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June 16, 2020

Via Electronic Mail
Members of the Salem City Council
c/o Dan Atchison, City Attorney
Aaron Panko
555 Liberty St SE, Room 205
Salem, OR 97301

RE: Request for Remand

Dear Honorable Mayor and Members of the City Council:

The Applicants[1] in the above referenced matter hereby request that the City respond to LUBA's remand. ORS 227.181. LUBA's decision held:

> "The Costco store is a 'shopping center' within the meaning of SRC 111.001, a 'retail use' that is allowed in the CR zone, and PacTrust's proposal does not exceed either the 240,000 GLA limit for a store or the 299,000 GLA for the subject property." LUBA Decision Slip Op *18.

Scope of Remand

The only issue that LUBA decided the City must determine on remand, is whether PacTrust has a vested right to a shopping center composed of 299,000 sq. ft gross leasable area (GLA), such that the site review application PacTrust submitted for significantly less GLA, may not be denied. The record should be reopened to address that issue. However, no hearing is required.

Both the City and opponents conceded at LUBA that PacTrust has a vested right to the requested shopping center use. That means that there can be no dispute that PacTrust has a vested right to a shopping center composed of 299,000 GLA or less.

The proposal is for total retail GLA of 189,550 sq. ft.; when the added to the existing medical buildings composed of 38,512 sq. ft., the total integrated shopping center development on the subject property is 228,062 sq. ft., which is 70,938 sq. ft. or 24% less GLA than PacTrust's vested right. Accordingly, PacTrust demonstrates in this remand submission that it has a vested right to complete development of the community shopping center that was approved

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

in the 2007 Decision as part of the unified shopping center that included the medical offices/clinic with up to 299,000 GLA consistent with the conceptual plans presented in 2007.

The City and Opponents Have Conceded That PacTrust has a Vested Right to a Shopping Center up to 299,000 sq. ft.

All parties agreed at LUBA that PacTrust has a vested right to its shopping center. The opponents' concession in this regard was complete, subject only to their constrained view of the 2007 Decision, which neither LUBA nor the court of appeals accepted.[2] The City's concession was qualified by its claim that PacTrust's vested right can be denied if the City decides that the vested shopping center use does not meet tree preservation standards.[3]

PacTrust disagrees with the City's qualified position. PacTrust has a vested right to a shopping center composed of 299,000 sq. ft. GLA, and the proposed shopping center at issue in the site review application, which is substantially smaller, cannot be denied. Per City-imposed conditions of approval on the 2007 Decision, PacTrust has fully mitigated the impacts of a larger shopping center composed of 314,000 sq. ft.[4]

The only issue that the City must decide on remand, is whether PacTrust has a vested right to its shopping center and must approve the proposed site plan. PacTrust requests that the City affirm that it has a vested right to its shopping center and approve the proposed site plan for the shopping center that is well within the scope of PacTrust's vested right.

Site Review Seeks a Limited Land Use Decision

LUBA observed that the City's site plan review is a limited land use decision:

> "The challenged decision is a limited land use decision, as all parties acknowledge." Slip op *5.

LUBA provided no specific guidance about how PacTrust's vested right interfaced with City site review criteria:

> "If *** PacTrust possesses a vested right to approval of the shopping center, then we understand PacTrust to argue that the City may not apply site plan review criteria in a manner that prevents development of the shopping center. We express no opinion here about that argument." Slip op *6.

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[2] Opponents argued in their LUBA brief: "There is not [sic] dispute PacTrust has a vested right to develop the property **in conformance with** the development proposed and approved in the CPC/ZC 06-06 Decision." (Emphasis in original)

[3] The City argued in its LUBA brief: "Petitioners' 'vested rights' argument does not assert an independent basis for approval, it simply argues that Petitioners are entitled to build what the 2007 Decision allowed, and Respondent agrees. Respondent only maintains that the proposed development must comply with the applicable standards and criteria."

[4] *See* Kittelson Memorandum Exhibit C, p 1.

While LUBA affirmed the City's restrictive interpretation of its tree preservation ordinance which the City used to deny site review, it also remanded the City's denial decision, based upon PacTrust's vested right. That can only mean that in LUBA's view, PacTrust's vested right precludes the City from denying site review based upon tree preservation or any other standards. *See* slip op *29:

> "Finally, Costco argues that the City's findings are inadequate and fail to address Costco's argument that the $3.75 million in off-site transportation improvements PacTrust has already spent entitle PacTrust to City approval ofthe shopping center. This argument is similar to PacTrust's second assignment of error. For the same reasons that we sustained PacTrust's second assignment of error, we agree with Costco that remand is required in order for the City to address Costco's argument that it is entitled to City approval of the shopping center."

PacTrust is entitled to have its site plan review application approved without any requirement or condition that it implement measures to avoid impacting the trees.

As a Limited Land Use Decision, the City May Not Apply its Tree Preservation Standards to Deny the Proposed Shopping Center

The site plan review application seeks a limited land use decision. That has been decided and is the law of this case. That means that PacTrust's site plan review application seeks a decision that is "somewhere between" one issued under clear and objective standards and one requiring the application of discretionary land use standards. *Fechtig v. City of Albany*, 27 Or LUBA 480, *aff'd* 130 Or App 138 (1994).

The City site plan review standards clearly show that site plan review is a limited land use decision since they require approval when particular standards are met:

> "An application for Class 3 site plan review *shall be granted* if ***". UDC 220.005(3).

