expenditures).

After the 2007 Decision and in reliance on that decision, Applicants obtained City approvals, development permits, and statements of satisfaction of the original conditions of approval in 2008, 2009, 2010, 2012, 2013, 2015 and 2016, all at considerable expense. *See*, LUBA Record-7087-88.[5] The Applicants performed a great deal of other work in reliance on the 2007 Decision toward developing their property with the approved shopping center. For example, they performed property surveys, designed storm systems, delineated wetlands, and performed environmental studies for the development, in 2011. LUBA Record 1476-1484; 2264. They performed fill and removal work under permits in 2013-2014. LUBA Record 1500-04. In 2014 they obtained City subdivision approval (SUB14-01). LUBA Record 2141, 2144-60. They took traffic counts for the 2018 Kittelson traffic study in 2017. LUBA Record 2231. They performed water hydrologic studies in 2017. LUBA Record 4119-4123, 4153, 4186, 4187-4269, 5007-5011. They conducted soils studies in 2017. LUBA Record 4279. They performed geologic studies in 2017. LUBA Record 4135. They performed additional survey work in 2017. LUBA Record 5892. Applicants also began fulfilling many of the conditions of approval required by the 2007 Decision, making significant expenditures. Among those expenditures, at the request of the City in 2015, Applicants prefunded $3 million to satisfy a condition of approval in the 2007 Decision to widen the south side of Kuebler Boulevard, which constituted about 94% of the total project public improvements budget and, which the City has now completed.[6] Why wouldn't PacTrust, as a responsible member of the community, cooperate with the City's timeline for infrastructure improvements? It simply meant satisfying one of seventeen conditions of approval that moved closer to realizing the project that the City approved in the 2007 Decision. These expenditures furthered implementation of the 2007 Decision and established the Applicants' vested right to approval of this site review for the shopping center approved in 2007 Decision.

A vested right entitles the holder to proceed with the vested development regardless of new regulations adopted after the approval decision. Here, the 2007 Decision restricted the use of the subject property to a shopping center of up to 299,000 GLA; the 2007 Decision did not allow anything else to be developed on the property. Because the City did not have a "site review process" in 2007,[7] the 2007 Decision comprehensively dealt with development issues, like traffic and even natural resources.[8] The 2007 Decision expressly established the specific subsequent reviews necessary for the Applicants to establish a shopping center of up to 299,000

[5] References to the Record are to the LUBA Record following the original decision. References to the documents submitted on remand are to the party name and date of document.
[6] Request for Remand Proceeding, Exhibit G (PacTrust June 15, 2020 letter, p. 2); ($3 million / $3.21 million = .09375 or 9.375%). *See also*, First Open Record Exhibit 4 (Promissory Note).
[7] Site review was adopted by the City for the first time in 2008 and became effective on January 1, 2009. *See,* First Open Record Exhibit 2 (Legislative History of City Site Plan Review Ordinance, p. 1).
[8] With regard to natural resources, the 2007 Decision determined that there were no significant natural resources on the property. 2007 Decision, p 19. With regard to transportation, the 2007 Decision determined that with the required mitigation, all transportation standards would be met on the date of opening – thought to be 2009 –and that the development would not make traffic worse in 2025, when the shopping center was fully developed. 2007 Decision p. 25.

GLA on the subject property.[9] Consequently, Applicants' compliance with the conditions of the 2007 Decision means that the Applicants either have a vested right to build the shopping center without having to comply with the later adopted City site review standards, or that the current site review standards cannot be applied in a manner that denies the shopping center as it is proposed by the Applicants.

D. Summary Conclusion

Applicants respectfully submit that the voluminous record in this matter shows that the Applicants have a vested right to a shopping center of 299,000 square feet gross leasable area on the subject property, that traffic impacts were determined and resolved in the 2007 Decision and its conditions, and that it is impossible to enjoy that vested right and maintain the 8 significant oak trees in-place. Regardless, **the Applicants will transplant those trees to a suitable location on the subject property, rather than remove them**, which is a preservation strategy contemplated by the City's tree ordinance. This means the City's tree ordinance regarding significant trees is not violated, because no significant trees will be "removed" per the express terms of the City's code.

I. Specific Issue – The Applicant Will Not Remove Any Significant Trees

In the June 16, 2020 request for remand, Applicants explained that the proposal has been supplemented to include transplanting all eight of the "significant" oak trees on the subject property, at an estimated cost in excess of $450,000, to the southeastern portion of the property. The Arborist Report provided in Exhibit B to the request for remand letter, analyzes the current condition of the trees and explains the manner in which the tree transplanting will be completed. That letter was supplemented by additional arborist reports dated July 24, 2020 and August 12, 2020. The transplant means the Applicants are not "removing" those significant trees.

UDC 808.015 prohibits the "removal" of significant trees. UDC 808.005 defines "Tree removal" to mean:

> "to cut down a tree or remove 30 percent or more of the crown, trunk, or root system of a tree; or to damage a tree so as to cause the tree to decline or die. ***."

The proposal to transplant the eight "significant" trees does not "remove" the trees as defined in UDC 808.005. The proposal does not cut the trees down, does not remove more than 30% of the crowns, trunks or root systems, and will be done with the care and experience outlined in the arborist reports such that it will not "damage the trees so as to cause them to decline or die." *See*, e.g., Applicants' Rebuttal, Attachment 3, p. 2.

Despite opponents' claim of mere semantics, there is in fact a substantive difference between "removing" and "transplanting" the trees. The City's tree ordinance expressly reflects

[9] The subsequent reviews that were contemplated, were expressly identified by the 2007 Decision. 2007 Decision p. 38.

the reality that certain actions designed to save trees do not constitute "removal." *See State v. Couch*, 341 Or 610, 617, 147 P3d 322 (2006) (when a code or statute provides an express definition of a term, then that definition is controlling). Here, the UDC limits "removal" to cutting down a tree, removing 30 percent or more of important components of the tree, or otherwise damaging a tree causing it to decline or die. A transplant is none of those things – the tree is not "cut down," there is no removal of crown, trunk or root, and the tree is not mortally damaged (to the contrary, it continues to live).[10]

Moreover, **to accept opponents' interpretation would have the perverse result of discouraging efforts to save significant trees**; **very few developers would consider the much more expensive option of transplant over removal, if either action required the same removal permit.** Fortunately, the City code encourages careful efforts to transplant significant trees, and Applicants are not proposing to "remove" the eight white oak trees as that term is expressly defined by the UDC. By specifically defining "removal" as it does, the City's tree code expressly contemplates the situation here – that trees can be transplanted and, therefore, not "removed."

The City should also recognize that Applicants' proposal to transplant the trees is voluntary. Applicants have a vested right to remove those trees and, regardless, they can be removed under the City's tree code because it is necessary to do so to allow the shopping center approved by the 2007 Decision, proposed here. However, as a show of good faith, Applicants are willing to voluntarily incur significant expense to preserve a City resource that would otherwise to be lost.

Certain opponents have argued (without supporting evidence), that transplanting the trees will adversely affect their "ecosystem." *See*, e.g., Dalton e-mail dated August 12, 2020. Monarch Tree Services directly addressed this issue in their August 12, 2020 rebuttal. *See*, Applicants' Rebuttal, Attachment 3, p. 4. Monarch noted that, "there is nothing unusual or unique about the area within which the trees at issue survive. They can be transplanted to the proposed location on the property with the reasonable expectations of their survival that we explained in our report." Monarch further explained that the trees' ecosystem will not be adversely affected because the transplanting will occur on the same property where the trees now exist. Monarch ultimately concluded that, "The best protection for these trees is for a careful effort to relocate them to a sustainable portion of the property, by competent, experienced arborists, such as ourselves, in the mindful manner we have proposed." Applicants' Rebuttal, Attachment 3, p. 4.

Other opponents have argued (also without evidence), that it is not possible for old trees to be transplanted and survive. *See*, e.g., Aiello e-mail dated July 23, 2020. Applicants' arborist has successfully transplanted trees of the size found on the subject property and the arborist is

[10] One of the eight trees will have a lesser chance of survival upon transplant than the other seven, but that tree is already expected to die in its current location, and the transplant will not reduce its chances of survival. *See* Request for Remand, Exhibit A, p. 1, and Exhibit B (Monarch Report, p. 11 ("Maintaining this tree in a developed environmental condition is not sustainable and thus recommended for relocation as its best chance for survival.")).

confident that they can transplant the trees as they have described. Applicants' Rebuttal, Attachment 3, p. 3-4. The City Council should rely on the professional opinion of an ISA Certified Arborist, not baseless speculation of a non-expert.

II. Specific Issue – There are no "Heritage Trees" on the Subject Property

Opponents repeatedly misrepresent the eight Oregon White Oak Trees on the property and assert that they are "Heritage Trees" under the Salem Code. *See*, e.g., Anuta Letter, July 28, 2020, p. 3, 10, 12, 15; Meisner e-mail dated August 11, 2020. The assertion is factually and legally incorrect. As expressly defined by UDC 808.005, the Oregon White Oak Trees are "Significant trees", but they are certainly not "Heritage trees".[11] The term "Heritage tree" is specifically defined by UDC 808.005 and 010(a). No tree on the subject property meets the definition of "Heritage tree" under the City code definition. A "Heritage tree" requires the (1) nomination of the property owner that a particular tree be considered a "Heritage tree", and (2) a specific designation of the nominated tree as a "Heritage tree" by the City Council must also occur. Neither has occurred. The claim that any tree on the subject property is a "Heritage tree" is wrong and lacks any support in the record.

In addition, while largely irrelevant, some opponents assert that the Oregon White Oak Trees are "ancient" or "200-300" years old. *See*, e.g., Anuta Letter, July 10, 2020 p. 2 (ancient); Walker e-mail dated July 27, 2020 (200-300 years old); Rohrs e-mail dated July 27, 2020 (200-300 years old). Monarch Tree Services, based upon a simple math formula it explains, establishes that the oldest onsite "Significant" tree is approximately 188 years old and the youngest is 140 years old. Monarch Letter, August 12, 2020, p. 4. Opponents' characterizations are wrong and serve no purpose, although they do illustrate the persistent pattern of misstating facts and making assertions devoid of supporting evidence, that is evident throughout the opponents' case.

The City Council should (1) reject opponent claims that the trees on the property are "Heritage trees"; (2) determine the Applicants' vested right means that the City cannot apply the City tree ordinance to deny the proposal as it has been submitted; (3) that regardless, the Applicants' transplant program will not "remove" the Significant trees, per the express terms of the City's tree ordinance; and (4) regardless, that it is necessary to remove the trees to allow this commercial development to proceed. Applicants will accept a condition of approval that provides:

---

[11] UDC 808.005 provides, in relevant part:

> *"Heritage tree* means a tree designated as a heritage tree pursuant to UDC 808.010(a).
>
> * * * * *
>
> *Significant tree* means rare, threatened, or endangered trees of any size, as defined or designated under state or federal law and included in the tree and vegetation technical manual, and Oregon white oaks (Quercus garryana) with a dbh of 24 inches or greater."

"The eight (8) 'significant' white oak trees on the subject property shall be transplanted and maintained after transplant, consistent with the recommendations of the PacTrust Remand Letter, Exhibit B, Arborist's Report."

III. Specific Issue – Details About the Applicants' Vested Right

a. Applicants' have a Vested Right to Approval of the Development Authorized by the 2007 Decision

As noted in the Executive Summary, a vested right allows development that may not and need not conform to presently applicable regulations. Here, the Applicants have a vested right to develop the site in the manner approved by the 2007 Decision.

The 2007 Decision is unusual in many respects. The decision changed the plan designation and zoning classification for the subject property, which every decision of that type does. But it also expressly identified a single use (a shopping center), that is the only use allowed and further recognized that the subject property would likely be developed as a unified shopping center. Furthermore, the 2007 Decision specifically imposed limits as to the scale of the only allowed use, imposing exactions based upon the maximum impacts of that use. All of the above was supported by express findings about the lack of natural resources on the subject property and the design considerations subsequent development proposals would be subject to. As a result, the 2007 Decision was not a typical site-specific plan and zone change that leaves most development considerations to subsequent land use applications, as would likely occur today. It was instead a comprehensive approval, much more specific in what it reviewed and allowed, which made sense given that, at the time, the City lacked any site or design review processes to later apply. Furthermore, the specific types of subsequent reviews contemplated for the approved shopping center were expressly identified in the 2007 Decision.[12]

Applicants' vested right is to the development authorized in the 2007 Decision – a shopping center up to 299,000 GLA, as the Applicants have laid it out. This proposal falls well within the approved development parameters and contains no impacts that exceed those expressly contemplated, mitigated, and authorized by the 2007 Decision. Under vested rights law, the City cannot apply standards that would otherwise now apply, to deny the application. With respect to trees, the 2007 Decision expressly approved development of 299,000 square feet of GLA and its required parking, which would occupy the entire subject property – all trees would have to be removed. This is the reason for the City Council's findings in the 2007 Decision explaining that there were no significant natural resources on the property.[13] Regarding transportation facilities, the evidence in the record plainly demonstrates that the City exacted transportation improvements in the 2007 Decision, many of which have been completed, to mitigate for a greater volume of transportation trips and related impacts than will be generated by the proposed shopping center. Thus, any evidence of potential problems with the City's transportation system is not "caused" by the proposed development and any further

[12] 2007 Decision, p. 38.
[13] 2007 Decision, p. 19.

transportation exactions imposed on the Applicants raise significant Constitutional takings issues, because they would be mitigating for the impacts of others, not the proposed development.

b. Vested Rights Legal Framework

Applicants presented a detailed discussion of the vested rights legal framework in their letter requesting remand. For purposes of brevity, the bulk of that analysis will only be summarized here. However, Applicants refer the City Council to the request for remand letter should any Councilors have further questions about vested rights.

The seminal case concerning vested rights in Oregon is *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973), where the Oregon Supreme Court set forth seven factors it considered in determining whether the expenditures in furtherance of development established a vested right to complete the development. Several years later, the Court of Appeals in *Ecklund v. Clackamas County*, 36 Or App 73, 583 P2d 567 (1978), summarized the main *Holmes* factors, consolidating them into four main areas of focus, explaining:

> "The Supreme Court in *Holmes* identified four essential factors to be considered in asserting the evidence of a nonconforming use; (1) the ratio of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost. None of these factors is predominant; they are merely guidelines in assessing the evidence and deciding the issue." 36 Or App at 81.

The Court of Appeals has subsequently reiterated the last of the above points – that not all *Holmes* factors will come into play in any particular case. *Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 8, 724 P2d 341 (1986).

Much attention has been paid to the "ratio of expenditures" factor in numerous cases. In determining whether claimed expenditures are properly considered under this factor, LUBA has held that several other *Holmes* factors are relevant and include: (1) identifying the time at which the expenditures were made; (2) analyzing whether the expenditures were made in good faith and were lawful when made; and (3) determining whether the expenditures were directly related to the proposed use of the property. *DLCD v. Curry County*, 19 Or LUBA 249, 255 (1990).

The *Holmes* court also showed concern about the "substantiality" of the expenditures. The Court explained:

> "in order for a landowner to have acquired a vested right * * * the commencement of the construction must have been substantial, or substantial costs towards completion of the job must have been incurred." 265 Or at 197.

In response to that issue, nearly 40 years after *Holmes*, the Oregon Supreme Court revisited that case and noted that given the changing nature of land use laws and the significant up-front costs that landowners are required to incur, "We cannot lose sight of those changes in applying the factors identified in *Holmes* to current conditions." *Friends of Yamhill County v. Bd. of Com'rs of Yamhill County*, 351 Or 219, 237-38 (2011). The Court explained that "when the ultimate cost of a project runs into millions of dollars, an expenditure may be substantial even though it's only a small percentage of the projected cost." *Id*. at 248. That is the context presented here. As the evidence in the record demonstrates, Applicants have spent millions of dollars implementing the 2007 Decision as required by that decision.

With that background in mind, Applicants turn to the *Holmes* factors as they apply to this proceeding.

1. Applicants Have A Vested Right To Develop Under The *Holmes* Factors

Applicants' June 16, 2020 Request for Remand and the accompanying exhibits thoroughly addressed the *Holmes* factors based both on the original record and on the additional evidence submitted on remand. The final argument below incorporates those arguments by reference and summarizes and supplements them.

a. Ratio of Expenditures to Total Costs

The evidence in the record shows that the Applicants have expended at least $13.3 million towards completing the 299,000 square feet of GLA development the City approved in the 2007 Decision. *See* PacTrust June 15, 2020 letter (Request for Remand Proceedings, Exhibit G). The expected total cost for the approved development, to include the above expenditures, is approximately $61.4 million. The ratio of expenditures to total costs is roughly 1:4.5, meaning approximately 22% of the total cost of the project has been spent – significantly within the expenditure ratio the *Holmes* court concluded granted the petitioner in that case a vested right to develop.

The Applicants have already expended $3,765,190 of the anticipated $6.25 million in transportation exaction costs imposed by the 2007 Decision's conditions of approval. As summarized in the Request for Remand, other expenses incurred to implement the 2007 Decision include: mass grading costs for the western portion of the property; construction of the Salem Clinic medical center building and tenant improvements; costs related to the development and leasing of the second medical office building; mass grading costs for the shopping center property; waterline improvements in Kuebler Boulevard; and additional shopping center design, transportation design, application material costs, and more. Applicants' expenditures also include PacTrust's dedication of land to the City, estimated at approximately $80,000, for transportation improvements.

The sheer amount of the above expenditures meets the *Holmes* significant expenditure requirement, as explained in *Friends of Yamhill County*, and the ratio of expenditures to costs weighs greatly in the Applicants' favor.

b. Good Faith of the Landowner

As discussed in the Request for Remand, there is no basis to conclude that the Applicants did not proceed with all of the above expenditures in good faith. In the proceedings that resulted in the 2007 Decision, PacTrust openly presented its plan for the unified development on the 18.4-acre parcel that was the subject of the application and the adjacent 10-acre parcel. The 2007 Decision itself repeatedly recognizes this. For example, Condition 14 included the development of the adjacent 10 acres in reaching the 299,000 square feet of GLA limitation. More significantly, the decision used the scale of the unified development as a basis for imposing the conditions of approval, which exacted the estimated $6.25 million for public improvements to existing transportation facilities discussed above.

The Applicants' good faith is further exemplified by the 2009 application and City approval for the zone change to the medical center property, which is consistent with the 2007 Decision. In 2012, the City approved development of part of the unified project approved in the 2007 Decision when the City approved the site plan review for the medical clinic and office building. The City expressly referred to that portion of the development as "Phase I" of the larger project approved in 2007. Thus, the City's approvals throughout the years provided PacTrust a reasonable basis to believe that the City authorized the entire development proposal through the 2007 Decision and conditions of approval. Stated differently, PacTrust would not have willingly made those expenditures if it had any reason to believe that its ability to develop the shopping center was in jeopardy. As the 2007 Decision recognized, development of the medical and office buildings alone was not a sustainable proposition. The decision explained:

> "Moreover, the record establishes that in the absence of the proposal or something like it, the costs of supplying infrastructure in the area are so high that a single commercial use like a medical office cannot establish a new office on the abutting 10-acre property and provide commercial medical services to Salem citizens in south and southeast Salem." 2007 Decision, p. 20.

Importantly in 2015, the City accepted the benefits of its approval of the unified project when it negotiated an agreement with PacTrust to fund 94% of the cost of substantial public improvements to Kuebler Boulevard well in advance of the time at which PacTrust was required to complete them. PacTrust's obligation to make improvements to Kuebler Boulevard arose because it had an obligation to mitigate the impacts of the development of the shopping center with 299,000 square feet of GLA on the entire site. In other words, without the shopping center approval, the City had no basis to ask PacTrust to pay for the Kuebler Boulevard improvements in 2015 and PacTrust would have no reason to accede to the City's request. The City's request that PacTrust pay for these improvements in advance was a clear and unambiguous signal from the City that it fully expected PacTrust would eventually build the 299,000 square foot retail shopping center/medical office buildings that PacTrust presented in its 2006 plan change and zone change request that was approved in 2007.

Additionally, even as late as October 2018, the City took the position that PacTrust was authorized to proceed with the retail shopping center component of the project. That year, the

City Planning Administrator approved PacTrust's site plan review, which illustrated the retail shopping center with a Costco store and additional retail pads. LUBA Record 6042.

Opponents Eason and Rice, in their letter dated July 28, 2020, suggest that Applicants fail the "good faith" factor "if they have misled the City and neighbors to the area to be developed about their intent for use of the land." Opponents Eason and Rice are among other opponents who have falsely insinuated or allege that Applicants lied about the proposed development during the 2007 Decision. They are wrong and both LUBA and the Court of Appeals agreed that the present proposal is consistent with the representations made to the City Council in 2006-2007 and the 2007 Decision. Opponents' arguments about Applicants' lack of good faith are without merit or evidence.

There can be no reasonable doubt that each of PacTrust's expenditures in furtherance of the shopping center approved by the 2007 Decision was made in good faith. This factor weighs in favor of recognizing that PacTrust has a vested right to develop the project.

c. Relationship of Expenditures to Completed Project

All of the expenditures presented by Applicants in this proceeding relate directly to implementing either the proposed development expressly approved by the 2007 Decision or to the required mitigation of that development as specified in the 2007 Decision's conditions of approval. *See*, Request for Remand Proceeding Exhibit G (PacTrust June 15, 2020 letter). In fact, on September 12, 2012, the City Planning Administrator approved the Site Plan Review application to develop the medical clinic building and separate medical/office building. In that decision, the City Planning Administrator acknowledged the proposed development as part of the unified shopping center development. The expenditures on mass grading and build-out of the medical clinic building and medical/office building were integral parts of the unified shopping center approved by the 2007 Decision. Indeed, but for the City's approval and ongoing facilitation of the development of the unified shopping center, the Applicants would never have spent money on the smaller medical office/clinic part of the center for the reasons explained in the above quote from page 20 of the 2007 Decision. *See also* Applicants' Remand Letter, Exhibit G, p 2.

Opponents Eason and Rice argue that the expenditures made by Applicants "are necessary for whatever development they make on that land" and, consequently, "it is not like the improvements they have made would be for nothing." Eason/Rice Letter dated July 28, 2020. Opponents misunderstand this factor. The requirement to demonstrate the relationship of expenditures to completed project is whether the expenditures are in furtherance of implementation of the approved project. Opponents appear to concede that they are (besides the fact that many expenditures are imposed through conditions of approval). It matters not whether the expenditures could be used for another development on that same site as opponents contend. That is not a basis for concluding the factor is not satisfied.

The expenditures listed by Applicants are directly related to completing the project approved by the 2007 Decision. This factor weighs in favor of recognizing a vested right.

d. Nature of the Project, Location and Ultimate Cost

The 2007 Decision established that the entire subject property (the combined 18.4 acres and 10 acres) can only be developed as a shopping center with associated medical clinic/office buildings of up to 299,000 square feet of GLA. That use was approved in an area where the City expressly found there was a lack of alternative sites for such development to occur. There was never any question that the site was to be developed with the uses PacTrust intended and expended money in reliance upon. Under the 2007 Decision, the site could be put to no other use.

As the quote from page 20 of the 2007 Decision explains, it was consistently understood by all concerned that it would never be feasible to proceed with only the medical office portion of the shopping center. In light of the extensive off-site improvements the City required, development of just the medical clinic and office was simply not economically viable. The subject property was approved to be and is a unified project that requires the retail shopping component to justify expending the mitigation costs the City required. Indeed, the exactions were imposed expressly to address the impacts of the unified 299,000 square foot GLA shopping center.

In the 2012 City Decision approving the Site Plan Review for the medical clinic/office building, the City acknowledged that in a development the size of that approved in 2007, any developer/owner would install improvements over time to facilitate the ultimate completion of the project.[14] Logically, it would have taken longer for any developer to build out the shopping center, in view of the recession that gripped the state, nation and world, shortly after the 2007 Decision. Here, the expenditures detailed in the above-cited evidence were all made to complete an approved shopping center of up to 299,000 square feet GLA. The total estimated cost of the completed project is approximately $61.4 million. That is a reasonable cost for a project of this size.

The nature of the project, expressly limited to this use at this location by the 2007 Decision, as well as the ultimate cost of approximately $61.4 million for a unified shopping center project, weigh in favor of a vested right for Applicants.

All four *Holmes* factors weigh overwhelmingly in Applicants' favor. None weigh against it. Furthermore, given that the expenditures the Applicants have already made are in the millions of dollars, those expenditures are unquestionably significant, which weighs even more in Applicants' favor. The City Council can reach no other reasonable conclusion than that Applicants have a vested right to implement the development project approved by and, in fact, required by the 2007 Decision.

---

[14] Request for Remand, p. 17; 2012 Site Plan Approval, LUBA Record-4028 (Conditions 6 and 9, requiring completion of infrastructure work prior to building permits for the retail shopping center identified as Phase 2, other conditions require work to be completed before building permit issuance for Phase 1, the medical and office buildings).

2. Applicants' Vested Right Means the Proposal as Submitted May Not be Denied or Redesigned by Either the City or Opponents

While some opponents concede that the Applicants have a vested right, they erroneously claim that it essentially gives the Applicants nothing.[15] Opponents' position is contrary to law. A vested right will necessarily, in some respect or another, be inconsistent with the present local land use regulations. Yet, because of the vested right, an approved use must be allowed to be developed and then used as approved. If the development complied with all current land use regulations, then the vested rights question would be irrelevant.

That is what led LUBA to explain that, despite the City's 2018 denial based upon present approval criteria, Applicants may (and do, in fact) have a vested right to develop the Applicants' shopping center as requested, meaning the denial bases are unlawful. This is so even if the City were to conclude that the proposed site plan is inconsistent with one or more otherwise applicable site plan review standards. In addition, LUBA recognized the limited land use decision aspect of site plan review greatly constrains the City's discretion to deny the proposed use.

This is not a conditional use proceeding where the City has discretion to determine whether a requested use is even allowed and where the City can ultimately deny that use. Consequently, the City does not have discretion to deny the site plan review application because of the limitations imposed by the law related to both vested rights and limited land use decisions. Furthermore, as discussed in greater detail below, at the time of the 2007 Decision, there was no site review process or similar requirements in the City Code. Accordingly, the 2007 Decision expressly identified the reviews that would be undertaken prior to building permit issuance and Site Plan Review is not on the list of future reviews provided by the 2007 Decision, because it did not exist. *See*, 2007 Decision, p. 38.

Given all of the above, opponents' contentions – that Applicants' vested rights are insignificant or afford no right to develop the project as proposed – have no legal merit. As the evidence in the record and the analysis herein demonstrates, the 2007 Decision authorized the future use of the property as a shopping center as proposed and the conditions under which the shopping center will be reviewed. Those rights are now vested.

3. The Arrangement of the Proposed Shopping Center is Vested

The 2007 Decision was approved not just based on the described uses, but also based on the site plan examples and other evidence for the proposed use. 2007 Decision, p. 7.[16] Those

[15] *See, e.g.,* Dalton Letter, August 12, 2020 (conceding vested right, but only "to develop land consistent with the City's overall guidelines re. 'commercial development.'" That of course is wrong, since the property is zoned CR, and regardless, a shopping center is the only use allowed under the 2007 Decision).

[16] The relevant passage states:

site plan examples consist of several documents in the record here. One is the now-familiar "bubble diagram" that plainly shows the main retail development on the southeastern portion of the subject property (where the eight Oregon white oak trees are), the medical buildings on the southwestern portion of the property, smaller retail development along Kuebler Boulevard and parking throughout the center of the site. LUBA Record-2450. That diagram also shows the main accesses to the property to include the right-turn only access from Kuebler Boulevard, the SE 27th Avenue entrance and the SE Boone Road entrance. Also in the record from the 2006/2007 proceedings is a diagram showing the landscape buffer concept for SE Boone Road. LUBA Rec-672. That drawing shows, in plan and cross section, the intense retail development located on the southern portion of the property, also where the Oregon white oak trees are situated.

Opponents assert that while these and other materials were presented to the City Council in the 2007 Decision's proceedings, there is no evidence that the City Council noticed them or relied on them. This argument is both irrelevant and wrong. The materials are expressly referenced in the 2007 Decision (see quote provided in footnote 16 herein), which expressly cites and relies upon those drawings in reaching the 2007 Decision to approve the shopping center. But also, the City Council imposed conditions of approval that reflected the submitted documents. For example, Condition of Approval (7) provides, "The developer shall provide right-in access from Kuebler Boulevard[.]" And Condition of Approval (12) provides:

> "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 Boon 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*." 2007 Decision, p. 3. (Emphasis supplied).

The emphasized language above directly reflects the berms shown in the landscape buffer concept diagram discussed above. The fact that the City Council not only cited the materials, but imposed conditions of approval that reflected the submitted conceptual plans, is indisputable evidence that the City Council was aware of and considered the potential arrangement of the shopping center for which the proposal is completely consistent, in approving the shopping center. The right to an arrangement of the anchor shopping center building that is consistent with the 2007 Decision, is vested.

> "Further, the Applicant has submitted site plan examples as well as other evidence for the proposed use establishing that the Applicant's proposed use requires a parcel size larger than the 18.4 acres that is the Subject Property because it plans to develop the property in conjunction with the Abutting Property." 2007 Decision, p. 7.

Opponents' assertions that the City Council didn't see proposed site plans as part of the plan and zone change proceedings are contradicted by the 2007 Decision's findings. *See*, Anuta July 28, 2020 letter, p. 3.

4. The Vested Right Includes the Right to Traffic Volumes Consistent With What the 2006/2007 TIA Showed Would Result From the 299,000 Square Feet Of GLA Shopping Center Approved by the 2007 Decision and the Transportation System Mitigation Measures Imposed by That Decision.

A significant issue during the 2007 Decision's proceedings was the adequacy of the 2006 TIA and the capacity of the City's transportation system to handle the volumes of traffic that would be produced by the proposed use. Indeed, that was one of the primary bases for the appeal to LUBA of that decision. *See*, *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008). The traffic volumes evaluated by the 2006 TIA and supplements, led to corresponding conditions of approval, which exacted transportation system improvements to mitigate for the impacts of those traffic volumes associated with a 299,000 square foot GLA retail shopping and service center approved by the 2007 Decision. Consequently, Applicants have a vested right develop the subject property consistent with those traffic levels. The proposal here is consistent with the traffic levels expressly approved (and mitigated) by the 2007 Decision.

The City Council's 2007 Decision expressly recognized that the 2006 TIA evaluated the traffic impacts from significantly higher levels of traffic than was ultimately approved. For example, at page 29 of the 2007 Decision, the City Council explained, "Further, the TIA evaluated a larger shopping facility than was ultimately proposed by the Applicant and allowed by the conditions of approval to this decision." It reemphasized that point on the following page, page 30, of the 2007 Decision: "Based on the above, it is apparent that the TIA likely overstates rather than understates trips. This is because the TIA analyzes the same use categories under the Trip Generation manual, but for a greater square footage of gross leasable area than Council allowed in this decision."

In fact, the 2006 TIA was based on a shopping center consisting of 314,000 sq. ft., GLA. In other words, as the decision recognizes, the 2006 TIA overestimated the impacts of the permitted development. And it did so with a planning horizon of 2025. 2007 Decision, p. 27.

The 2007 Decision recognizes that the TIA for that proceeding included vehicle trip rates based on a "reasonable worst-case development scenario" of occupants for the retail shopping center. *See*, 2007 Decision, p. 14, 19, 29, 30, 38. So, not only was the 2006 TIA conducted for a larger facility, it included the most traffic-intensive occupants of the proposed facility. Still, even with the "reasonable worst-case development scenario," once the mitigation measures are accounted for, the 2006 TIA and its supplements demonstrated that there would be no greater impacts to the City's greater transportation system due to the permitted use. As the City Council described in the 2007 Decision, "The TIA is complete, accurate and transparent." 2007 Decision, p. 24. City Staff and ODOT concurred with the TIA. 2007 Decision, p. 29. And as noted above, the legal challenge to the adequacy of the TIA failed on appeal to LUBA.

As demonstrated in the May 2018 Kittelson traffic study for this proceeding, the proposed shopping center actually generates fewer trips than the 2007 Decision approved:

Table 1. Total Net New Trip Comparison of the Approved TIA (2006) and Proposed Kuebler Gateway Shopping Center (2018)

Land Use Scenario	Daily Trips	Weekday PM Peak Hour Trips	Saturday Midday Peak Hour Trips
		Total	Total
Proposed Development (plus approved Salem Clinic)			
Proposed Costco & Retail Pads	7,743	747	986
Salem Clinic and Medical/Office Bldg. (Existing)	815	85	40
Approved 2006 Rezone TIA			
September 2006 TIA	9,660	900	1,350
Difference = Proposed Kuebler Gateway Shopping Center - Approved 2006 Rezone	**-1,102**	**-68**	**-324**

Furthermore, the mitigation measures, imposed by the 2007 Decision's conditions of approval, are for the greater traffic volumes approved by that decision. The first seven conditions of approval to the 2007 Decision impose measures that mitigate for the impacts generated from traffic levels greater than what is allowed by the 2007 Decision and for significantly greater traffic levels than what the shopping center proposed here, will generate. It is in large part the Applicants' good-faith implementation of these mitigation measures, to the tune of several million dollars, that has vested Applicants with the right to develop a shopping center per the 2007 Decision. The traffic volumes generated by the shopping center proposal at issue here, and its impacts on the City's overall transportation system, fall well within the volumes allowed by the 2007 Decision. Again, the City Council's 2007 Decision explains, "Therefore, the proposal and its required mitigation efforts will improve the transportation system adequately mitigating its own impacts[.]". 2007 Decision, p. 24. *See also*, Applicants' Rebuttal Attachment 5 (Kittelson & Associates p. 2 ("The Transportation Planning Rule section within the 2006 TIA established that even with a 314,000 square feet GLA shopping center, with the approved mitigation, in 2025 that larger transportation system was predicted to function better than it would function without the development and its required mitigation[.]")).[17]

If Applicants are not entitled to develop up to the levels approved by the City Council in 2007, serious Constitutional takings issues arise given the transportation mitigation exactions imposed by the 2007 Decision's conditions of approval that continue to apply today. The U.S. Supreme Court cases *Nollan* and *Dolan* require that there be both an essential nexus and rough proportionality for an exaction to be Constitutional.[18] If the Applicants are not allowed to utilize the traffic volumes for which the exactions are based to establish the proposed shopping center,

[17] The 2007 Decision, p 39, similarly states: "As explained in the TIA, Kuebler Blvd. is able to accommodate the traffic from the proposed use and in fact under the proposal the area transportation system including Kuebler Blvd, *will function better than it currently does under the proposal*." (Emphasis supplied.)

[18] *Nollan v. California Coastal Com.,* 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987) (establishing "essential nexus" test); *Dolan v. City of Tigard*, 512 Us 374, 114 S Ct 2309, 129 L Ed2d 304 (1994) (establishing "rough proportionality" test).

then those conditions which demand improvements be in place today and that demanded other improvements before the shopping center was built, violate these constitutional standards.

There can be no doubt that Applicants have a vested right to the traffic volumes that were approved by the 2007 Decision and the corresponding transportation system mitigation measures imposed by that decision's conditions of approval. Applicants have a vested right to traffic levels that would be generated by a 299,000 square foot GLA shopping center, and the proposal is for only 228,062 square feet GLA. That right cannot be taken away by other traffic users, as opponents suggest. Nor can opponents challenge the City's finding in 2007 that the mitigation measures imposed are adequate to offset the transportation system impacts that would flow from a 299,000 square foot GLA unified shopping center. Opponents do nothing more than reiterate the arguments made in *Lufkin v. City of Salem* that challenged the adequacy of the TIA and the City Council's conclusions. Those arguments did not prevail then and have even less merit now. Opponents' arguments amount to an impermissible collateral attack on that prior land use decision and must be rejected. *Just v. Linn County*, 59 Or LUBA 233, 236 (2009).

5. <u>The Applicants' Vested Right Includes a Right to Benefit From the Traffic Mitigation Imposed By the 2007 Decision in Exchange for the Right to Develop a Shopping Center of up to 299,000 square feet GLA.</u>

An important corollary to the exactions imposed by the 2007 Decision's conditions of approval is that, because the conditions of approval imposed exactions to fully mitigate for all of the impacts to the City's transportation system that would flow from the permitted uses, and do so at levels greater than that permitted by the decision, the Applicants also have a vested right to not have to provide any further mitigation to the greater transportation system because its proposal not only falls within the traffic volumes permitted by the 2007 Decision, but also the actual traffic volumes are less. Applicants are entitled to benefit from the mitigation they have already paid for, at the behest of the City, in furtherance of the 2007 Decision.

This is not to say that the 2007 Decision resolved all issues. Indeed, the 2007 Decision recognized that on-site circulation, for example, remained an issue for subsequent determination at the time a development proposal is submitted. *See*, 2007 Decision, p. 38. Also, the 2007 Decision does not discuss the adequacy of the development proposal with respect to ingress and egress for the subject property, which could not be analyzed until a detailed development plan was submitted. Thus, the May 2018 traffic study conducted by Applicants for the subject site review reviewed these issues in addition to others, including a sensitivity check that the proposed traffic volumes remained within those analyzed by the 2006 TIA, as requested by City staff.[19]

[19] Opponents' counsel contends there is no evidence in the record to support Applicants' stated reasons why the City transportation staff identified the limited scope for the transportation analysis. This is flatly incorrect. Not only did staff never contradict Applicants' assertions, the March 27, 2020 Transportation Staff Memorandum clearly states:

However, as the 2007 Decision plainly explained, "[T]he traffic impact of a 'worst-case' commercial development on the adjacent street *network* has been analyzed in the TIA." 2007 Decision p. 38. The 2007 Decision was based upon a TIA that looked at the street network and concluded the Applicants met all relevant standards. 2007 Decision p. 14, 23-31, 47. The 2007 Decision's mitigation measures for that "worst-case" scenario have already been exacted from Applicants. There is no basis for the City to impose further transportation system exactions on the Applicants. The Applicants have made many and will soon make other of the improvements required by the 2007 Decision and they have a vested right to those exactions and no more.

The Applicants cannot be required to pay for or install further improvements to the City's transportation system.

6. The Vested Right Includes a Right to Subsequent Review of Development Proposals Consistent With Only Those Reviews Identified in The 2007 Decision's Findings That a Future Development Proposal Would Be Subject to and Not Have to Repeat Reviews for Matters the 2007 Decision's Findings Already Addressed.

The 2007 Decision carefully identified a number of reviews that any proposed development for the site would have to undergo before development. This is significant because as noted elsewhere, at that time the City did not have a Site Plan Review process for development.[20] As of 2007, PacTrust's next step would have been to seek development approval for the entire shopping center. Because of the intervening recession, PacTrust continued to move forward to implement the 2007 Decision by proceeding with development land use actions that facilitated rezoning and development of the medical clinics and office building and laying the groundwork for the shopping center.

The 2007 Decision mentions several development-level reviews that future development of the property would be subject to. Most significantly, the 2007 Decision explains:

> "2. Shopping and Service Facilities: Development of shopping and service facilities may be approved only after reviewing a development plan consisting of maps and written statements.

> "The City's position is that the TIA that was submitted in 2018 was to verify that the traffic generated by the proposed development did not exceed volumes that were approved in the 2007 CPC/ZC and to analyze the driveway access to 27th Street SE."

[20] *See*, Kellington Law Group Letter July 23, 2020 (re: legislative history of the City of Salem's Site Plan Review Ordinance). That letter and its attachments refutes Mr. Krishnan's assertion the City has not changed any of the rules that would apply to development authorized by the 2007 Decision. Krishnan Letter, dated July 28, 2020 (argument repeated in subsequent letter dated August 12, 2020).

> "This policy applies to the development of shopping and service facilities, and is not directly applicable to this application. *Information required by this policy* will be provided at the time the site is proposed for development. *The location of buildings, arrangement of parking and loading facilities, on-site circulation, buffer yards, setbacks, and landscaping, and other features as may be required, will be shown on the detailed building plans that will be submitted for permits*. The impact of the redesignation of the site on adjacent neighborhoods is discussed in these findings, and the traffic impact of a "worst-case" commercial development on the adjacent street network has been analyzed in the TIA. The availability of transit service is a part of the pre-application comments from the Transit District. Utility and storm water plans are subject to City design standards and will be reviewed and approved prior to site development. The necessary information will be provided on the plans submitted at the time development permits are requested. The requirements of this policy are met by providing the referenced information for review and approval prior to development of the site." 2007 Decision, p. 38. (Emphasis supplied.)

Several aspects of the above passage are worth noting. The passage identifies a limited range of issues to be examined by the City at the time a development proposal is submitted, specifically: the location of buildings; the arrangement of parking and loading facilities; on-site circulation; buffer yards; setbacks and landscaping. Also reviewed at that time will be the availability of transit service for the site and utility and storm water plans for the development.

Just as significant is what the findings expressly state will <u>not</u> be addressed at the time of development of the shopping center. First, the impact of the shopping center on adjacent neighborhoods is not a relevant standard to the application for site review here, even under today's site review standards. That issue was expressly considered, and appropriate conditions were imposed, in the 2007 Decision.[21] Second, the traffic impacts from the proposed development would not be revisited – as the 2007 Decision explains, that issue was analyzed as part of the TIA for the CPC/ZC application the City approved.

Also, worth noting is the complete lack of any statement regarding review of future development plans for protecting natural resources or, specifically, trees. At that time, the City had a tree preservation ordinance, so this omission is telling. In discussing land resources, the City Council found:

> "The Subject Property is primarily a vacant field. *There are no identified significant natural resources on the Subject Property*. Development of vacant urban land is expected. The proposed change will have no significant negative impact on the quality of the land." 2007 Decision, p. 19. (Emphasis supplied.)

Elsewhere in the 2007 Decision, the findings list a number of other design considerations for which the development plans will be evaluated. These include standards under land use

[21] "The impact of the redesignation of the site on adjacent neighborhoods is discussed in these findings, and the traffic impact of a 'worst-case' commercial development on the adjacent street network has been analyzed in the TIA." 2007 Decision, p 38.

regulations that govern screening, landscaping, setback, and building height and mass. 2007 Decision, p. 37. Other cited considerations pertain to the screening of outdoor storage areas and exterior lighting. 2007 Decision, p. 36-37. And the decision expressly refers to the then in effect Salem Code Section 132's buffer yard setback, screening and landscaping requirements. 2007 Decision, p. 44; p. 3, Condition of Approval (11).

Each of the above review standards cited by the City Council in 2007 is a straight-forward review for which the City has adopted specific siting standards. The City Council was already fully aware that there would likely be at least one large tenant – expressly-identified possibilities included Target, Fred Meyer and Costco, each with buildings as large as 200,000 square feet in size (*see*, LUBA Record-636) – and a site plan that showed the bulk of the retail development to occur on the southern boundary of the property (where the trees are) and smaller retail development on the northern edge of the property (*see*, LUBA Record-2450). The City Council was fully aware of the general size and layout of the development, the only question was whether the eventual site plan would meet the City's published standards for things such as setbacks, building heights, number of parking spaces and landscaping, as well as the requirements imposed by the conditions of approval. The Applicants have a vested right to have their development proposal reviewed under those standards and only those standards.

Likewise, the 2007 Decision held that future development proposals would not be subject to review under other standards. 2007 Decision, p. 38. The two standards that the findings expressly state were already addressed by the 2007 Decision were compatibility with surrounding neighborhoods and impacts to the street network. *Id.* Also, the express finding that there are no significant natural resources on the property, precludes a different determination in this proceeding where the Applicants have a vested right to the 2007 Decision approval, particularly given the fact there was a tree ordinance at that time.[22] As discussed immediately below, the Applicants also have a vested right to not have to readdress issues the City Council stated in the 2007 Decision had been addressed and resolved.

The 2007 Decision held that the approved development's impacts on the City's transportation facilities have been fully mitigated through the conditions of approval, which Applicants have already invested millions of dollars towards satisfying. Because Applicants have commenced implementation of those mitigation measures, Applicants have a vested right to not have to again prove up on the adequacy of those measures or to do a new comprehensive TIA. That work has been done and the mitigation measures substantially implemented.

The 2007 Decision also concluded there were no significant natural resources on the site (*i.e.*, no significant trees that were required to be preserved) and no subsequent tree review was

[22] The LUBA decision held that application of the tree preservation standards as part of site review does not constitute a collateral attack on the 2007 Decision. LUBA Decision, p. 29. That is a very different issue than whether the Applicants have a *vested right* to the determination made in the 2007 Decision that no significant natural resources, to include trees, are on the property that would preclude development of the proposal. The Applicants have that vested right, as explained in this letter.

contemplated.[23] In short, the 2007 Decision resolved the issue of whether the UDC imposed a standard of approval that required review of trees at the time development plans were submitted. The determination that a vested right to an approved use exists, means that the holder of that right is protected from changes to the interpretation and application of code sections[24] as well as changes to conclusions about applicable criteria under ORS 227.178(3).[25] *Holland v. City of Cannon Beach*, 154 Or App 450, 457-59, 962 P2d 701 (1998).

An important point must be noted. The City's Site Plan Review provisions were not effective until 2009, two years after the City Council's 2007 Decision. In addition to demonstrating that opponents' arguments that the Applicants could have applied for Site Plan Review in addition to the CPC/ZC in 2006 is wrong, the fact that the Site Plan Review code provisions were adopted after the 2007 Decision upon which the vested right is based, means that those standards cannot be applied to the present application in a way that substantially changes it or denies it. That conclusion flows again from the nature of vested rights – the use will inevitably be inconsistent with some aspect of the development code due to subsequently adopted provisions or amendments to the code. Those subsequent standards simply do not apply to a development that has vested, as is the case here.

Opponents' counsel argues that Applicants' rights became vested in 2012-13 (when the medical clinic was approved and built) at the earliest, or in 2015 when PacTrust agreed to provide $3 million in transportation improvement funds before it was required to implement the improvements. Anuta Letter, August 12, 2020, p. 3. Opponents' counsel then states that "the law . . . [is] clear" that the Site Plan Review provisions were in effect, without citing to any law to support his argument. *Id.* at 4. Opposing counsel appears to assume that the standards that are

---

[23] 2007 Decision, p. 19.

[24] A vested right use need not conform to current code standards. As discussed in the prior proceedings, the City has always applied the "necessary" standard for tree preservation as deferential to commercial and industrial development, thus the Planning Administrator's approval of the applications. The City Council changed that interpretation and LUBA afforded that interpretation deference. However, LUBA's decision does not change the fact that the City in its 2007 Decision interpreted and applied its tree preservation ordinances in a particular manner, such that the trees on the subject property were not a significant resource in light of the proposed (and ultimately approved) commercial use, and it is that interpretation and determination that pertains to the Applicants' vested right. That is why LUBA remanded the decision –LUBA recognized that the vested right may preclude application of the tree ordinance in this proceeding. However, that fact does not affect the applicability of the City Council's interpretation of the tree preservation ordinance's "necessary" requirement in future decisions, but it is exactly relevant to this proceeding.

[25] ORS 227.178(3) provides, in relevant part:

> "(a) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

in effect at the time a right becomes vested (*i.e*. the expenditures are made) are the standards that apply. That is not what the law states. As *Holmes* and the other cases cited above make clear, what is vested is the right to complete the development as it was approved in 2007, not the development that would have been approved at the time the right vests, as opponents assert. Later adopted standards (including those in effect when the 2007 Decision rights vested) cannot be applied where they undermine the Applicants' vested right to the shopping center approved in the 2007 Decision.

Finally, even if subsequently adopted standards, such as the Site Plan Review standards, could still be applied to an application for which the Applicants have vested rights, those standards cannot be applied in a manner that denies the vested right. In this instance, that means no subsequently adopted standard can be applied in a manner that is inconsistent with the 2007 Decision.

c. *Vested Rights Conclusion*

Based upon the evidence in the record and the arguments provided above and by the Applicants during this remand proceeding, the Applicants have a vested right to the proposed development, which is consistent with the rights derived from implementing the development approved by the City Council in the 2007 Decision and by the findings, conclusions, and conditions of approval of that decision. The tree preservation basis for the City Council's previous denial violates Applicants' vested rights. Each of opponents' arguments is inconsistent with one or more of Applicants' vested rights. For these reasons, the City Council should conclude that the Applicants have a vested right to approval of the application as approved and conditioned by the Planning Administrator with the additional conditions of approval proposed by the Applicants.

IV. Specific Issue – Regardless of the Applicants' Vested Right and Even if it is Not Considered, the Applicants Have Demonstrated Compliance With the UDC Standards for Tree Removal and for Traffic and Safety.

As noted above, the City Council should conclude that the Applicants have a vested right to approval of their application, to include removal of the eight Oregon white oak trees. The City Council should also adopt alternative findings, in addition to approval based on vested rights, that even without the vested right, the proposal complies with all site review standards.

a. *The Evidence in The Record Supports the Conclusion That the Application Will not "Remove" Any Significant Trees and Regardless That Removal of the Oregon White Oaks is Necessary in Connection With Construction of a Commercial (Shopping Center) Facility.*

As discussed above, the proposal does not remove any significant trees, and the City should so find under the express terms of the City's code.

Moreover, during the proceedings leading to the 2018 Decision, several site diagrams were submitted by the Applicants to demonstrate that it was necessary to remove the eight white

oak trees to develop the proposed use consistently with the 2007 Decision, which is an exception to the tree permit requirement under UDC 808.030(a)(2)(L). On remand, Applicants have submitted additional evidence of necessity. Specifically, Exhibit A to the Applicants' remand letter supplements each of the diagrams submitted previously with detailed analysis as to why, under each of the options, it is impossible to develop the proposed vested shopping center in compliance with all applicable City standards and also to preserve the trees in their current locations.

Application of the necessity exception under UDC 808.030(a)(2)(l) requires defining the term "necessary" in UDC 808.030(a)(2)(1), which authorizes:

> "Removal of Oregon white oaks (Quercus garryana) [without a permit] where the removal is necessary in connection with construction of a commercial or industrial facility."

In the 2018 Decision, the City Council disagreed with how staff had previously applied the term "necessary" but did not define the term further. Instead, it simply turned to Applicants' arguments that the evidence in the record shows the requirement had been met and ultimately disagreed. The City Council also found that: (1) a design that provides additional buffering and mitigation of adverse impacts for the adjacent residential neighborhood, beyond that required by the 2007 Decision, was not "necessary" to comply with the Site Review standards because the conditions of approval from the 2007 Decision imposed buffering requirements sufficient to ensure neighborhood compatibility; and (2) economic considerations do not factor into the meaning of "necessary" under UDC 808.030(a)(2)(L) because those considerations are relevant to an "economic use" tree variance under UDC 808.045(d)(2). LUBA Decision, p. 25. LUBA affirmed the City's interpretation. LUBA Decision p. 23-39.[26]

Recall that under the vested rights analysis, none of this is relevant. Rather, it is relevant only in the context of alternative findings to explain that the "necessary" standard is met in any event and in the alternative to the finding that Applicants have a vested right. Thus, if the standard is applied, the question remains, how does one understand what meets the "necessary" standard? The City Council should conclude that "necessary" means necessary to comply with otherwise applicable approval standards and/or the 2007 Decision's conditions of approval.

The extensive list of exceptions provided under UDC 808.030(a)(2), and the explicit exception in UDC 808.030(a)(2)(L) for commercial and industrial development, plainly establish a hierarchy of approval criteria. If a development requirement must be disregarded to allow commercial or industrial development while preserving the trees, then removal of the trees must be "necessary." Consequently, if any of the alternative site plan "options" are inconsistent with conditions of approval imposed by the 2007 Decision or result in a failure to comply with City code requirements, they are not viable options and it is "necessary" to remove the trees.

[26] LUBA left open, however, the question of whether Applicants had a vested right that might prohibit application of the City's tree standards altogether. LUBA Decision, p. 30-31.

Exhibit A, page 1 from the Remand Request is the Applicants' proposed site plan. It shows the proposed shopping center with its anchor store, as well as the transplanted eight Oregon white oak trees in the southeast corner of the property. That site plan meets the needs of the Applicants, is consistent with the 2007 Decision and meets all 17 of the conditions of approval from the 2007 Decision. It also satisfies all of the City's standards for Site Plan Review. The only dispute, if there is one, is whether transplanting the trees constitutes removal of the trees. As discussed above it does not, but even if it does, it is still "necessary" to remove the trees unless one of the other "options" can also meet the Applicants' needs, comply with the 2007 Decision and City standards, and preserve the trees in their current locations.

In evaluating "options", it should be noted that the entire site is covered with either the allowed structures, parking, required landscaping or buffer areas. And this is with only 189,550 square feet GLA of the 240,000 square foot GLA retail shopping center use authorized by the 2007 Decision. A retail shopping center of 240,000 square feet of GLA would be physically impossible on the site as there would be no room to meet the City's minimum parking requirement, not to mention additional loss of land due to landscaping and buffer areas, and the resulting unsafe and inefficient layout. This fact alone demonstrates that it is "necessary" to remove the eight significant oak trees to implement either the proposed shopping center here, or the much larger center authorized by the 2007 Decision.

Remand Request Exhibit A, page 2 is the so-called "Northwest Option" used by opponents to argue that removal of the trees is not necessary. However, the Northwest Option does not meet the needs of the Applicants, fails to comply with the City's minimum parking standards (UDC 860.005(a)(1)/806.015(a) Table 806-1) and results in a deficit of 110 parking spaces from the minimum parking required by the UDC. Note that the minimum amount of parking provided in the City's code is inadequate to meet the Applicants' needs – the code requires at least 4 spaces per 1000 sq. ft. of GLA, while the Applicants require and propose 5.6 stalls per 1000 sq. ft. GLA, which is within the range of parking the City's code allows. UDC 806.005(a)(1); 806.015(a) and Table 806-1; Applicants' Remand Submittal, Exhibit E, p. 2.

This is unsurprising because in this or any other scenario where the trees are preserved in their current location, an estimated 65,000 square feet of land or about 1.5 acres (approximately 7.1% of the entire site), located in a central portion of the subject property, cannot be used for anything else.[27] The amount of GLA authorized by the 2007 Decision simply cannot be established given the other development standards required by the UDC and the terms of the 2007 Decision itself, when the area needed to protect the eight Oregon white oak trees is exacted from the subject property, even if that area is used to meet minimum landscaping requirements. Furthermore, given the central location of the eight Oregon white oak trees, they cannot be simply "designed around," as opponents suggest. Their location means that it is impossible to keep the trees where they are and simultaneously develop the shopping center approved in the 2007 Decision while also meeting the minimum City parking standards, complying with the terms of the 2007 Decision, designing a safe and efficient layout, and meeting the Applicants' needs. Therefore, it is necessary to remove the eight Oregon white oak trees – UDC 808.030(a)(2)(L).

[27] Applicants Rebuttal August 12, 2020 Attachment 7, August 10, 2020 Bullock Letter.

The alternative site plan options would also make it impossible to develop safe and adequate vehicular and pedestrian circulation within the shopping center, in contravention of UDC 220.005(f)(3)(B) and (C) regarding safe and efficient movement of vehicles and pedestrians, and UDC 800.065(a)(3) and (5) regarding connections through off-street parking areas and to abutting properties, thereby increasing the risk of vehicle-pedestrian and vehicle-vehicle accidents. *See also* Remand Request, Exhibit E (letters from Jeff Olson, Commercial Realty Advisors Northwest, LLC, and Frank Schmidt, Tiland/Schmidt Architects, PC. (discussing, among other things, fire access, traffic safety, impaired visibility, and loss of parking spaces issues flowing from the Northwest Option)).

The transcript of Kristy Mayer from the City Council's December 2018 public hearing exposes another problem with the Northwest Option. As Ms. Mayer testified, "if you pave around them, you're going to kill them anyway." That subjective opinion is confirmed by Monarch Tree Service's rebuttal memorandum, which explains, "Allowing the trees to remain in their current location and building around them has a far greater potential to adversely affect their health."[28] Monarch Tree Service's August 12, 2020 memorandum, p. 4. That statement is true for any proposal that would surround the trees with development, such as that proposed by Wildwood/Mahonia in their August 11, 2020 letter.[29] The Northwest Option is not a viable option for preserving the trees nor is it a basis for denial of the application.

The remaining "options" suffer from even greater fatal flaws. The option shown at Exhibit A, page 3 (Northeast Option) is the only site diagram that appears as if it could preserve all eight Oregon white oak trees. However, that option is plainly inconsistent with the condition of approval to the 2007 Decision requiring an entrance on 27th Avenue, or the roundabout preferred by the City – no traffic can enter or leave from that required entrance under the Northeast Option. One simply cannot comply with the conditions of approval imposed by the 2007 Decision and implement the Northeast Option. This option also, like all the other options, fails to satisfy the City's minimum parking requirements and is therefore inconsistent with UDC 220.005(f)(3)(B) and (C), and UDC 800.065(a)(3) and (5). The Northeast Option is not a viable option for preserving the eight Oregon white oak trees and cannot be the basis for denial of the proposal.

Like the Northeast Option, the option shown on Exhibit A, page 4 (Southeast Option) suffers from the same fatal flaw in that it would render impossible the required access from 27th Avenue. This option also would require relocation of one of the entrances off of Boone Road SE, in violation of the 2007 Decision. Furthermore, this option would not meet the City's

---

[28] Monarch Tree Services, August 12, 2020 memorandum also states at page 4:

> "The subject property is zoned commercial retail and it will development [*sic*] with intensive commercial uses. The best protection for these trees is for a careful effort to relocate them to sustainable portion of the property by competent, experienced arborists, such as ourselves, in the mindful manner we have proposed."

[29] *See also*, Altered Site Plan, Unattributed, Public Comments 2020-07-23 to 2020-07-28, p. 125 (site plan showing building wrapping around trees).

minimum number of parking stalls and would establish vehicle traffic-flow conflicts between vehicles seeking to use the fueling station and those that are seeking parking for shopping, again violating the Site Plan Review requirement for safe on-site circulation. Finally, the proposal would require the removal of five of the eight Oregon white oak trees, and the surrounding parking lot and buildings will likely lead to the deaths of the other three. The Southeast Option is not a viable option for preserving the eight Oregon white oak trees and is not a basis for denial of the proposal.

Exhibit A, page 5 shows an East Option that also completely blocks the entrance from 27th Avenue required by the 2007 Decision. Furthermore, this option would require removal of at least one of the eight Oregon white oak trees, due to the additional entrance for delivery trucks from Boone Road SE, and, as with the Southeast Option, would require relocation of a customer site access required by the 2007 Decision. Like the other options, the East Option fails to meet the City's minimum parking requirement and the surrounding development will harm the trees if left in place. Consequently, the East Option is not a viable option for preserving the eight Oregon white oak trees and is not a basis for denial of the proposal.

The final site diagram, a West Option, shown at Exhibit A, page 6, suffers from several inconsistencies with the 2007 Decision and the City's Site Review standards. The location of the Costco building would impede access to the site from Kuebler Boulevard and would require locating two entrances from Boone Road SE, which is inconsistent with Conditions 5 and 8 of the 2007 Decision. The building location also interferes with on-site circulation, which is contrary to Site Review circulation requirements, and requires the removal of six of the eight Oregon white oak trees. The other two are unlikely to survive due to surrounding development. Last, as with all of the options except the preferred option, this option fails to provide the City's minimum required parking spaces for the development and results in unsafe and inefficient internal traffic circulation. The West Option also is not a viable option for preserving the eight Oregon white oak trees and is not a basis for denial of the proposal.

The alternative options show unequivocally that only the proposed layout can satisfy all of the Site Review, parking, and tree preservation approval criteria, the 2007 Decision's conditions of approval and the needs of the Applicants. The evidentiary record does not support an argument that the Northwest Option, or any of the other options, would preserve the eight Oregon white oak trees and still allow the size of the development proposed by Applicants, which is already reduced significantly in size from what was expressly authorized by the 2007 Decision. Instead, the evidence demonstrates that it is impossible to develop a 240,000 square foot GLA shopping center on the portion of the property zoned for retail shopping center use consistent with the City's development standards, the 2007 Decision and the Applicants' needs, and still preserve the eight Oregon white oak trees in place. Accordingly, removal of the eight Oregon white oak trees is necessary for construction of any commercial facility that remotely resembles what the 2007 Decision authorized and is commensurate with the scale of the imposed exactions.

Opponents' arguments that with just a little bit of "creativity" and a "slightly smaller store" or a "smaller fueling depot" or even a bit "less parking" one could design a shopping center that overcomes the significant hurdle the eight Oregon white oak trees present for

development of the site, has no evidentiary basis in the record. Opponents' arguments altogether ignore the design implications of losing over 65,000 square feet of land – 1.5 acres (just over 7% of the site), in the south-central portion of the subject property and the impossible position that would place any owner for developing a viable shopping center on the subject property. One opponent, Wildwood/Mahonia, argues that with "just" the loss of another 16% of GLA the trees could be accommodated in place. However, this contention is contradicted by Applicants' tree expert, Rick Sartori of Monarch Tree Services, who explains that keeping the trees in their current location but building around them has a far greater potential to adversely affect their health than responsibly transplanting them on the site as Applicants propose. Applicants' Rebuttal, Attachment 3, p. 4. The City can and should rely on Monarch Tree Services' expertise, rather than on speculation. Also, 16% is not an insignificant reduction – it would reduce the proposed 168,550 square foot Costco store to 141,582 square feet. A smaller anchor store is not what the Applicants propose and the anchor retailer has made clear that a smaller store is insufficient to meet its needs to properly service their Salem customers – Costco is leaving a site with a smaller store (existing store is 145,363 sq. ft.[30]), to establish the larger store proposed here, not an even smaller one.

Wildwood/Mahonia also proposes moving the trees to a different part of the property – along Boone Rd. SE – to provide additional buffering (as well as reducing the size of the project including its anchor store, by 16%). First, this proposal necessarily concedes that transplanting the trees onsite means they are not being removed. Second, the City Council has already explained that no additional buffering of the project is necessary because the 2007 Decision incorporated sufficient buffering to mitigate adverse impacts to the adjacent residential neighborhoods through conditions of approval. Wildwood/Mahonia's reasoning was rejected by the City Council in the 2007 Decision. Third, Wildwood/Mahonia provides no evidence that moving the trees to a different location of the site rather than the one proposed will in any way improve their chances of survival. And if the risks are the same, there is no justification for rejecting the Applicants' transplant proposal in favor of a different transplant proposal that meets less of the Applicants' other criteria.

As a final point, opponents' arguments fail to appreciate the fact that millions of dollars have been spent to mitigate for traffic impacts significantly greater than what will result from the proposed project. Just how much smaller of a shopping center are the Applicants expected to propose, when they have already paid for a larger shopping center than the one that they intend to build? Why would an applicant submit a proposal for a commercial retail shopping center it knows its anchor store will refuse to occupy? Nobody wants a failed shopping center anywhere in the City.

Based upon the evidence in the record, the City Council should conclude that removal of the eight Oregon white oak trees is necessary in connection with construction of a retail shopping facility that is consistent with the 2007 Decision and that the proposal is consistent with UDC Chapter 808 because it qualifies for an exception to the tree removal permit requirement under UDC 808.030(a)(2)(L).

[30] Applicants' August 12, 2020 Final Evidentiary Submittal, Attachment 5, p. 8.

b. *The Proposal Satisfies the City's Transportation Requirements for Site Plan Review*

1. LUBA Did Not Require The City To Look at Transportation and the City Council Should Not Revisit That Issue.

LUBA expressly stated:

"On remand, the city may choose to address intervenors' arguments presented in the cross petition for review." Slip Op at 30.

Contrast that with LUBA's direction on remand regarding vested rights:

"Remand of the decision is required for the city to address that argument [vested rights] in the first instance." Slip Op at 31.

Because LUBA did not require the City to address traffic issues on remand, the City is not required to. If opponents felt that LUBA was wrong and that LUBA should have required the City to revisit transportation related issues, it was incumbent upon opponents to appeal that ruling to the Court of Appeals. They did not do so.

On remand, revisiting traffic issues will serve no purpose. The City already properly evaluated the transportation impacts associated with the proposed shopping center development and did not find transportation issues to be a basis for denial under the decision now on remand.[31] The 2007 Decision and its conditions of approval were based upon a comprehensive transportation impact study that addressed potential impacts on the broader system that could be expected from development of a retail shopping center on the site. That TIA, and the mitigation measures incorporated into the 2007 Decision's conditions of approval, were based on a proposed retail shopping center and service facility complex, using the so-called "reasonable worst-case" scenario tenants and with up to 314,000 square feet of GLA. So, while the decision limited the development to a total of 299,000 square feet of GLA, it imposed mitigation for the traffic impacts that flow from 314,000 square feet of GLA with tenants that present a reasonable worst-case scenario for transportation system impacts. Accordingly, City Council has already accounted for the transportation system impacts from the proposed use by the conditions of approval in the 2007 Decision that imposed transportation related exactions for a significantly larger project that would have significantly greater impacts than will flow from the proposed unified shopping center. As discussed in detail in below, opponents have refused to address these largely implemented mitigation measures in their criticisms of the transportation analyses.

Furthermore, as explained in Applicants' July 27, 2020 letter, the City did not have a separate site plan review process in 2006-2007. *See,* Applicants' First Open Record Exhibit 2. Consequently, the 2007 City Council had every reason to and did carefully review the transportation impacts from the allowed use of the site because that was the City's one

[31] Opponents' quotation of one of the City Councilors does not change the fact that the majority of the City Council did not agree with that opinion and that traffic issues did not form a basis for denial.

opportunity to require all of the mitigation necessary to address the impacts of the 299,000 square foot GLA unified shopping center with medical offices expressly approved by the decision.

Because the traffic impacts from the maximum allowed use have already been mitigated through conditions of approval, and that mitigation was already mostly before 2018 when the Applicants began the site plan review process, the new traffic analysis required by the City did not mirror (and no purpose would have been served to have it mirror) what had been previously done. Instead, the traffic analysis required by the City was conducted to verify that the conclusions in the 2006 TIA remained reasonably valid (a "sensitivity check") and to demonstrate compliance with the subsequently adopted site review criteria, which focus on access to and from the subject property from the immediately adjacent street system. The traffic analysis prepared for the Site Plan Review application demonstrated the validity of the previous TIA and that the proposal satisfies all transportation-related Site Review requirements. Applicants' July 27, 2020 letter discusses the above in great detail.

The City has carefully and completely evaluated the transportation impacts that will flow from the proposed development. The evidence in the record demonstrates that all of the traffic impacts that will flow from the proposed development have already been mitigated or will be mitigated. Transportation issues were not cited in the 2018 Decision, because there was no need to discuss them; PacTrust had demonstrated that all transportation related criteria were met. Because LUBA did not require the City Council to revisit transportation issues on remand, the City Council should first decide that there is no reason to now revisit aspects of the proposal already adequately reviewed and addressed.[32]

2. The Director's Decision To Grant An Exception Pursuant To UDC 803.015(D), Is Correct And The Council Should Affirm It.

Before opponents have the right to challenge the adequacy of the transportation studies on the grounds that a fundamentally different type of traffic analysis is required, opponents must first overcome the fact that the Director of the City's Public Works Department has properly granted the proposed development an exception to the TIA requirements pursuant to UDC 803.015(d). The Director's determination is correct and so the City Council should affirm the Director's exception.

UDC Chapter 803 concerns streets and right of way improvements and Section 803.015 governs Traffic Impact Analyses. On March 27, 2020, the Public Works Department forwarded a Memo to the City Attorney that grants an exception to the TIA requirement in this case, which states:

> "(d) Exception. An exception to the requirement for a traffic impact analysis may be granted for development that generates more than the trips specified in subsection (b)(1) of this section if the Director determines the traffic impact

[32] As explained elsewhere, the Applicants request the City make alternative findings that even if traffic were addressed, all potentially applicable standards are met.

analysis is not necessary to satisfy the purposes set forth in subsection (a) of this section.

The Director has determined that UDC 803.015(d) applies in this case, even though the criterion in UDC 803[.]015(b)(1) is met. The improvements to accommodate the traffic impacts from the proposed development were identified in their Traffic Impact Analysis (TIA) and conditioned to this property as part of the 2007 Comprehensive Plan Change and Zone Change (CPC/ZC)."

Opponents' arguments with respect to the Director's decision play a shell game with the City Council to sow confusion. *See*, Anuta Letter, July 28, 2020, p. 5. Opponents argue that since the remand is to the City Council, it is the City Council that must determine whether the Applicants' traffic impact study is sufficient to meet Site Plan Review code requirements. That is true so far as it goes. However, opponents also argue that City staff had no authority to grant the exception that the express language of the code authorizes. This is plainly wrong under the express terms of the City's code. Opponents then concede that a TIA for a comprehensive plan amendment is different than what is required for Site Plan review but assert that the Applicants' traffic analyses supporting the subject application are inadequate. In making that argument, opponents (unlike the Director) ignore that the 2007 Decision determines that a larger shopping center with greater traffic volumes met all transportation standards both for the year of opening[33] and in 2025[34] and imposed conditions of approval that exacted transportation infrastructure improvements for a greater volume of traffic than will occur here. Opponents then further ignore the fact that the increase in traffic on the adjacent road system comes not from the proposed

[33] It is irrelevant that the year of opening then was 2009 and now the year of opening for the traffic analysis supporting the application is 2019, adjusted to 2021 to account for the delays related to the land use process. The fact is all of the Applicants' transportation impacts to the transportation system have been fully mitigated. That is all the City may require or has required.

[34] The 2007 Decision required that the approved shopping center would not make the transportation system worse in 2025 than it was expected to be without the shopping center. No one challenges the finding in the 2007 Decision that in 2025, the transportation system would actually function *better* with the proposed development and its transportation infrastructure improvements, than without it. September 2006 TIA (page 42, Table 10); 2007 Decision, p. 39 ("under the proposal the area transportation system including Kuebler Blvd, will function better than it currently does ***."); p. 46 ("The proposal will significantly improve the affected area streets to City standards and such facilities will be supplied under the proposal." And "The proposal includes significant street improvements including sidewalks and bike facilities which do not now exist."); p. 48 (stating that the approved shopping center with the required mitigation "is a significant improvement in the pedestrian opportunities currently provided."); p. 53 ("The proposal will also improve the functionality of the intersections of 27th Avenue and Battle Creek Road SE with Kuebler Boulevard, where the applicant proposes pedestrian friendly gateways to the proposed commercial development." And "The condition of the transportation system in the area will be enhanced by the improvements to the street system that serves the area, including the Battle Creek-Kuebler intersection, the Kuebler at 27th intersection, the widening Kuebler to four lanes, and additional turn lanes at the southbound I-5 off ramp.").

development, but from other growth in the City. Opponents also fail to explain how the use by others can deprive an applicant of the right to benefit from mitigation measures it has funded in order to mitigate the impacts of the Applicants' future development. One easily gets lost in opponents' arguments, but it is worthwhile piecing them apart.

Regarding the contention that the Director has no authority to grant an exception to an applicant from the City's comprehensive traffic impact analysis regulations, UDC 803.015(d) expressly states "if the Director determines the traffic impact analysis is not necessary to satisfy the purposes set forth in subsection (a) of this section." (emphasis supplied). The UDC authorizes only the Director to make such a determination. Opponents take a position that is contrary to the express language of the code. This is not a defensible position. While the City Council is the decision maker regarding whether the Site Review transportation standards are met, it is the Director who determines whether an exception to a comprehensive TIA is granted.

Furthermore, as the Director's finding quoted above accurately concludes, a TIA in this instance is not necessary to satisfy the purposes of the TIA, because those purposes have already been met by the 2007 Decisions' conditions of approval.

UDC 803.015(a) provides:

> "*Purpose*. The purpose of a traffic impact analysis is to ensure that development generating a significant amount of traffic provides the facilities necessary to accommodate the traffic impacts of the proposed development." (underline added).

Opponents have never addressed, or ever even acknowledged, the simple fact that the 2007 Decision exacted transportation improvements that more than fully mitigate for the worst-case traffic impacts that would flow from a unified shopping facility of 314,000 square feet of GLA while authorizing development only of a 299,000 square foot GLA project.[35] Given that the proposal is for a project of 228,062 square feet of GLA, 24% smaller in size than that authorized by the 2007 Decision and even smaller than the basis for the exacted transportation facility improvements, there can be no question that Applicants have already "provided the facilities necessary to accommodate the traffic impacts of the proposed development" as required by the standard.

Applicants have improved and will shortly complete improvements to the transportation facilities sufficient to handle the worst-case traffic volumes from a 314,000 square foot GLA shopping center. As the Director correctly concluded, the needed improvements were identified and then made conditions of approval with the 2007 Decision, and most of those improvements

[35] *See, e.g.,* 2007 Decision, p. 29 ("Further, the TIA evaluated a larger shopping facility than was ultimately proposed by the Applicant and allowed by the conditions of approval to this decision"); and p. 30 ("Based on the above, it is apparent that the TIA likely overstates rather than understates trips. This is because the TIA analyzes the same use categories under the Trip Generation manual, but for a greater square footage of gross leasable area than Council allowed in this decision.").

have already been implemented. The remainder must be completed before the proposed use is allowed to operate. The basis for granting the exception has been satisfied and, just as significant, nothing would be gained from redoing a full TIA because the outcome cannot change, since the transportation impacts from the proposed development are similar in nature and have fewer adverse impacts due to the smaller size of the proposal compared to the size of the development project authorized by the 2007 Decision and the mitigation it required.

Next, opponents argue that the Director's conclusion was factually wrong and that there are documented "traffic problems" in the area. This argument suffers from several flaws. First, as noted above, opponents do not claim that the 2007 Decision's traffic-related exactions have not been or will be implemented, and opponents make no argument that those transportation improvements did not significantly improve the transportation facilities at issue. Opponents cannot make that argument. Furthermore, opponents do not even address, let alone refute, the fact that Applicants have yet to fully develop the unified development project approved in 2007. Consequently, the Director's statements about the 2007 Decision's conditions and implemented mitigation measures are not "factually wrong" – Applicants have already improved the transportation facilities to accommodate the traffic impacts the proposal will produce and then some. What opponents are actually saying is that they believe that the Applicants are not entitled to develop a proposal to utilize the over $3+ million in transportation improvements that they have already paid for. The Director's statements are not factually wrong, it is opponents' mischaracterization of the effect and purpose of the mitigation measures already paid for by the Applicants that is incorrect.

Second, opponents totally ignore the fact that, if there are any traffic "problems" nearby the project site (which the Kittelson and Associates' analyses and responses to opponents' materials demonstrate that there are not), those problems are caused by impacts of development other than the proposed development. Applicants have expended millions of dollars to improve the City's transportation system and are entitled to benefit from those expenditures. Throughout these proceedings, opponents have conveniently ignored the Constitutional takings issues their positions raise for the City if it follows opponents' advice. As discussed above, *Nollan* and *Dolan* require both an essential nexus and rough proportionality for an exaction to be Constitutional. As noted, the 2007 Decision's conditions of approval and the transportation facility exactions arguably satisfy those requirements; opponents' arguments that further exactions should be imposed to offset the transportation system capacity hit due to development unrelated to Applicants' proposed use fail to meet those requirements. There is no essential nexus between impacts caused by others' use of the transportation system and Applicants' proposed use. And there is no rough proportionality with Applicants being required to compensate not only for the transportation impacts from their own proposed use but from impacts on the system that flow from others. Opponents' expressed concerns regarding the provision of adequate transportation facilities for a growing city require a community-wide solution,[36] not an unconstitutional exaction that forces Applicants to mitigate the transportation impacts caused by others after having paid to mitigate their own transportation impacts.

[36] *See*, *e.g,* James Black e-mail, July 1, 2020 (discussing impacts of "unchecked residential development in the south" and need to "accelerate the already approved improvements to the Transportation Master Plan").

Furthermore, opponents have not provided any legal basis for their position that an applicant can pay for City-mandated transportation system improvements to mitigate impacts from development of their property but then lose the benefit of that mitigation because others wind up driving on those roads before an applicant's development is completed. There is no legal basis for that position.

Opponents also improperly ask the City Council to decide this remand based upon standards that are not adopted in the Salem Code. This the City Council cannot do. Opponents argue that two intersections will be at the "outer edge" of Salem's mobility standards and the application should be denied because, in their opinion, they are "certain to fall below" Salem's mobility standards at some unspecified date in the future. What opponents are actually saying is that the evidence in the record shows that the Kittelson analysis demonstrates that the transportation facility capacity standards are met. It may be close in opponents' view, but the standard has been met. However, opponents ask the City Council to impose a "close is not enough" approval criterion to deny the application despite the fact that such standard has not been adopted into the UDC or acknowledged by DLCD. It's as if a development proposal had to satisfy a 15' setback requirement and an applicant demonstrated the setback would be 15'-1," but opponents argued that barely meeting the setback requirement was not sufficient to demonstrate compliance with the standard. In both that example and this application, the standard has been met. The City Council is only allowed to apply approval standards and criteria that are contained in the code, ORS 227.173(1), and cannot apply standards recommended on an ad-hoc basis by opponents to a project.[37] Opponents ask the City Council to apply a standard the Council is not allowed to apply.

The Director's March 2020 Memorandum states that the Director determines that the exception provided by UDC 803.015(d) applies in this instance and explains why it applies. That memorandum memorializes the decision the Director made during the TIA scoping meeting held prior to the 2018 Kittelson traffic study. Opponents present no valid argument that explains why the Director cannot make that determination or that undermines the analysis the Director's determination is based upon. Opponents utterly fail to explain why the 2006 TIA, which led to exactions that require transportation facility improvements that mitigate the worst-case traffic impacts from a 314,000 square foot GLA retail shopping and medical office facility, must be redone for a proposal that is only 228,062 square feet of GLA in size and that has far fewer vehicle trips than analyzed by the 2006 TIA. The 2006 TIA and subsequent transportation analysis for the 2007 Decision already addressed the greater transportation system issues opponents seek to re-raise. Opponents simply ignore that fact and claim the old analysis and imposed conditions of approval are irrelevant. They are not irrelevant.

---

[37] ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

Opponents' arguments for why Applicants are not entitled to an UDC 803.015(d) exception to the comprehensive TIA requirements do not withstand scrutiny. The Director did not err in granting Applicants an exception. The City Council should respect the Director's conclusion and reject opponent's related arguments.

3. A TIA That Satisfies the City's Public Works Standards is Not Required by the Site Plan Review Standards and Would Not Inform Those Standards.

As discussed above, opponents provide no basis for why the City should conclude that Applicants' traffic analysis supporting the application is inadequate in scope. There is no basis to conclude that the traffic analysis provided by the Applicants for site review and requested by City staff, together with the 2006 TIA and its supplements as well as the mitigation measures imposed by conditions of approval to the 2007 Decision, are insufficient to demonstrate compliance with the Site Plan Review Standards in UDC 200.005(f)(3).

Moreover, neither Salem's Administrative Rules ("SARs") nor the Site Plan Review standards require any different analysis than the Applicants provided for site review.

The City's TIA standards are generally provided in the City's Public Works Design Standards at SAR 6.33. SAR Division 001-General-Design-Standards sets forth the introductory framework for the rules and provides the following:

> **"1.15 – Traffic Impact Analysis**
>
> The Salem Transportation System Plan (TSP) establishes the requirements for a Traffic Impact Analysis (TIA) as part of land use development proposal. Whether or not a TIA will be required for a particular project is determined during the land use application process. Guidelines for completing the TIA are provided in Division 006-Streets, and in Appendix 1C-Traffic Impact Analysis Report Format of this Division. The Engineer of Record (EOR) shall be responsible for submitting the TIA as part of the development review process, as required."

The first sentence of SAR 1.15 identifies the TSP as the touchstone for TIAs. However, the Salem TSP does not contain any requirements for a TIA and, in any event, the TSP does not apply to a limited land use decision.[38] What it does say is that a transportation system plan analysis is required for a number of types of land use decisions. SAR 17-2 provides:

> "**Relationship with Land Use Actions and Development Review**
>
> "In accordance with requirements contained in the State Transportation Planning Rule and the *Salem Revised Code*, the adopted goals, objectives, policies, projects and maps of the *Salem Transportation System Plan* must be considered and

[38] Unincorporated plan provisions do not apply to limited land use decisions. ORS 197.195; *Oster v. City of Silverton*, ___ Or LUBA ___ (LUBA No. 2018-103, May 7, 2019).

applied towards the review and approval of specified land use actions and development applications. This means that applications submitted for such actions as Comprehensive Plan Map amendments, zone changes, conditional use permits, subdivision review, and land partitions need to include findings that show how the application is in conformance with the tenants of the *Salem Transportation System Plan*. City staff need to review these findings for conformity."[39] (italics in original; underline added).

Conspicuously absent from the list of applications that must demonstrate compliance with the greater transportation system is site plan review. That is understandable due to the limited land use decision nature of site review, something that LUBA explained has consequences for how this Site Plan Review application can be reviewed. For example, unless a local government explicitly incorporates specific comprehensive plan policies into its land use regulations for limited land use decisions, the comprehensive plan policies do not apply as a standard for approval. ORS 197.195(1).[40] In this instance, the UDC Site Plan Review provisions do not expressly cite any comprehensive plan provisions that act as approval criteria for Site Review. [41]

---

[39] TSP at 17-5, Policy 3-1 purports to apply the TSP to all land use matters. However, as noted above and below, state law prohibits plan policies from applying to limited land use decisions unless the policies are explicitly incorporated into the relevant code provision. TSP **Policy 3.1 Land use and Development Review** is not "incorporated and so cannot be applied. It states:

> "The goals, objectives, policies, standards, and maps contained in *Salem Transportation System Plan*, and its implementing ordinances, shall be considered and applied towards the review and approval of all land use actions and development applications. Applications need to contain findings that show how the proposed land use action or development is in conformity with the *Salem Transportation System Plan*." TSP 17-5.

[40] ORS 197.195(1) provides:

> "A limited land use decision shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations. Such a decision may include conditions authorized by law. **Within two years of September 29, 1991, cities and counties shall incorporate all comprehensive plan standards applicable to limited land use decisions into their land use regulations.** A decision to incorporate all, some, or none of the applicable comprehensive plan standards into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS 197.610 to 197.625. **If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision by the city or county or on appeal from that decision**." (Emphasis supplied.)

[41] The TSP (17-5, Objective No. 3.2) seems to contemplate that TSP requirements will be carried out by the public works design standards. Policy 3.2 **Relationship to Other City Standards** provides:

The UDC 220.005(f)(3) approval criteria for a Class 3 site plan review contains two provisions that relate to transportation. The relevant portions of UDC 220.005(f)(3) provide:

> "(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[.]".

Accordingly, it is plain that no comprehensive plan policies are invoked, even by reference, in the above provisions. Consequently, opponent requests that the City Council apply plan policies to deny the application must be ignored. *See*, *e.g.,* Krishnan letter, August 12, 2020, p. 2-3.

With respect to the site review standards, UDC 220.005(f)(3)(B) expressly identifies the flow of traffic into and out of the development site as an issue for site plan review. Nobody questions that the Applicants must demonstrate that the design of the proposal facilitates the safe movement of traffic into and out of the proposed development. While the 2007 Decision did impose requirements that determined where several of the ingress-egress points must be located on the subject property and the proposed design must be consistent with those conditions of approval, the details of the design for traffic flow into and out of the site were not before the City Council in 2007, and thus are properly before the City Council now. Site plan review is a mechanism to evaluate such ingress and egress.

UDC 220.005(f)(3)(B) also requires that a site plan demonstrate that "negative impacts to the transportation system are mitigated adequately." That language is directed specifically to the transportation facilities that are impacted by the flow of traffic into and out of the site – in other words, the driveways and the immediately adjacent street system that feeds them. The Oregon Supreme Court has reviewed plan and code language very similar to how the City of Salem's plan and code are structured and concluded that there are distinct differences between the transportation analysis required for plan and zone changes and for site review. In *Siporen v. City of Medford*, 349 Or 47, 263-65, 243 P3d 776 (2010), the Supreme Court explained that a transportation study for a plan and zone change examines whether the street system is adequate to serve the permitted uses as a part of a determination about whether a type of use can be

---

> "The *Salem Transportation System Plan* shall be used as the basis for other implementing standards and ordinances. The *City of Salem Design Standards* and *City of Salem Standard Construction Specifications* shall be the basis for the design of all capital construction projects. Administrative procedures shall be implemented through the *City of Salem Public Works Department Policies*. These documents must be consistent with the adopted tenets of the *Salem Transportation System Plan*."

allowed at all. The Supreme Court further noted that site plan review has a different focus than that broad review and, instead, looks to the traffic flow on the development site, at the points of ingress and egress to the site, and the immediately adjacent streets to accommodate that flow.

City transportation staff followed that same approach in this proceeding. They requested that the Applicants do an analysis of the traffic ingress and egress from the subject property as well as the immediately surrounding street system. City staff also requested that the Applicants do a sensitivity check to verify that the volume of traffic generated by the proposed development did not exceed the volumes approved by the 2007 Decision, which would demonstrate whether the 2006 TIA analysis remained valid. Ultimately, City staff requested that Applicants locate a roundabout at the 27th Avenue S.E. entrance instead of a traffic signal to accommodate traffic flow into and out of the proposed development.

The 2018 Kittelson traffic study demonstrated that traffic volumes from the proposed use are less than those permitted and mitigated by the 2007 Decision. The traffic study also demonstrated that all surrounding intersections would operate within the required levels of service (LOS) even with the addition of the traffic from the proposed use. As a result of the mitigation measures imposed by the 2007 Decision, the present proposal's consistency with the traffic volume limitations imposed by that decision, and the evidence in the record regarding the transportation impacts that will flow from the proposed use, the only conclusion that can be reached is that the "negative impacts to the transportation system are mitigated adequately."

Turning to the other standard, the focus of UDC 220.005(f)(3)(C) is entirely within the subject property. There is nothing in that standard that can even remotely be said to pertain to the larger transportation system to which a comprehensive TIA is intended to evaluate. Nothing in the Site Plan Review Standards require a comprehensive TIA whenever a Site Plan Review application is submitted. Opponents provide no basis upon which the City Council could conclude that the Applicants need to do a comprehensive TIA. The traffic study that was requested by City Staff and that the Applicants prepared as part of their application was sufficient to demonstrate compliance with the Site Plan Review standards at UDC 200.005(f)(3).

4. The Purpose of a Broad TIA Informs Whether a Use Can Be Allowed, not Whether a Use That is Permitted Outright Meets Site Review Standards. The Adequacy of, And Mitigation of Traffic for, the Greater Transportation System Was Satisfied By The 2007 Decision and its Conditions of Approval that Approved the Unified Shopping Center and its Highest Possible Volumes of Traffic. Nothing Requires that Analysis Be Redone.

Turning to the City's administrative rules, SAR 6.33 – Traffic Impact Analysis (TIA) provides:

"SRC [UDC] Chapter 803 identifies the threshold for requiring a TIA."

As discussed above, the Director approved an exception to the TIA requirements under SRC [UDC] 803.015(d), conclusively establishing that a new, broad TIA was not required.

Furthermore, UDC 803.015(a) provides the purpose for conducting a TIA:

> "*Purpose*. The purpose of a traffic impact analysis is to ensure that development generating a significant amount of traffic provides the facilities necessary to accommodate the traffic impacts of the proposed development." (emphasis supplied).

As discussed above, the conditions of approval for the 2007 Decision imposed development constraints on the subject property and exactions to mitigate for the transportation system impacts of traffic volumes associated with a unified shopping center composed of 299,000 square feet of GLA. Furthermore, City staff, including its engineering professionals, required the Applicants to conduct a sensitivity check to ensure that the volume of traffic that will result from the proposed development will fall within the permissible traffic volumes and consequent traffic impacts approved by the 2007 Decision. It cannot be questioned that the 2007 Decision's conditions more than mitigate the traffic impacts from the proposed development. City staff requested that the Applicants exchange the previously approved traffic signal at the main site access on 27th Avenue for a roundabout to improve the flow of traffic into and out of the proposed development. The Applicants have agreed to this request. That does not mean the mitigation approved by the 2007 Decision was or is inadequate.

The fact that the Director appropriately decided that the SAR requirements should not be applied to the traffic analysis for this site review, is also reflected in the SAR 6.33(i) language regarding mitigation, which provides in relevant part:

> "The TIA shall identify and propose transportation system improvements that will restore the operations to a level of service not exceeding pre-development conditions[.]" (Emphasis supplied.)

Again, because the 2007 Decision imposed transportation system mitigation measures for traffic volumes greater than that proposed, there can be no question that the transportation system levels of operation will not degrade as a result of the proposed development. Opponents' arguments that the transportation system will be worse off if site review is approved, ignores the mitigation already implemented to offset the impacts from the *approved unified shopping center*.

In this instance, the 2007 Decision imposed conditions of approval to mitigate for the worst-case scenario traffic impacts from a unified shopping center of a significantly greater size with significantly greater transportation impacts than proposed by the Applicants. Applicants are entitled to benefit from those mitigation measures when evaluating whether the traffic impacts from the proposed use, in conjunction with the implemented mitigation measures, meet site review standards.

Because the 2007 Decision imposed transportation system mitigation measures that offset the transportation system impacts of the permitted unified shopping center, the purpose for doing a TIA of the type contemplated in the SARs, has already been met, and the SARs do not impose any relevant requirements.

5. Evidence in the Record Shows no Relevant Intersections Will Fail and Even if Certain SARs Were Applied, They Would Be Met.

As explained above, the relevant inquiry is whether the two modest site review standards regarding traffic are met.[42] The SARs were adopted in 2014, and so may not be applied to deny the Applicants' vested right, in any event. Regardless, most of the SARs do not inform the answer to the questions posed by these site review standards. As noted above, the SARs ask about the much larger transportation system than ingress and egress into the proposed development. This is one of the good reasons that the Director correctly concluded that a TIA of the type contemplated by the SARs was not required, and granted the exemption discussed above. Regardless, even if some of the SARs were applied, they are properly met.

a. The May 2018 Traffic Study and Supplemental Materials Prepared by Kittelson & Associates Comply With The Requirements Of SAR 6.33.

Kittelson & Associates has prepared numerous transportation-related materials for this Site Review application as well as for the 2006 TIA and related supplements that support the 2007 Decision. They have consistently responded to City, ODOT and opponent inquiries, responding to each question, often by obtaining additional data and conducting additional analysis. The most recent submittals include Kittelson's July 21, 2020 First Open Record analysis and their August 12, 2020 rebuttal materials (Applicants' Rebuttal, Attachments 1, 5 and 6). The July 21, 2020 letter responded to several allegations that the TIA analysis does not satisfy the requirements of SAR 6.33 and specifically addressed issues concerning the build-out year and Costco trip generation data versus Institute of Transportation Engineers (ITE) trip generation data. Applicants' Rebuttal, Attachment 1 responds to the July 2, 2020 Greenlight Engineering analysis and data, and its invalid nature (discussed further below). Applicants' Rebuttal, Attachment 5 addresses the July 28, 2020 comments from Greenlight Engineering and from Karl Anuta and explains that the Applicants' analysis is consistent with sound principles of traffic engineering. And Applicants' Rebuttal, Attachment 6 addresses e-mail and letter comments made between March and July 2020 by opponents, many of which comments were also addressed in prior responses.

Even if the City Council decides to evaluate the provisions of the rule, SAR 6.33(a) requires a Level of Service (LOS) operational standard for all intersections to be LOS E or better and signalized intersections have a v/c ratio of 0.90 or below. Kittelson's July 21, 2020 submittal and accompanying data demonstrate these standards are met even with a 2021 horizon year, with all of the ten study intersections or site access points identified by the City transportation staff for evaluation, forecast to operate at LOS of D or better, or at a v/c of 0.90 or better, meeting City's operational standards.

[42] UDC 220.005(f)(3)(B) provides: "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." (Emphasis supplied.) UDC 220.005(f)(3)(C) provides: "*Parking areas and driveways* are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians." (Emphasis supplied.)

Opponents' arguments against that evidence are two-fold. First, they argue that based on their own traffic data collected in February and March of 2020, traffic volumes are greater than shown in Kittelson's data and as a result the intersections will fail. *See*, Greenlight, July 2, 2020. Alternatively, opponents argue that the estimated levels of service from Applicants' 2006 TIA show the key intersections performing at LOS "F" confirms the intersections are already failing. Greenlight, July 28, 2020, p. 4. Each of the above arguments are significantly flawed.

Kittelson & Associates directly addressed Greenlight's use of data collected on February 27, 2020 and on March 3, 2020 and explained why that data is flawed and cannot be considered valid. In early March, ODOT issued an APM Update Appendix 3E that explained:

> "caution should be exercised in taking new traffic counts during disruptive events. New traffic counts should only be taken during disruptive events when it is determined that the data already available is not sufficient for decision making." *See*, Applicants' Rebuttal, Attachment 1, p. 2.

Greenlight argues that its data was taken before the Governor's announcement of a "State of Emergency" due to COVID-19 and is therefore valid. However, evidence in the record demonstrates that transportation professionals have concluded that the disruptive event began as early as February 24 and continues to this day. The Governor's announcement reflected that disruptive conditions that existed already, created an emergency. The Governor's announcement does not mean that there were no disruptive conditions before the State of Emergency caused by such conditions was declared.

Furthermore, the record contains a letter from Costco that states that on March 3, 2020, one of the days Greenlight collected data, foot traffic was up 28% over the previous year, food sales were up over 23% over the previous year and that Costco was required to limit per-person purchases of certain items and, due to the spike in traffic, Costco hired an additional 40 employees. Applicants' Rebuttal, Attachment 1, p. 11. That is a "disruptive event." Because valid traffic counts exist from before the disruptive event, professional standards require that the pre-event data be used in decision-making.

Also, Greenlight's February 27, 2020 traffic counts taken at the Kuebler Blvd/Battle Creek Rd intersection are actually lower than the May 2018 Kittelson traffic study assumed. Greenlight's assertions that the traffic volumes are greater at the I-5 southbound/ Kuebler Blvd intersection than stated in the May 2018 Kittelson traffic study, results from Greenlight's utilization of the counts it conducted later – on March 3, 2020 – during fairly extreme and documented "disruptive conditions".[43] Lower vehicle traffic existed at the Kuebler Blvd/Battle Creek Blvd. intersection on February 27, 2020 despite the fact that foot traffic at Costco was up 6.2% over the previous year and food sales were up 13.1% over the previous sales on that date. *See*, Applicants' August 12, 2020 Rebuttal submittal, Attachment 1, p. 64. This supports the observation in the ODOT manual that traffic behavior during disruptive events is unusual and

[43] Evidence demonstrating that March 3, 2020 was in the heart of "disruptive conditions" associated with COVID-19, is at the Applicants August 12, 2020 Rebuttal submittal, Attachment 1, p 10-64.

should not be used. February 27, 2020 was a period in the beginning of the COVID disruptive event, when Costco started running out of key items, like toilet paper. People were not behaving as they usually do either on February 27, 2020 or March 3, 2020, and many of them rushed to Costco to buy items perceived to be in short supply.

Greenlight's conclusions are belied by two additional facts. First, Greenlight's data does not show that traffic volumes are universally greater than the Kittelson data. Second, ODOT's concerns about estimates taken during disruptive events are valid ones. Greenlight's evidence shows that traffic counts taken during disruptive conditions are variable, unpredictable, and unrepresentative of normal traffic behavior and that ODOT is correct to assert they should not be used for trip generation or transportation system improvement decision-making. *See*, Applicants' Rebuttal, Attachment 1, p. 2 (Kittelson explanation), and 57 (ODOT Bulletin).

Last, Kittelson's August 12, 2020 rebuttal lists a number of invalid data and assumptions used by Greenlight Engineering in addition to those noted above. Greenlight improperly used a significant seasonal adjustment factor, which are used for locations such as those which see heavy winter seasonal traffic to Mount Hood, for example, but are inappropriate for Salem. Salem does not use a seasonal adjustment. As the ODOT Analysis Procedures Manual (APM) Version 2, Chapter 5 states:

> "The peak hour from a manual count is converted to the 30HV by applying a seasonal factor. The 30 HV is then used for design and analysis purposes. Experience has shown that the 30HV in large urban areas usually occurs on an afternoon on a weekday during the peak month of the year. The Metropolitan Planning Organization's (MPO) of Metro, Salem and Eugene are large enough that the average weekday peak hour approximates the 30HV." Applicants' Rebuttal, Attachment 1, p. 4.

In other words, Salem does not need and does not use a seasonal adjustment to get accurate traffic data. Greenlight improperly inflated the traffic numbers.

Also, Greenlight uses a 2022 buildout year analysis, despite arguing before that Kittelson should be using a 2021 buildout year analysis. This is another example of Greenlight shifting the analytical goalposts. As explained elsewhere, at the time the May 2018 Kittelson traffic study was performed, the 2019 year of build out was reasonable. No City or other standard requires the Applicants to chase year of opening due to delays caused by the land use process. Moreover, also as noted elsewhere, as a precaution, the Applicants have supplemented their analysis to presume a year of opening of 2021. That too is reasonable and achievable. Importantly, nothing about relying on either a 2019 year of opening or a 2021 year of opening, is error.[44]

Next, Greenlight used a 1.8 percent growth rate, citing the Mid-Willamette Valley Council of Governments (MWVCOG), as the basis for that value. As Kittelson notes, there is no

[44] Kittelson July 21, 2020 – Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments.

1.8% growth rate in MWVCOG's traffic model data for this area.[45] In addition, the MWVCOG model factors into its methodology that the subject property exists as built out with the 2007 Decision approved shopping center, as well as presumes the build-out of all other properties based on the existing zoning.[46] Consequently, as Kittelson explains, Greenlight's explanation for why it used a 1.8% growth factor **double counts vehicle trips**. Likewise, when Greenlight or other opponents argue that Kittelson's analysis does not consider the build-out of the Amazon Facility or the retirement community, they are simply wrong.[47] The analysis model assumes build-out of all properties either expressly planned, or consistent with their zoning. Applicants' Rebuttal, Attachment 1, p. 5. Both errors found in Greenlight's analysis improperly inflate traffic numbers.

Kittelson also explains that Greenlight appears to use only data from a single segment of the area's roadway system to reach its preferred 1.8% growth rate to represent background regional traffic growth, without comprehending that the future volumes utilized in the selective calculation already account for site-generated traffic associated with a much larger shopping center on the subject property (the traffic associated with the CR zoning approved by the 2007 Decision) and other properties in the "Traffic Analysis Zone" or TAZ.[48] Greenlight's approach is contrary to professional practices because it builds in double-counting of trips.[49] When the double-counting issue is resolved and the data from even a single other segment is considered along with the one segment relied upon by Greenlight, Kittelson explains that an appropriately calculated annual growth rate is 1.06 %, which is consistent with the City of Salem transportation staff's setting of a 1% growth rate for the May 2018 Kittelson traffic study. Applicants' Rebuttal, Attachment 1, p. 5.

Next, Greenlight uses a saturation flow rate of 1,800 vehicles per hour per lane (vphpl) value in their analysis of intersections along Kuebler Boulevard. Kittelson explains, "When actual data is available, it is best practices to use actual versus software default values." Applicants' Rebuttal, Attachment 1, p. 8. Here, Kittelson conducted a saturation flow study at several high-volume lane movement locations to get a representative sample of saturation flow characteristics at various high-volume intersections and lane group movements in the study area. Applicants' Rebuttal, Attachment 5, p. 21. That study was done consistently with the City public works administrative rules as well as the guidelines of the 2010 Highway Capacity Manual (Chapter 31) and the ODOT Analysis Procedures Manual (APM) (pages 3-38). *Id*. The study met all conditions for all lanes and the methodology and results were confirmed to be appropriate by City staff, including the City Engineer. *Id.* That analysis showed that a saturation flow rate of 1,900 vphpl is appropriate. Kittelson also points out that the standard Greenlight refers to for using a saturation flow rate of 1,800 expressly states "unless a separate flow rate analysis has been performed." Applicants' Rebuttal, Attachment 5, p. 21. Greenlight should have used a

[45] Kittelson Response to July 2, 2020 Greenlight Comments, p 5.
[46] Kittelson Response to July 2, 2020 Greenlight Comments, p 5.
[47] *See, e.g.*, Worcester e-mail dated March 18, 2020 (discussing piecemeal approach to traffic impacts and ignoring Amazon and retirement facility).
[48] Kittelson Response to July 2, 2020 Greenlight Comments, p 5.
[49] Kittelson Response to July 2, 2020 Greenlight Comments, p 5.

saturation flow rate of 1,900 vphpl. Using the lower saturation flow rate improperly inflates the traffic impacts.

Next, Greenlight similarly used a lower, default right-turn on red (RTOR) percentage for I-5 Southbound/Kuebler Boulevard intersection instead of the site-specific data taken by Kittelson for the intersection. Again, best practices call for the use of actual data when available instead of software default values. Once more, the purposeful use of a lower RTOR rate results in worse traffic conditions.

Each of the above errors is cumulative and increasingly exacerbates the inaccuracies of Greenlight's analysis to overstate transportation system impacts. It is only because of these cumulative errors that Greenlight is able to reach conclusions that appear to show transportation facilities performing below City or ODOT intersection operating standards. The City Council should reject Greenlight's flawed efforts and conclude that Kittelson's data and analysis demonstrate that the proposed development complies with the Level of Service and volume-to-capacity operational standards provided under SAR 6.33(a), to the extent they apply.

SAR 6.33(b) Analysis requires that the TIA analysis be conducted using the most current version of the Transportation Research Board, Highway Capacity Manual methodologies. The 2006 TIA and subsequent analysis utilized the appropriate methodologies in its transportation study. As discussed further below, City transportation staff and ODOT have reviewed the analysis and have not objected to the methodology used. That methodology, among other things, recognizes the value and increased accuracy of site-specific field data over assumed software values in evaluating transportation issues. Thus, opponent's objections against the Applicants' use of data collected from actual Costco stores, or from the existing transportation facilities around the subject property are efforts to deviate from the approved methodologies.

The 2006 TIA and subsequent analyses are consistent with SAR 6.33(b).[50] SAR 6.33(c) Extent of Study Area requires the TIA study area to include a number of locations, some of which are triggered by traffic volumes or when identified by City staff. Here, City transportation staff established the scope of work for the TIA in pre-application communications with Kittelson & Associates. The scope of the sensitivity check mirrored those intersections that were evaluated in the 2007 Decision with the exception of Commercial Street SE and Kuebler Boulevard SE. Staff excepted that intersection because the City had completed a Capital Improvement Project that rebuilt the intersection and added right-turn lanes and double left-turn lanes on all approaches, so staff knew no additional mitigation was required at this particular intersection. Staff Memo, March 27, 2020, p. 2-3. The scope of the study area also included a detailed examination of the ingress/egress points for the proposed development as well as the immediately surrounding street system as required by the Site Plan Review standards. The Staff

[50] The SARs, including SAR 6.33 were not adopted until 2014, but the 2006 TIA was comprehensive, providing a similar analysis to that contemplated by the SARs. The fact that the SARs were not in effect when the shopping center was approved in 2007 is another reason the SARs cannot and should not be applied here to result in denial or limitations upon the Applicants' shopping center to which they have a vested right based upon the 2007 approval which comprehensively dealt with traffic issues, including to the larger system.

Memo ultimately described the purpose of the study, which "was to verify that the traffic generated by the proposed development did not exceed volumes that were approved in the 2007 CPC/ZC and to analyze the driveway access to 27th Street SE." *Id* at p. 3.

Further, a larger analysis area under SAR 6.33(c), is irrelevant to the applicable site review standards of either UDC 220.005(f)(3)(b) or (c). The only relevant traffic analysis area is that which informs (1) internal circulation, (2) ingress and egress at the driveways to the shopping center, and (3) the adequacy of the immediately adjacent streets, which flow into those driveways. No purpose is served by demanding an analysis area that is irrelevant to the applicable UDC site review standard. The City Council should make a specific, alternative finding[51] so interpreting its own code and SARs.

As Kittelson & Associates' June 6, 2020 memorandum explains, the October 23, 2018 Staff Decision correctly concluded that the 2018 Kittelson traffic study area is adequate to demonstrate compliance with the City's UDC site review standards. Applicants' Request for Remand Proceeding, Exhibit C, p. 16. The City Council should conclude the May 2018 Kittelson traffic study and its supplements, comply with SAR 6.33(c).

SAR 3.66(d) requires consideration of potential transportation impacts on other jurisdictions. No party has contended that there will be impacts on any other local jurisdiction. Regarding transportation facilities under ODOT jurisdiction, Kittelson has addressed ODOT's concerns and ODOT has not filed any further concerns or voiced opposition to the proposal.

SAR 3.66(e) concerns the horizon year for TIA analysis, and provides:

> "The horizon year of a TIA is defined as the most distant future year that shall be considered." SAR 006-51.

As an initial matter, the standard expressly fixes the horizon year based upon when the TIA is <u>first prepared</u>. Opponents argue that the horizon year must be adjusted to consider the remand of the initial approval and that the remand now makes development of the project in 2019 an impossibility. Consequently, opponents argue that the horizon year should be 2021.[52]

---

[51] Specifically, in the alternative to City Council approval of the Director's Memorandum that establishes the type of TIA required by UDC 803 and the SARs, is not required.

[52] Opponents have equivocated on that date and have argued that the horizon year should be even later, and/or that the proposal in fact is a series of phases and that each "phase" should have its horizon year evaluated. At times it seems opponents do not know which position they are asserting is the correct position. As discussed herein, Applicants' position is that the horizon year is the year of opening measured from the time the traffic analysis for the site review was prepared in May 2018. Nothing requires the horizon year to shift if there is a remand, the horizon year is the one stated in the 2018 Kittelson traffic study, and that the shopping center proposal is the unified shopping center approved by the 2007 Decision – which is allowed outright by the existing zoning. As a precaution, the Applicants have also provided a supplemental analysis that evaluates traffic conditions as if the horizon year is 2021. Even then, the traffic system continues to function in compliance with all standards.

However, opponents offer no legal basis for their assertion and case law takes a different position. For example, in *Citizens for Responsible Development v. City of the Dalles*, 60 Or LUBA 12, 17 (2009), LUBA held that simply because a decision is held up due to a remand does not mean that a TIA must be redone to account for the delay. The decision maker is allowed to continue basing the decision on the TIA conducted in preparation for the application submittal. Opponents' arguments that the TIA opening date must be adjusted is without legal basis.

In any event, as a precaution and without waiving it is unnecessary to do so, Kittelson ran the numbers for a 2021 opening date and compared them to the numbers in the 2018 Kittelson traffic study. Applicants' First Open Record Exhibit 3, p. 1, 3. The analysis shows that the transportation facilities continue to operate within agency operational standards.

Table 6-33 provides the horizon year for various proposed developments:

Proposed Development	**Horizon Year**
Allowed under existing zoning	Year of Opening
Multi-phased Development	Year of opening each phase
Comp Plan Amendment and/or Zone Change.*	Salem TSP Horizon Year
Multi-Jurisdictional (ODOT, Marion or Polk County, Keizer)	As required by Jurisdiction
**Subject to the requirements of the Transportation Planning Rule (OAR 660-012)*	

Table 6-33. Horizon Year for Various Proposed Developments

Opponents contend that the application is for a multi-phase shopping center project and so the horizon year for that must be observed. They are incorrect. First, the proposal is for a use "allowed under existing zoning" under the above chart and so there is no requirement to observe a horizon year for "year of opening each phase." Second, there is no "phasing" for the retail shopping center in any event. Rather, the proposal is a single shopping center development proposal. Third, the retail shopping center at issue here is the last remaining part of the unified shopping center approved in the 2007 Decision. Accordingly, regardless of whether we are in the last phase of that shopping center or a unified shopping center with no "phases", the horizon year for the TIA is the year of opening estimated at the time the TIA was prepared. That is the horizon year used in the May 2018 Kittelson traffic study supporting the site review before the City Council here.

The TIA conducted for the 2007 Decision had a horizon year of 2025. We are still within the horizon year for the TIA analysis conducted for the 2007 Decision. Consequently, that greater transportation system TIA remains valid despite the intervening years, contrary to opponents' assertions.

SAR 6.33(f) provides that the City Traffic Engineer will determine which peak hours are required for traffic study. Here, Kittelson prepared their peak traffic hour analysis based upon the guidance provided by the City Traffic Engineer and consistent with the 2006 TIA, supporting the 2007 Decision. Furthermore, Kittelson responded to Greenlight's claims that Kittelson failed to consider Saturday peak hour impacts in the Kittelson July 21, 2020 response to Greenlight's

comments. Applicants' Request for Remand Proceeding, Exhibit C, p. 4. Kittelson's explanation states that the required analysis is provided in either the May 31, 2018 Kittelson traffic study or its supplements and related appendices, to include those attached to The Request for Remand Proceeding, Exhibit C. That explanation notes that both transportation professionals at the City and ODOT have reviewed the materials and there are no outstanding concerns about either its content or the methodologies employed. The proposal is consistent with SAR 6.33(f).

SAR 6.33(g) Background Growth and Trip Distribution provides that the specified analysis shall be based on the MWVCOG model, and if model data is not available, background growth rates and trip distribution shall be determined by the City Traffic Engineer.

The MWVCOG model does not have data available for a Costco warehouse, consequently, the use of data derived from examining the Salem Costco and other Costco stores, which was authorized and approved by the City Traffic Engineer, was appropriate under the model.

Furthermore, as discussed above under SAR 6.33(a), City staff indicated a growth rate of 1% was required to be used in Kittelson's traffic study. As also discussed above, that growth rate is accurate and is supported by Greenlight's own data once the double-counting of vehicle trips and the consideration of the area transportation system, instead of a single leg, is considered.

As also discussed under SAR 6.33(a) above, the MWVCOG model factors into the analysis in-process applications (Amazon and the retirement center for example) as well as buildout of the surrounding area consistent with the zoning of the property – which includes the subject property's CR zoning – which is the basis for the Kittelson 2006 "reasonable worst case" traffic study that presumed traffic associated with a 314,000 square foot GLA shopping center.

Regarding trip distribution, Kittelson explained that the Salem Costco sales data for FY 2014 through 2016 was analyzed by zip code and estimated directional routing to each zip code was then determined to approximate percentage of travel from each direction to and from the proposed new Costco site. Again, consistent with best practices as well as the Roadway Standards, the City Traffic Engineer determined this to be an appropriate basis for analysis.

The Applicants' transportation analysis is consistent with SAR 6.33(g).

SAR 6.33(h) site generated traffic provides:

> "Trip generation for the proposed development shall be estimated using the most current version of the Institute of Transportation Engineers (ITE) Trip Generation Manual. For land uses not listed in the ITE Trip Generation Manual, studies for similar development in similar regions may be used upon approval by the City Traffic Engineer. Pass-by trips must be quantified and may be approved based upon sufficient supporting data."

Kittelson & Associates explain in their June 6, 2020 response to Greenlight's December 2018 comments that the estimated site generated traffic volumes are based on data and guidance from the most current version of the ITE Trip Generation Manual as required by this standard. Applicants' Request for Remand Proceeding, Exhibit C, p. 8. As Kittelson further explains, "The City of Salem Traffic Engineer has reviewed and accepted the trip generation estimates associated with the proposed development." *Id.* Compliance with ITE Trip Generation Manual requirements is also discussed at Applicants' Rebuttal, Attachment 5, p. 8-9.

Opponents were critical of the fact that Kittelson's analysis was based solely on data drawn from the existing Salem Costco store, arguing that the change in size of the store and increased number of fueling stations would result in significantly higher traffic volumes than extrapolated by Kittelson. Consequently, Kittelson compiled data collected from other Costco stores in Oregon and other states, some larger than the proposed store, some smaller. The additional data did not significantly alter the analysis, and in some cases showed that the average trip rate used by Kittelson was higher than what would be used if the data from other similar Costco stores were used. Applicants' Rebuttal, Attachment 5, p. 3-7, and Kittelson document Attachments B-D.

Furthermore, the pass-by trip data is quantified and provided as Appendix A to Applicants' Request for Remand, Exhibit C, and is discussed throughout the analysis provided in Exhibit C. *See*, e.g., Applicants' Request for Remand, Exhibit C, p. 8-13, 16, 25.

The 2018 Kittelson traffic study and supplemental documents are consistent with SAR 6.33(h).

The mitigation measure requirements of SAR 6.33(i) have been discussed above. There can be no question that the conditions of approval imposed by the 2007 Decision mitigate for significantly more traffic impacts than the present proposal will produce, thereby restoring the level of service to pre-development conditions. Those mitigation measures included the direct development of improved transportation facilities, the dedication of ROW and the payment of the costs of construction. For the mitigation measures that have not yet been completed, the Kittelson traffic study for this site review explain how the remaining mitigation measures from the 2007 Decision will be completed as well as demonstrate how the improvements, such as the roundabout on 27th Avenue SE that will facilitate traffic flow into and out of the proposed development. The 2018 Kittelson traffic study and supplemental documents are consistent with SAR 6.33(i).

Opponents' arguments that the proposal is not consistent with the ITE manual or are inconsistent with SAR 6.33 are not supported by the evidence in the record. The City transportation staff concluded that the proposal satisfies all of the City's TIA requirements, which means it is consistent with the ITE manual. ODOT's statements that the traffic materials and analysis resolve all of ODOT's concerns means the information provided was consistent with all of ODOT's requirements.

b. The May 2018 Traffic Study and Supporting Materials Submitted by Kittelson & Associates Demonstrate That the Proposal Complies with the Transportation-Related Standards Provided Under UDC 220.005(F)(3)(B) and (C) and That no Intersections Will Fail Even With the Traffic From the Proposed Development.

As the evidence in the record and the above discussion demonstrates, the 2018 Kittelson traffic study prepared by Kittelson & Associates satisfies the City's TIA requirements. It follows the methodology set forth by the City's rules and is consistent with the scope of that study established by the City Transportation Engineer. The scope of the 2018 Kittelson traffic study combined with the 2006 TIA cover the entire transportation system impacted by the proposed use.

The evidence in the record demonstrates that, with the mitigation measures implemented as a result of the 2007 Decision and included as part of this proposal, all of the adverse transportation system impacts that will flow from the proposed use will be mitigated and the transportation system will operate at a higher level of service than if the proposed use and mitigation measures had not been authorized. Just as importantly, Kittelson & Associates' evidence demonstrates that no intersections will fail, even when the traffic from the proposed development is added to the system as it is currently operating.

Particular to the Site Plan Review standards, Applicants' 2018 Kittelson traffic study demonstrates that the transportation system will provide for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and that negative impacts to the transportation system are mitigated adequately as required by UDC 220.005(f)(3)(B). The evidence in the record demonstrates that the roundabout at the 27th Avenue site access, which was specifically requested by the City Traffic Engineer, will safely and efficiently move traffic not only into and out of the proposed development, but will also move residential traffic more efficiently into and out of the neighborhood. While irrelevant to the site review approval criteria, the traffic calming measures, which are required by the 2007 Decision, but for which Applicants have proposed to supplement even further, will mitigate for potential speeding impacts that some opponents have expressed concern about.[53] The other improvements required by the 2007 Decision, such as the right-turn-in only access from Kuebler Boulevard, which has already been implemented as part of the Kuebler Boulevard improvements, also helps satisfy this requirement.

Kittelson & Associates have responded to each of opponents' traffic concerns and technical allegations and disproven each of them. Some claims insisted upon other forms of

---

[53] The 2007 Decision includes the following condition of approval:

> (6) The developer shall commit up to $5,000 for traffic calming devices (such as speed humps or other traffic calming measures) to be used in the residential neighborhood south of the proposed development if a need is identified. The Neighborhood Traffic Management Program is the process used to identify traffic calming needs.

analysis, which Kittelson did and demonstrated that the results were not what either Greenlight or opponents predicted, and that the standard was met. Other opponent claims were based on unfavorable and erroneous assumptions, which predictably led to erroneous conclusions. Kittelson responded to these allegations and pointed to the professional standards as well as evidence in the record that refuted their allegations. Repeatedly, opponents argued that Kittelson did not follow best practices, such as whether it was proper for Kittelson to use Costco-specific trip generation data instead of ITE specified trip generation rates. Continuing with that example, Kittelson first pointed out to where in the ITE Trip Generation Handbook it stated that using the Costco-specific traffic data was the best practice, and then went ahead and conducted the alternative analysis requested by opponents using ITE rates ascribed to different types of discount stores (some of which ITE acknowledged included fueling positions), and added to those ITE rates, rates for a stand-alone gas station, which made the Kittelson ITE analysis performed to answer the opponents' objections, even more conservative than sought by Greenlight. *See*, Applicants' First Open Record Exhibit 3, July 21, 2020.[54] That analysis proved Greenlight's assertions wrong. Time and time again, Kittelson's analysis withstood scrutiny and the opponents' claims that Kittelson was trying to fudge the numbers or that the methodology underestimated the traffic impacts, have consistently been demonstrated to be incorrect. When opponents argued that 2019 was not a reasonable build-out year and that calculations should be based on a build-out year of 2021, Kittelson ran the numbers and found no change. None of opponents' transportation system arguments have been left unanswered and the result is still the same – negative impacts to the transportation system that may flow from the proposed development are mitigated adequately, satisfying UDC 220.005(f)(3)(B).

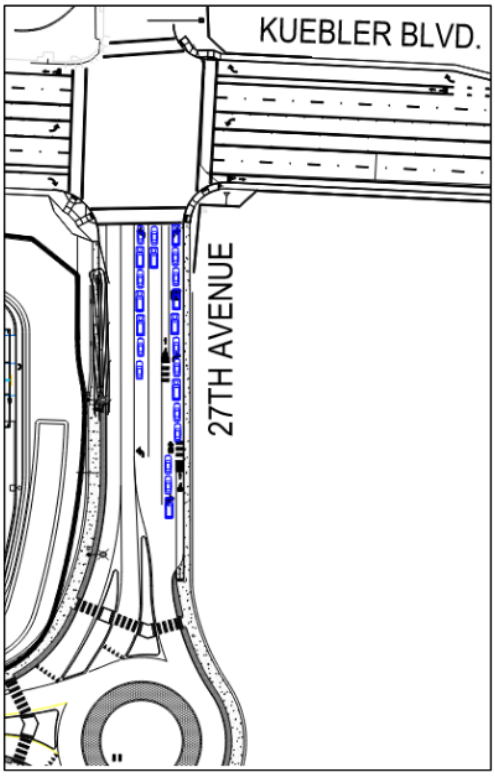
The evidence in the record also demonstrates that the on-site circulation will be safe and efficient as required by UDC 220.005(f)(3)(C). The only issue raised by opponents relevant to this standard is that the fuel station has an insufficient queue and that Kittelson's analysis and conclusions were inadequate because Kittelson failed to show the data and calculations used in reaching its conclusion. In response, Kittelson provided in great detail the basis for its conclusions, which demonstrated that opponents' claims were incorrect and that the fueling station will operate safely and not create any on-site or off-site safety issues (including queueing) and will operate efficiently. *See*, Applicants' Rebuttal Argument, Attachment 5, p. 14-16.

Opponents also argued that northbound left turn movements at the Kuebler and 27th Ave. intersection "could very well be stuck behind this 342' queue." However, this is based upon incorrect math. In the July 28, 2020 Greenlight Engineering comment to this effect, Greenlight mistakenly adds the northbound left turn, through lane and right turn lane queue lengths together to claim error regarding the northbound left-turning and through vehicles. This is wrong. In Kittelson's *Response to July 28, 2020 Remand Response Comments memo* (dated August 12, 2020), they provide Exhibit 4 (reproduced below), which showed how the northbound queues

[54] Kittelson's response considered the following ITE categories of uses: a Free-Standing Discount Superstore, a Free-Standing Discount Store; and a Discount Club. For the supplemental analysis, Kittelson also included the trip generation from a Gasoline/Service Station in conjunction with the Discount Club data, in an effort to be conservative. In that same response, Kittelson evaluated the traffic data for several other Costco stores, which demonstrated that the data derived from the existing Salem Costco and used by Kittelson were accurate.

can be accommodated for the 2019 PM peak hour scenario. If one more vehicle were added to the right-turn lane (as to represent the 2021 PM peak hour scenario 95th percentile queue estimate), then the right-turn queue would still not block the other lanes nor extend into the 27th Ave. roundabout.

Exhibit 4. Kuebler Blvd / 27th Avenue Northbound Approach Vehicle Queues



Furthermore, it is worth reiterating that 95th percentile queue lengths represent the worst-case queue that occurs 5 percent of the time during the peak hour. Should northbound approach queues extend further in the future, simple signal timing adjustment to Kuebler Blvd/27th Ave traffic signal can be made to allocate more time to the northbound approach movements, a routine adjustment commonly made to traffic signals.

The City Council should conclude that the evidence in the record demonstrates that the proposal is consistent with the Site Plan Review transportation requirements set forth under UDC 220.005(f)(3).

V. Specific Responses to Other Opponent Arguments

This section responds to various arguments presented by opponents.

a. *Applicants Have Not "Implicitly Admitted" That a TIA Appropriate For a Plan And Zone Change, is Required For Site Plan Review.*

Opponents' counsel contends that PacTrust "implicitly admitted" that it was required to do a comprehensive TIA because if the TIA for the 2007 Decision had been adequate, "PacTrust would never have spent money having Kittelson do a Site Plan TIA. But they did." Anuta Letter, July 28, 2020, p. 10. Counsel mischaracterizes Applicants' statements as they do Mr. Panko's statements regarding the TIA issue made during the December 10, 2018 hearing. Anuta Letter, July 28, 2020, p. 6.

Mr. Anuta's statement is an example of the confusing use of the term "TIA" discussed throughout this proceeding. The same term "TIA" is used for a transportation impact analysis prepared to demonstrate compliance with Statewide Planning Goal 12 (Transportation) and one that is prepared for site plan review, but they each have an entirely separate and significantly different analytical scope. Applicants have never contended that they did not need to do a traffic analysis related to the Site Plan Review standards in UDC 220.005, which are concerned with the safety and adequacy of the driveways to the shopping center from the immediately adjacent streets. Applicants' analysis of that was also called a TIA.

The Applicants are on record stating that no new comprehensive TIA – of the type that was performed for the plan amendment and zone change in 2006 – Is required for Site Plan Review. That is an accurate statement, as is confirmed in the Director's memorandum. But that does not mean that an analysis of traffic adequate to establish the adequacy of internal circulation and of access into and out of the shopping center, is inappropriate. The Applicants' 2018 Kittelson traffic study demonstrates the adequacy of internal circulation and traffic in and out of the shopping center. It also performs a sensitivity check on the continued validity of the 2006 TIA in the particulars requested by staff. As a technical matter, no standard required the Applicants to perform the sensitivity check requested. But consistent with the manner in which the Applicants have always gone about developing their property, they were happy to accede to staff's request.

However, a sensitivity check is not the same thing as a comprehensive TIA. It's not even close. When Mr. Panko answered the City Councilor's question if the TIA PacTrust prepared for the application was required, he was responding that the ingress-egress and sensitivity check components of the Applicants' TIA were, in his view, necessary to demonstrate compliance with the Site Plan Review standards. Mr. Panko was not saying that a comprehensive TIA that complied with all SAR standards was necessary. Opponents misrepresent Mr. Panko's statements. When PacTrust did a TIA for the Site Plan Review application, it was in recognition that Site Plan Review requires some transportation analysis and as a courtesy to the City's request to do a sensitivity check of the conclusions of the continued validity of the transportation assumptions underpinning the 2007 Decision. It was not an "implicit admission" on Applicants' part that a comprehensive TIA is required for Site Plan Review that complies with SAR standards that do not and cannot inform the site plan review standards. A TIA that substantially revisits the analysis conducted in 2006-2007 or looks to the surrounding street network is wholly irrelevant to site review and so is not required to demonstrate compliance with Site Plan Review approval criteria.

Opponents' counsel is simply wrong in his assertions.

b. Opponents and Greenlight Fail to Acknowledge or Address the Fact That the Transportation System Mitigation Exactions From the 2007 Decision Are Scaled For a Project of 314,000 Square Feet Of GLA or Explain How Those Improvements do not Offset the Transportation Impacts From the Proposed Development.

To put it simply, opponents and Greenlight avoid the traffic elephant in the room. Throughout these proceedings, the simple fact has not changed that, while the proposal is for a retail shopping center of 189,550 square feet of GLA in size that will be used in conjunction with the medical and office uses on the site for a project 228,062 square feet of GLA in size, Applicants have or will implement mitigation measures for traffic impacts ***that would result from a similar development of 314,000 square feet of GLA in size***. Opponents do not and cannot explain how the mitigation measures implemented by the Applicants do not mitigate for the impacts to the transportation system that will flow from the significantly smaller proposed use.

Greenlight concedes that the UDC requires that projects demonstrate that "negative impacts to the transportation system are mitigated adequately." Greenlight, July 28, 2020, p. 9. Yet Greenlight and opponents continue to refuse to incorporate the mitigation of transportation impacts from 314,000 square feet of GLA into their calculations or arguments. Their assorted complaints do not undo the simple fact that the proposed smaller development does not have unmitigated adverse transportation system impacts after implementation of the mitigation measures for the approved larger development with significantly greater veh.icle trips. The math is simply not on their side.

Nor is the law. Opponents present no legal basis for the City to impose further exactions on the Applicants. The City Council in 2007 recognized that they were imposing exactions based on a TIA that evaluated transportation impacts on the City's transportation system greater than the use proposed by the Applicants, and significantly greater than that allowed by the City Council. *See*, *e.g*., 2007 Decision, p. 30 ("This is because the TIA analyzes the same use categories under the Trip Generation manual, but for a greater square footage of gross leasable area than City Council allowed in this decision."). There is no legal theory that allows the City, after it has imposed exactions that more than compensate for the impacts to the transportation system caused by the authorized development, to impose further exactions for those very same impacts. As discussed above, doing so violates the principles of Constitutional takings law set forth in *Nollan* and *Dolan*.

Throughout their arguments, opponents choose instead to criticize and collaterally attack the 2006 TIA. As noted above, this they are not allowed to do. Opponents are repeating the same losing arguments that were raised in *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008). They have no right to re-hash them again in this proceeding. The City Council in 2007 expressly held:

"[The] Council finds the TIA complete, adequate and reliable." 2007 Decision, p. 30.

Opponents cannot now argue that the 2006 TIA was incomplete, inadequate and unreliable in an effort to argue that the mitigation measures that relied on that evidence are somehow incomplete or inadequate. They made those arguments in the *Lufkin* appeal and lost. They cannot make those arguments again. That is an impermissible collateral attack on the prior decision and the evidence behind the decision. *Just v. Linn County*, 59 Or at 236; *see also*, *Olson v. City of Springfield*, 56 Or LUBA 229, 233 (2008) (cannot challenge the underlying data behind a prior land use decision in a later application that relies on the prior decision); *Graser-*

Lindsey v. City of Oregon City, __ Or LUBA __ (LUBA No. 2016-044, November 22, 2016) (cannot challenged data behind prior adopted TSP in subsequent appeal of application that relies on TSP). Opponents cannot act as if the analysis they say should be done now has not already been done. Rather, opponents must directly address the fact that the 2007 Decision imposed mitigation measures greater than the impacts that would flow from the authorized use instead of trying to undermine the 2006 TIA as inadequate. This they have failed to do.

Kittelson & Associates' August 12, 2020 rebuttal to opponents' July 28, 2020 submittal (Applicants' Rebuttal Attachment 5) plainly explained:

> The 2006 TIA approved by the 2007 Decision documented that the identified volume of traffic associated with a 314,000 square feet GLA unified shopping center, mitigated with the particular required transportation improvements, fully mitigated for the impacts of the approved unified shopping center and that no further mitigation was needed to accommodate 'the traffic impacts of the proposed development [shopping center]' – whether it opened in 2009 as the 2006 TIA predicted or 2019 or 2021. The growth in background traffic since the 2007 Decision does not change the fact that PacTrust, through the requirements of the 2007 Decision, has 'fully mitigated' for the impacts of the approved unified shopping center, meeting the UDC standard for granting an exemption per UDC 803.015(d) to the technical TIA requirements otherwise expressed in the City's regulations." Applicants' Rebuttal Attachment 5, Page 2.

The consequence of the City Council imposing such extreme mitigation measures in the 2007 Decision is also explained by the Kittelson rebuttal:

> "Even if the larger system was predicted to fail in the 2006 TIA by 2025, and indeed even if it were failing now or in 2021, the 2006 TIA establishes that such failure is not caused by the proposed shopping center." Applicants' Rebuttal Attachment 5, p. 2.

Simply put, the evidence in the record demonstrates "with the approved mitigation, in 2025 that larger transportation system was predicted to function better than it would function without the development and its required mitigation[.]" Applicants' Rebuttal, Attachment 5, p. 2.

Greenlight Engineering's rebuttal argument continues to ignore the overall effect of the 2007 Decision's transportation mitigation measures that more than mitigate for the development's system-wide transportation impacts to claim that Applicants must still address "this development's *unmitigated impacts*." Greenlight Engineering, August 12, 2020, p. 11 (emphasis supplied). The proposal's transportation impacts are not unmitigated – <u>they have already been mitigated</u>. Greenlight simply wants to ignore the mitigation improvements already paid for and implemented by Applicants and to act as if that is the baseline. It is not. Greenlight wants the Applicants <u>to mitigate for the transportation impacts from the proposed development for a second time</u>.

The question that really should be asked, and which Greenlight and opponents ignore, is what would the levels of service be with current volumes of traffic and *with none of the transportation system improvements that the 2007 Decision mitigation measures, paid for by the Applicants, in place*? Then compare that to the levels of service that would exist after the additional traffic from the proposal is added and the transportation mitigation measures required by the 2007 Decision are fully implemented as they will be with the proposal. As the City Council concluded in 2007, there is no doubt the answer would be that the levels of service would be better with the proposal and mitigation measures in place because the mitigation measures imposed by the 2007 Decision more than fully mitigate for the worst-case traffic impacts of the approved development.

Because opponents have not addressed the fundamental issue that the Applicants have already mitigated for the transportation system impacts of the proposed use, opponents' arguments are without merit and provide the City Council no basis upon which to conclude Applicants do not have a vested right to approval of the proposed use or that the proposal does not comply with the Site Plan Review transportation-related approval criteria.

c. The City Council Should Reject the Opponents' Efforts to Have the City Council Believe Greenlight Instead of the City's Professional Transportation Staff, Applicants' Traffic Data and Expert Analysis, and ODOT.

Opponents recognize that the City of Salem Public Works transportation staff and ODOT have reviewed the transportation analysis Applicant prepared for the proposed development. Greenlight, July 28, 2020, p. 11. City transportation staff concurred with Kittelson's analysis and conclusions in this proceeding. After having some initial questions, which Kittelson addressed, ODOT has expressed no opposition to the proposed development. Such concurrence and satisfaction of ODOT concerns would not have come had Applicants' 2006 TIA not adhered to the ITE *Trip Generation Manual* and *Trip Generation Handbook* methodologies and requirements as opponents' repeatedly assert. *See*, e.g., Greenlight Letter, August 12, 2020, p. 2.

Furthermore, ODOT concurred with the 2006 TIA as consistent with ODOT's Analysis Procedures Manual ("APM"). 2007 Decision, p. 23. And, at that time, both ODOT and City transportation staff concurred that the approved use, as conditioned, is fully consistent with Statewide Planning Goal 12's requirement that the City's transportation system will continue to function consistently with all performance level of service standards and that all potential significant impacts to the City's system will be mitigated. 2007 Decision, p. 24.

Despite the above, opponents ask the City Council to conclude that City transportation staff, ODOT, and Kittelson & Associates, Inc. are all wrong in their conclusions, both now and back in 2007, and that the City Council should, instead, rely upon their consultant's analysis. The City Council should reject that request. Not only has Kittelson & Associates demonstrated compliance with all approval standards and responded to all City staff and ODOT inquiries, but also Kittelson has repeatedly responded to the plethora of allegations made by opponents and Greenlight with data and analysis that refutes the allegations. City staff has specifically determined that the Applicants' analyses are correct. In fact, City staff and ODOT have had plenty of opportunity to inform Applicants or the City that the Kittelson methodology was

flawed if it, in fact, was. City transportation staff and ODOT have remained silent, despite all of opponents' arguments throughout this proceeding. Kittelson & Associate's data, reports and analyses are not flawed. When the data disproves opponents' arguments, opponents have consistently just moved on to other allegations, to then be refuted again.[55]

The materials prepared by Kittelson & Associates include:

- May 2018 Traffic Study
- Response to City and ODOT Comments (August 9, 2018)
- Response to ODOT Additional Comments (September 17, 2018)
- Response to Appeal Comments (November 29, 2018)
- Response to Greenlight Engineering Comments (June 6, 2020)
- Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments (July 21, 2020)
- Response to July 2, 2020 Greenlight Engineering Comments (August 12, 2020)
- Response to July 28, 2020 Greenlight Engineering Comments (August 12, 2020)
- Response to Additional Remand Response Comments (August 12, 2020).

The above constitutes substantial evidence a reasonable decision maker would rely upon to conclude that the application demonstrates compliance with all traffic-related approval standards. That is so even with the contentions made by Greenlight Engineering in the record. The City's transportation staff are technical experts. The City staff and ODOT did not err in concurring with Kittelson's transportation system analysis and conclusions.

As the next section demonstrates, Greenlight's actions during this proceeding warrant an explicit finding that the City Council finds Kittelson & Associates' TIA and subsequent materials to be more credible than those of Greenlight Engineering. The City Council should not reject the City's transportation staff's conclusions that the proposal satisfies all transportation related requirements.

d. The City Council Should Make an Express Finding That The Kittelson & Associates, Inc.'s Evidence And Conclusions Are More Credible Than Those of Greenlight Engineering.

LUBA affords local decision-makers deference with respect to credibility determinations among witness testimony. *Applebee v. Washington County*, 54 Or LUBA 364, 390 (2007). This extends to the local decision maker's choice of experts so long as a reasonable person could

[55] A prime example of this is Greenlight Engineering's extensive arguments in its July 28, 2020 letter asserting that Kittelson & Associates must use ITE trip generation numbers in its analysis instead of the Costco-specific numbers and that Kittelson's analysis is flawed because it does not. Greenlight Letter, July 28, 2020, p. 10-13. However, when Kittelson did the analysis the way that Greenlight Engineering asserted it must be done, and demonstrated that using the ITE trip generation numbers resulted in lesser transportation systems impacts than the empirically derived Costco numbers, Greenlight changes its position and asserted in its August 12, 2020 letter (p. 1, 2-3), that ITE *Trip Generation Manual* data cannot be used.

make the same choice. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff'd* 133 Or App 258 (1995). Simply put, LUBA is not authorized to second guess such judgments made by the decision-maker as the finder in fact. *Sanders v. Clackamas County*, 10 Or LUBA 231, 237 (1984). When LUBA does so and reweighs the evidence, LUBA exceeds its scope of review and remand is appropriate. *Tigard Sand and Gravel, Inc. v. Clackamas County*, 151 Or App 16, 20, 949 P2d 1225 (1997), *rev den*, 327 Or 83, 961 P2d 217 (1988).

The City Council should make an express finding in this proceeding that Kittelson & Associates' evidence and conclusions are accurate and reliable and more credible than those of Greenlight Engineering. As highlighted throughout this final argument, Greenlight has consistently made assertions that subsequent analysis has demonstrated were incorrect or that led to shifting positions on Greenlight's part. *See*, e.g., Footnote 27 above. This undermines Greenlight Engineering's credibility and the City Council should state so in findings.

Greenlight Engineering's arguments presented in its July 28, 2020 submittal, are overly argumentative for a supposedly neutral analyst. This begs the question whether the assertions made are professional opinion on technical matters, or statements crafted to suit the position of a client. For example, Greenlight repeatedly misrepresents positions stated by the parties to the proceedings in an effort to paint views that differ from theirs as wrong. On page 1 of its July 28, 2020 letter, Greenlight asserts that City staff confirmed that a "full TIA is required" as part of the Site Plan Review application, further explaining on page 8 that at the December 10, 2018 hearing on the matter, City Staff Planner Aaron Panko noted that a TIA "is indeed required as part of this application." Greenlight understands full well the substantial differences between a TIA for a zone change and a TIA for site plan review, and that Mr. Panko did not say a comprehensive TIA was required. He simply stated, and Greenlight no doubt understood, that a traffic analysis was required as part of the Site Plan Review application to address the site ingress-egress question posed by City Site Plan Review standards and as a sensitivity check of the 2006 TIA's conclusions regarding transportation volumes and impacts.

Another example of Greenlight mischaracterizing the City's position is a statement on page 14 of the Greenlight July 28, 2020 letter: "There are many other intersections similarly impacted that were *inexplicably omitted* from the Site Plan Review TIA." (Emphasis supplied). One must question whether Greenlight has even read the transportation-related evidence in the record. The last page of the Director's decision that concluded that the Applicants are entitled to an exception to the full TIA requirements, explained that the purpose of the scope of the Site Plan TIA was "to verify that the traffic generated by the proposed development did not exceed volumes that were approved in the 2007 CPC/ZC and to analyze the driveway access to 27th Street SE." Furthermore, the Director's decision explained that the basis for the exception to the TIA requirement was the mitigation imposed by the 2007 Decision that more than compensated for the traffic impacts that would flow from the proposed use, as discussed above, that Greenlight and opponents have always failed to directly address. While Greenlight may disagree with that analysis or conclusion, it is wrong for Greenlight to assert that certain intersections were "inexplicably omitted." City staff explained why certain intersections were omitted. Greenlight Engineering misrepresented City staff's position.

Likewise, Greenlight mischaracterizes Applicants' positions. Greenlight asserts that the "applicant has clearly communicated that this is a multi-phase development" suggesting that the retail shopping center will be rolled out in a series of phases. As discussed above, this is not true. Applicants have always presented the development of the subject property as a single, unified development. The first part, or Phase One as the City's 2012 Decision called it, was the development of the Salem Clinic and related medical office building. Under the City's characterization in the 2012 Decision, "Phase Two" is the retail shopping center. Regardless, the development is a unified shopping center that is permitted under existing zoning. The retail shopping center, which includes Costco, is not a multi-phased development as Greenlight states.

Another mischaracterization of Applicants' position concerns the significance of the CPC/ZC mitigation measures. At page 5 of its July 28, 2020 letter, Greenlight states, "The applicant points to no code references that establish that addressing the requirements of a Zone Change traffic impact analysis exempt an applicant from meeting all requirements of a Site Plan Review TIA." However, Applicants have never taken the position that the 2006 TIA addressed all the transportation related issues that pertain to a Site Plan Review application. Consequently, it is unsurprising Applicants have not pointed to a code section that stands for a proposition Applicants are not asserting. Opponents mischaracterize Applicants' position, which is discussed fully in the traffic impacts section above.

Greenlight Engineering delves into areas of law in which it has no expertise and as a result makes incorrect legal assertions. On page 5 of the July 28, 2020 letter, Greenlight asserts, "At the time of the CPC/ZC, the applicant could have chosen to complete a Site Plan Review application, but instead opted to wait." That statement is incorrect as a matter of law – as the evidence in the record demonstrates, Site Plan Review did not exist in the Salem Revised Code until 2008 when it was adopted or more realistically, in 2009 when it became effective. This is three years after the CPC/ZC application was first submitted, and two years after it was approved. Applicants could not have submitted a Site Plan Review application in 2006. Similarly, on the same page, in making legal arguments regarding vested rights, Greenlight asserts: "A CPC/ZC approval does not vest trips for a future development approval any more than it does for a property that has not undergone a recent CPC/ZC." Greenlight, July 28, 2020, p. 5. That assertion betrays a misunderstanding of vested rights law, and fails to recognize that it is not the decision that vests a party's rights, it's the expenditures made to implement the mitigation measures imposed by the decision's conditions of approval that affords the applicant a vested right to completion of the project. Greenlight simply does not understand the law.

Similarly, on page 1 of the July 28, 2020 letter, Greenlight draws a legal conclusion that it is "impossible" to evaluate the adequacy of the transportation system well beyond that which the approval standards reach or to make a finding that the application meets the approval criteria. Determinations of whether the approval criteria have been met are the City Council's to make, not Greenlight's. Given that Greenlight and the opponents in general ignore much of the evidence in the record and the mitigation measures implemented as a result of the 2007 Decision, they cannot competently assert that it is "impossible" for the City Council to conclude the Site Plan Review transportation requirements have been met.

Last, the Greenlight testimony repeatedly applies faulty deductive reasoning in its assertions instead of basing conclusions upon demonstrated data. For example, at the top of

page 11, Greenlight's July 28, 2020 letter states: "The applicant's methodology assumes that just a small percentage of Costco warehouse traffic also uses the fueling station. If true, then the station clearly will generate a significant number of its own new trips not related to the warehouse."

Greenlight's statement is incorrect. The Applicants' methodology does not assume that a small percentage of Costco warehouse trips also use the fueling station. As presented in the May 2018 Traffic Study and supplemental documents prepared by Kittelson, the estimated trip generation for Costco accounts for all trips associated with the warehouse and fuel station. Put another way, the trip generation estimate for the fueling positions is accounted for (i.e. calculated) in the overall trip generation of the Costco (warehouse and fuel station). Kittelson explained this in great detail in its August 12, 2020 *Response to July 28, 2020 Remand Response Comments*, pages 3-7. In fact, the Applicants' traffic data and analysis has been presented throughout this proceeding, to include the basis for the assumptions factored into the analysis' methodology. Greenlight points to no evidence, nothing at all, that must lead to their statement and their statement is wrong.

Kittelson's evidence and conclusions are, by contrast, based upon transparent data that is directly responsive to comments and evidence submitted by others. Kittelson responded to each of the multitude of arguments thrown out by opponents and Greenlight. A prime example of this is Kittelson's June 6, 2020 response to Greenlight's report opponents filed on the night of the December 10, 2018 City Council hearing, to which Kittelson provided 35 pages of narrative and 85 pages of data and additional analysis responded to each issue raised by Greenlight Engineering. *See* Applicants' Remand Request, Exhibit C. Kittelson's analysis is focused on the technical area where it has expertise and relies upon data and evidence that is provided to the City Council, as it should be for a transportation expert witness.

Another example is Kittelson's response to claims that the transportation analysis should have used ITE trip generation rates instead of Costco-specific data, which the ITE expressly allows. Opponents' contention was that the ITE data would, in fact, show the proposed use to fail and that Costco was trying to avoid revealing that fact. Kittelson's 60-page, July 21, 2020 response again provides both analysis and supporting data from 10 intersections at or near the subject property. Kittelson's responses includes a comparison of Costco data with fuel stations that includes data from multiple stores, the ITE data for free-standing Discount Superstores, free-standing Discount Stores, and Discount Club with the traffic from a separate fueling station added to the uses that did not include a fueling station as part of the ITE classification. In all instances, the uses with an existing ITE Land Use Code had lower trip generation rates than those identified specifically from Costco. Furthermore, there was an insignificant change in the trip generation rate when the data collected from additional Costco sites was added to the data gathered from the existing Salem Costco site.

The above demonstrates that time and time again, Kittelson's traffic analysis has been validated by newly incorporated data whereas opponents' and Greenlight's assertions about what new data would demonstrate has been proven wrong. For these reasons, the City Council should conclude that it finds the transportation analysis and data produced by Kittelson & Associates,

Inc. to be more accurate and reliable, and more credible than that provided by Greenlight Engineering.

e. *Greenlight Refusal to Accept the Conclusions of the ITE Data They Demanded*

Greenlight's latest memorandum complains the Kittelson used ITE data, rather than Costco-specific data. That is ironic, given that the Kittelson analysis using *ITE Trip Generation Manual* data, particularly Land use Codes #857 and #944 was an accommodation to and was specifically requested by Greenlight Engineering in their December 10, 2018 report. Kittelson has consistently stated that the *higher* Costco-specific trip generation data, which is partly based on data collected at the existing local Salem Costco, serves as a better data point and thus was used as the basis of the May 2018 Kittelson traffic study prepared for the site review application submittal. Kittelson explained that using the Costco-specific data was most appropriate as reflected in the ITE Trip Generation Manual, that states when practical, the user is encouraged to supplement ITE data with local data that has been collected at similar sites. In this regard, the ITE Manual provides:

> "local data should be collected and used to estimate trip generation under the following circumstances…if the size of the study site is not within the range of points presented in the Manual data volumes"

The Greenlight statements are correct in that the size of data points in the ITE manual are smaller than the proposed elements. The data ranges are as follows:

- Discount Club (90 -149K SF)
- Gasoline/Fueling Station (~3-20 positions)"

The Kittelson ITE-based supplemental analysis was only provided to respond to the Greenlight Engineering claims that the ITE data should be used. Kittelson has made clear that it stands behind the Costco-specific trip generation data, for which the summarized and raw data has been provided on the record in the *Response to July 28, 2020 Remand Response Comments*, dated August 12, 2020.

Greenlight Engineering further ignores the ITE *Trip Generation Handbook* (page 86), which states: "*Where there are only one or two potential data collection sites in a comparable setting, the analyst should use that data, coupled with other local or national data, to derive the estimate."* This is precisely the analysis provided by Kittelson with Costco specific trip generation data, as most recently explained in the Kittelson *Response to July 28, 2020 Remand Response Comments*, dated August 12, 2020.

The traffic counts used by Kittelson are appropriate and, in fact, the City's professional engineering staff expressly required that the Costco specific data be used in the preparation of the 2018 traffic study.

f. *Opponents' Traffic Counts Taken During the Disruptive Conditions of 2020*

Opponents cite their traffic counts taken on February 27, 2020 and March 3, 2020 and claim that they should be used to undermine the Applicants' traffic counts taken in 2018 and reported in the Applicants' May 2018 traffic analysis submitted to support site review. Their traffic counts taken on February 27, 2020 and March 3, 2020, undermine neither the Applicants' traffic counts nor analysis.

In Kittelson's *Response to July 28, 2020 Remand Response Comments,* at pages 1-2, Kittelson makes three important points, all of which make clear that the opponents' traffic counts provide no useful data and certainly do not undermine the Applicants' information. First, Kittelson explains, that the March 3, 2020 counts occurred on a day in the heart of pandemic buying behavior. Costco had restricted purchases on that day and had to hire 40 more employees to manage the sudden increase in traffic in the Salem store. Costco explained:

> "*** on March 3rd, 2020 member foot traffic ran 28% up over last year. This was reflected in long lines in the building and long lines back to the freeway entrance trying to enter the parking lot. ***
>
> "Because of the increase in out of stocks, limits were imposed on select items prior to opening on March 3rd, at the direction of our corporate office. These items included water, bath tissue, rice, beans, sugar, flour and dog food.
>
> "The above-mentioned spikes in sales created an environment where members would run through the store to get to those items first, forcing us to manage the flow into the building. Due to the member foot traffic and increased parking lot traffic, we hired an additional 40 employees to help manage the sudden increase in traffic into the building."[56]

Presumably, on March 3, 2020, all grocery and general merchandise stores in the City of Salem experienced similar increases in traffic and strange customer behavior. Similarly, on February 27, 2020, Costco saw significant increases in food sales. Costco explained:

> "*** on February 27th, 2020 Foods sales ran up 13.1% over last year. Key staple items *** saw significant increases in volume. This was when we began to show panic buying in key paper goods and sundry items.
>
> "The jump in foot traffic and sales resulted in out of stock situations in key items such as bath tissue, paper towels, disinfecting wipes etc."[57]

Kittelson points out that it is improper to rely upon traffic counts taken during such disruptive conditions as those the City experienced on Feb 27, 2020 and March 3, 2020. Kittelson cites and attaches an ODOT memorandum to that effect, entitled "Traffic Volume

[56] Kittelson August 12, 2020 Response Memo, Attachment 1, p 1.
[57] Kittelson August 12, 2020 Response to Comments Attachment 1, p 64.

Development During Disruptive Events".[58] That memo expressly states: "Caution should be exercised in taking new traffic counts during disruptive events. New traffic counts should only be taken during disruptive events when it is determined that the data already available is not sufficient for decision making." The data already available – the counts relied upon in the May 2018 Kittelson traffic study supporting the site plan review application – is sufficient for decision making. There is no credible evidence otherwise. The Applicants' traffic counts are appropriate and reliable.

g. Greenlight's Objections to Signal Timing Adjustments are Meritless

The Applicants' traffic supplement dated July 21, 2020, explains that a modest signal timing adjustment at the Battle Creek Rd. and Kuebler Blvd. intersection will maintain operations compliance with all relevant mobility standards.[59] We do not disagree that additional signalized intersections along Kuebler Blvd. may need to be studied more in depth before implementing signal timing changes. In fact, the Applicants stated in their July 21, 2020 Supplemental Analysis memo, that they are willing to pay for a signal retiming study, which would be coordinated with the City and ODOT. There can be no dispute that signal timing and phase adjustments will have to be made to accommodate the planned off-site traffic signal improvements that are required conditions of approval from the 2007 Decision.[60]

Adjusting signal timing is a standard transportation procedure that occurs whenever adjustments (addition of signals, turn lanes, etc.) on a transportation system occur regardless of the property type. As such, the fact that retiming of traffic signals will occur, provides no basis for denial of site review.

h. *Greenlight Erroneously Claims That the Peak Hour Analyses Performed are Inadequate*

The evidence establishes that the highest peak hour for traffic volumes on Kuebler Blvd. is the weekday PM peak hour.[61] This is the analysis used by Kittelson and is correct. Greenlight asserts the analysis peak hour should have been the Saturday mid-day peak. Greenlight is wrong.

The quest for the traffic peak hour is a quest for the period when traffic volumes – for both the shopping center and background traffic together – are their highest. While Costco may have greater trip generation at the Saturday mid-day hour, that is not the critical peak hour period that must be used to determine traffic impacts. This is because the overall background volume of

---

[58] Kittelson August 12, 2020 Response to Comments, Attachment 1, p 57.
[59] Kittelson Memoranda dated July 21, 2020 – Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments, p 4.
[60] Kittelson explained in its July 21, 2020 Supplement, at p 4: "It is important to note that signal timing and phasing adjustments will be made at the signalized intersections along Kuebler Boulevard to accommodate the planned off-site traffic signal improvements, which are required conditions of approval from the 2007 year zone change decision for the site, regardless of the final development uses or horizon year."
[61] Kittelson May 2018 Traffic Analysis, p 6-7.

traffic on Saturday during the mid-day is much lower than during the week, so the overall volume of traffic entering the intersection, at the respective peaks, is highest during the weekday afternoon, peak hour. It is basic that it is the highest total traffic volume per hour, that matters.

The Kittelson May 2018 transportation analysis establishes that the weekday PM peak hour results in a total entering vehicle count at Battle Creek and Kuebler – 4705 vehicles entering per hour. This is to be contrasted with the Saturday mid-day peak, which is lower – 4320 vehicles entering per hour.[62] The total weekday PM peak hour entering vehicle count at the I-5 southbound ramp/Kuebler Blvd. is similarly higher at 3682 vehicles per hour than the Saturday mid-day peak hour which has 3400 vehicles per hour.

Accordingly, as specified on page 2 of the *Supplemental Analysis* memo, the peak hour analysis was limited to the critical time period, the PM peak hour. This is how a critical peak hour analysis is done.

Additionally, as shown on the May 2018 Kittelson traffic study, Figure 12, under Saturday mid-day peak hour conditions, all study intersections are well below the applicable City or ODOT operating standards.

- Battle Creek/Kuebler Blvd. Saturday Peak hour v/c = 0.71 (well below 0.90)
- I-5 Southbound Ramp/Kuebler Blvd. Saturday Peak hour v/c = 0.74 (well below 0.85)

Even if the Saturday midday peak hour volumes grew by 1% to represent a 2021 buildout year, the small traffic volume increase would not be predicted to result in operations above the applicable City or ODOT operating standard, as evidenced by the additional capacity available at the key intersections.

With regard to Greenlight's demand for an AM peak hour analysis, this repeats a previous comment that was fully addressed in Kittelson's November 29, 2018, Memo pages 3-4. The answer is the same – the AM peak traffic volumes are lower than those in attributed to the PM peak hour. As such it is not appropriate to use the AM peak hour.[63]

i. *Greenlight Engineering's Arguments Regarding the Kuebler Boulevard Entrance Collaterally Attacks the Conditions Of Approval From the 2007 Decision and Have No Legal Merit. There is no Access From the Project Directly Onto Kuebler Boulevard.*

Greenlight cites UDC 804.001 and 804.060 as grounds for denying the application because, as Greenlight contends, the proposal's inclusion of an entrance from Kuebler Blvd. "is in clear violation of the UDC." Greenlight, July 28, 2020, p. 19-20. Greenlight is wrong.

The right turn only entrance from Kuebler Boulevard is expressly required by Condition of Approval 7 of the 2007 Decision, which provides in relevant part:

[62] *See* Kittelson May 2018 Traffic Analysis, Figure 11, bubble 1 and Figure 12, bubble 2.
[63] Kittelson June 6, 2020 – Response to Greenlight Engineering comments (page 22).

"The developer shall provide right-in access from Kuebler Boulevard with a design that minimizes impact to through vehicles and provides a safe driveway crossing for bicycle and pedestrian traffic the final design of which to be approved by the Salem Public Works Director."

As Kittelson's response to Greenlight Engineering's argument explains:

"the existing right-in only access driveway from Kuebler Boulevard was a Condition of Approval from CPC/ZC06-06 and was constructed as part of a City capital improvements project, years ago. This ***existing*** access is not subject to reevaluation in this proceeding." Applicants' Rebuttal Attachment 5, p. 21 (emphasis in original).

Furthermore, opponents ignore the express language of SDC 804.060(a) which begins with, "The Director **may require the closure of a driveway approach** . . . ." That language uses the discretionary term "may". It does not require that the Director close an accessway; it gives the Director the discretion to do so.

Last, Greenlight's assertion that the proposal is inconsistent with UDC 804.040 is without legal merit. UDC 804.040 governs access onto parkways. It is silent about access to a property from a parkway. There is no access "onto" Kuebler Boulevard (classified as a Parkway in the City's TSP). The condition of approval requires, and all of the site plans show, a right-in only from Kuebler Boulevard into the subject property. There is no egress from the subject property directly onto Kuebler Boulevard.

This is another example of Greenlight either asserting an incorrect legal position or misrepresenting what the UDC standard provides, or both. Again, it simply makes all of Greenlight's assertions and analysis less credible.

The City Council should reject Greenlight Engineering's Kuebler Boulevard driveway arguments.

j. The 27th Avenue Driveway Meets the Driveway Approach Permit Standards.

In a brief challenge that presented a range of different arguments, Greenlight contends that the application fails to provide evidence that the 27th Avenue Driveway Access Permit requirements are met.

As an initial matter, Greenlight makes its allegation without addressing any of the application materials and reasoning as to why all of the driveway approach permit approval criteria are met. *See*, LUBA Record-7090-92 (application narrative for standards). Greenlight also fails to address, in any way, the Planning Administrator's findings that all of the driveway approach permit approval criteria are met. *See*, LUBA Record-6072-76 (decision findings). Mere claims alone that an application has failed to provide evidence that the criteria have been met are not sufficient to overturn the evidence and conclusions in the record that the proposal satisfies the driveway approach permit approval criteria.

Greenlight also makes a series of conclusory statements in a paragraph regarding the standards and provides no argument or evidence in support of its assertion. Greenlight, July 28, 2020 letter, p. 19. The paragraph states, "It cannot be found . . ." and then quotes verbatim UDC 804.025(d)(2), (6), (7), (8), (9).[64] That conclusory statement is not followed up by any evidence or argument. Conclusions alone are no basis to deny an application, especially when the record contains evidence that demonstrates the standards have been met and the Planning Administrator has concluded the standards have been met. Furthermore, Kittelson & Associates responded to the identified code provisions in Respondents' Rebuttal Attachment 5, p. 19-20. The proposal satisfies those standards.

Last, opponents make two arguments that warrant response. The first argument, which relies on arguments presented earlier in the submittal, contends, "the queuing at the Kuebler Boulevard/27th Avenue intersection will likely spillback into the roundabout at the 27th Avenue/Site Access intersection." Opponents present no evidence as to why the queuing will "likely" spill back to the roundabout. As Kittelson & Associates' response to the statement explains, "Greenlight Engineering takes an overly simplistic and blatantly incorrect approach by adding different northbound approach lane PM peak hour 95th percentile queue lengths together to state that there would be 525 feet of queues." Applicants' Rebuttal Attachment 5, p. 17. Kittelson's analysis includes 95th percentile queues for the intersection and a diagram of what the northbound approach vehicle queues would look like. Kittelson explains:

> "[T]he estimated northbound 95th percentile queues during the PM and Saturday midday peak hours can be accommodated by the planned 27th Avenue design.

---

[64] Opponents cite UDC 803.025(1)(1)-(9), but the relevant standards are at UDC 804.025(d)(1)-(9), which provide:

"(d) Criteria. A Class 2 driveway approach permit shall be granted if:

(1) The proposed driveway approach meets the standards of this chapter and the Public Works Design Standards;
(2) No site conditions prevent placing the driveway approach in the required location;
(3) The number of driveway approaches onto an arterial are minimized;
(4) The proposed driveway approach, where possible:
  (A) Is shared with an adjacent property; or
  (B) Takes access from the lowest classification of street abutting the property;
(5) The proposed driveway approach meets vision clearance standards;
(6) The proposed driveway approach does not create traffic hazards and provides for safe turning movements and access;
(7) The proposed driveway approach does not result in significant adverse impacts to the vicinity;
(8) The proposed driveway approach minimizes impact to the functionality of adjacent streets and intersections; and
(9) The proposed driveway approach balances the adverse impacts to residentially zoned property and the functionality of adjacent streets."

Northbound approach vehicle queues will not back-up from Kuebler Blvd to the 27th Avenue roundabout, nor will cars be trapped in the 27th Avenue roundabout." Applicants' Rebuttal Attachment 5, p. 17.

Opponents' second argument contends "the TIA fails to provide substantial evidence that queues from the fueling depot will not spillback onto 27th Avenue." Kittelson also directly responded to this argument (as it did all of Greenlight Engineering's arguments) and further supplemented the fuel station queuing data based on data from other Costco stores prepared and submitted in response to other Greenlight Engineering comments. That analysis explains that larger fuel stations with 24 or 30 fueling positions process peak demand efficiently and thus reduce waiting times, vehicle queuing and vehicle idling. The proposal has a capacity to handle 82 vehicles at any given time, with 30 vehicles at the fueling positions and 52 vehicles in queue. As the data shows, the estimated maximum peak hour queue ranges from between 8 and 13 vehicles, which can be accommodated by the proposal without spilling onto 27th Avenue as opponents contend. Applicants' Rebuttal Attachment 5, p. 14-16.

The City Council should conclude that the evidence in the record demonstrates that the driveway approach approval criteria for the 27th Avenue and Boone Road have been met and approve the Driveway Approach Permit.

k. Ms. Cozzie Photos And Summary of Crashes on March 18, and November 4, 2019 and Between February And August 2020 do not Undermine Kittelson's Reports Regarding Traffic Safety.

This comment presents evidence of four distinct crashes at the Battle Creek Road/Kuebler Blvd. intersection over a 6-month timeframe, presumably to show crashes happen. This comment presents nothing that undermines any Kittelson analysis or report. Rather, it supports Kittelson's data which shows that the historical crash data showed an average of 7 – 8 crashes occurring each year. Therefore, the resulting crash rate at that intersection reported in this comment, is entirely consistent with the historical rate documented in the May 2018 Kittelson traffic study and <u>below</u> the required ODOT 90th percentile rate.[65]

The comment also presented four crashes at the Battle Creek Road/Boone Road intersection. As Kittelson explained in its November 29, 2018 Response to Comments, that intersection is a stop-controlled intersection that was identified in the May 2018 Kittelson traffic study for having a crash rate that exceeds the ODOT 90th percentile rate. As Kittelson also explained, signalization of that Battle Creek Road/Boone Road intersection is Condition 1 to the 2007 Decision that will improve that intersection's safety performance. The traffic signal at the Battle Creek Road/Boone Road intersection is part of the proposed development, that will be installed when the City approves the application.

There is nothing about this comment that can result in denial of the proposal. Rather, it corroborates Kittelson's analysis and emphasizes one of the many transportation benefits of approving the proposal.

[65] Kittelson November 2018 Traffic Analysis, p. 3-4.

l. The Proposed Use is Not "Too Close" to Residential Neighborhoods.

Several opponents argue that the proposed uses are "too close" to residential neighborhoods and that such larger retail shopping centers are typically built in other areas, farther away from residential uses. *See*, *e.g*., Brogoitti e-mail dated 11 March 2020. Branczek e-mail dated July 18, 2020. Opponents are wrong for several reasons.

First, this comment is not relevant to any applicable zoning standard. The subject property is zoned CR and the proposed shopping center is permitted outright in the CR zone and under the 2007 Decision.

Moreover, one of the primary reasons why the City Council in 2007 decided to change the plan designation and zoning for the subject property was that there were inadequate commercial opportunities for commercial development to serve the growing residential development in the south part of the City.[66] The City Council wanted this development to be near residential uses. Second, the City Council understood in 2007 that the retail shopping center it was approving would be significant in size – up to 299,000 square feet of GLA – and had been presented with a range of potential commercial occupants for the property that had individual building sizes even larger than the proposed Costco. Opponents now are attempting to relitigate the issue of whether a Costco is a suitable retail store for the shopping center approved in 2007. LUBA held that it was. Opponents challenged that conclusion to the Court of Appeals and the court rejected their arguments. Opponents cannot now argue, again, that the proposed Costco store is not a use authorized by the 2007 Decision. *See*, e.g., Krishnan letters dated July 28, 2020 and August 12, 2020 (arguing that Applicants materially changed the uses proposed for the site from that presented during the 2007 Decision proceedings). Third, the evidence in the record demonstrates that retail stores of the size of the proposed Costco store are typically located adjacent to residential neighborhoods as the proposal is here. As the diagram submitted by Jeff Olson as an exhibit to his July 28, 2020 letter demonstrates, the WinCo Foods, Fred Meyer and Walmart stores, all located along Commercial Street SE, are adjacent to or surrounded by residential uses. The proposed retail shopping center is not "too close" to residential neighborhoods.

m. Opponents Cannot Now Raise Issues That Could Have Been Raised in the Prior Proceedings But Were Not or That Were Resolved By LUBA and/or the Court of Appeals.

Whether because they are well-outside of the scope of remand, or because the principles of raise-it-or waive it or issue preclusion apply, or because the matter was resolved by LUBA or the Court of Appeals, the City Council cannot revisit a range of issues and arguments raised by opponents in this proceeding that have been resolved or are no longer live issues. These include,

[66] For example, the 2007 Decision, p. 34, explains: "The location of the property is central to the surrounding residential neighborhoods that are otherwise a block of residential uses lacking in bikeable or walkable commercial shopping and service opportunities. The proposal includes a number of bike and pedestrian improvements that will further facilitate alternative modes of transportation for a meeting with friends, eating, shopping or medical services opportunities."

but are not limited to, the following issues: sewer, stormwater, fire and other emergency services, light pollution, noise and air pollution, crime, property values, the suitability of other locations, tribal lands, the impact on downtown shopping, and whether Costco is a regional store not authorized by the 2007 Decision. *See*, e.g., Coakley e-mail dated March 11, 2020 (multiple issues); Brigoitti, e-mail dated June 22, 2020 (multiple issues); West, e-mail dated July 18, 2020 (noise and pollution); Wills e-mail dated July 23, 2020 (environmental). Nerli, e-mail dated July 26, 2020 (crime); Clarke e-mail dated July 26, 2020 (property values). Ferris, email dated July 28, 2020 (other locations). Hatfield e-mail dated July 28, 2020 (tribal lands, noise pollution); Holmes, e-mail dated July 28, 2020 (downtown shopping); Dalton letter dated July 27, 2020 (Costco is a regional store).

None of the above issues are live on remand and the City Council should ignore all arguments that attempt to visit or revisit these issues.

VI. Conclusion

Applicants have a vested right to develop their unified shopping center as they have laid it out. The City Council should affirm that the 2007 Decision vests PacTrust's right to a shopping center as they have proposed, including the removal of the eight Oregon white oak trees. The City Council should also decide that, regardless, the Applicants' tree transplanting proposal does not "remove" the trees under the express terms of the City's code, so the City's tree ordinance is not triggered in this site plan review and, regardless, the City code standard which allows removal of significant trees when "necessary" for a commercial development, is met. In any case, the City Council should impose a condition of approval that the Applicants shall transplant the eight Oregon white oak trees in a manner consistent with the Applicants' arborist recommendations provided to the City in the Applicants' Remand Letter, Exhibit B.

The City Council should also find that the site plan review standards regarding whether access in and out of the shopping center and internal circulation are safe and adequate, are met. The Applicants are entitled to a determination that the proposed unified shopping center's traffic is less than the traffic volumes approved for the shopping center in the 2007 Decision. The City Council should find that the City has already determined that the traffic impacts to the street network meet relevant standards with the mitigation imposed under the 2007 Decision. No further transportation mitigation should be required.

The City Council should affirm the Director's decision exempting the Applicants' traffic analysis per UDC 803 from a TIA that conforms to the detailed SAR guidelines. The City Council should find that the SAR standards, particularly the analysis area they require, demand a much broader analysis than the site plan review standards call for and so the SAR guidelines cannot inform compliance with the site review standards in any event.

In conclusion, the Applicants respectfully request that the Salem City Council approve the Applicants' Site Plan Review and Driveway Approach Permit applications. Thank you for your consideration.

Very truly yours,

Wendie L. Kellington

WLK:wlk
CC: Shari Reed, Vice President, PacTrust