Relatedly, as a matter of state law, the only standards that may be applied to a limited land use decision are those that regulate the "physical characteristics" of the shopping center, which is a use permitted outright on the property. Because the site review application seeks approval of a limited land use decision for a use permitted outright, the shopping center use may not be denied. ORS 197.015(12).[5]

[5] "Limited land use decision":

(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
"*****

Viewed through this lens, nothing makes the City tree preservation requirements obviously applicable to site plan review. The most analogous provision of the UDC is in the site review criteria in UDC 220.005(3)(A), which *require* approval where:

> "The application meets all applicable standards of the UDC[.]"

The "applicable standards of the UDC" are articulated in the site plan review purpose statement at UDC 220.001. The standards:

> "include but are not limited to standards related to access, pedestrian connectivity, setbacks, parking areas, external refuse storage areas, open areas, landscaping, and transportation and utility infrastructure."

As explained in *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 193, 211 P3d 297 (2009), under the principle of *ejusdem generis*, a regulation that lists what is "included" is not an exclusive list, but items not expressly listed are limited by the common characteristics of the listed items. The non-exclusive list of standards in UDC 220.0001 includes no standards that could preclude the use itself; consequently, standards that could preclude an outright permitted use (such as the City's tree preservation requirements, as applied by the City here) are outside the scope of the list. In the prior proceedings, the City took the position that some shopping center layout "options" would preserve the oak trees, but those options are not economically viable and therefore would preclude PacTrust's vested right. This was made clear by Ms. Shari Reed and others whose testimony is in the record, as well as by the attached letters. For example, when evaluating locations to lease discerning retail business would not favor sites where its back is facing Kuebler Blvd.; Costco requires a minimum amount of parking that would be precluded; and access and circulation must meet UDC 220.005 site access and circulation standards, which cannot be met with any of the "options."

LUBA implicitly recognized that denial on the basis of such restrictive interpretation cannot be squared with PacTrust's vested right when it remanded the City's denial of site plan review. Thus, UDC 808 may not be applied to the proposed shopping center because it allows denial of the use rather than regulates its physical characteristics.

It is "Necessary" to Remove the Eight Oak Trees

Notwithstanding that Applicants are entitled to site plan approval that does not require protecting the eight oak trees, the attached supplemental "Options" plans graphically demonstrate that it is impossible to develop the proposed shopping center in compliance with all applicable City standards and also to "save" the trees.

(B) The approval or denial of an application based on discretionary standards designed to regulate the *physical characteristics* of a *use permitted outright*, including but not limited to site review and design review." (Emphasis supplied.)

The Proposal will not "Remove" any Significant Tree

Not only do the tree preservation requirements not apply, and not only is it "necessary" to remove the trees, PacTrust's proposal also will not "remove" any "significant" tree in fact. PacTrust intends to transplant all eight of the "significant" oak trees and no City permit is required to do so. *See* Exhibit B, Arborists Report.

UDC 808.015 only prohibits the removal of "significant trees," not all 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 term 'removal' includes, but is not limited to, topping, damage inflicted upon a root system by application of toxic substances, operation of equipment and vehicles, storage of materials, change of natural grade due to unapproved excavation or filling, or unapproved alteration of natural physical conditions. The term 'removal' does not include normal trimming or pruning of trees."

The proposal to transplant the eight "significant" trees does not cut them down, remove more than 30% of the crowns or damages the trees so as to cause them to decline or die. Consequently, none of the trees will be "removed" as defined in UDC 808.005.

Accordingly, because PacTrust will transplant and not remove the trees, UDC 808 is not triggered at all. In this regard, and without waiving its other arguments, to resolve the dispute PacTrust suggests a condition of approval that states:

> "The eight (8) "significant" oak trees on the subject property shall be transplanted and maintained after transplant, consistently with the recommendations of the PacTrust Remand Letter, Exhibit B, Arborists Report."

The arborist's report governing transplant demonstrates that all but one of the trees has a good chance for survival. The one tree with the poorest chance of surviving transplant is already in poor shape and has a low chance of survival even in its existing circumstances. Exhibit B, Arborist Report, p 11. While there can be no guarantee of their survival, PacTrust will follow all recommendations in the arborist's report to provide the trees with the best chance of survival during and after transplant. The cost of the replanting effort is not insignificant – the cost is in excess of $450,000 – but it is an effort the Applicants are willing to undertake to resolve the controversy concerning the "significant" trees.

Traffic Issues

LUBA also explained that if the City chooses, it may address the opponents' concerns regarding the proposal's compliance with the traffic impact requirements of UDC 220.005(f)(3). However, there is no useful purpose served by addressing traffic again, LUBA did not require

that the City do so, no one appealed that determination and the matter of traffic impacts has been exhaustively reviewed and vetted by the City's professional staff, ODOT and the applicant's traffic engineers. Traffic was appropriately not a basis for denial in the City's decision that LUBA remanded. The proposal's compliance with City site plan review traffic standards is a settled issue that need not be revisited. Accordingly, PacTrust requests that the City address only the vested right issue that LUBA remanded.

However, if and only if the City Council decides to revisit the traffic site plan review approval criteria at issue, then the City Council should reopen the record for additional evidence and argument on that issue as well. If the City does so, then PacTrust attaches Exhibit C, which is Kittelson Associates' response to the "Greenlight" report submitted by the opponents on December 10, 2018, the night of the City Council meeting. Combined with the other evidence in the record, Kittelson's attached report conclusively establishes that the proposal satisfies traffic site review approval criteria. We address this in greater detail below.

Remand Process Requirements

The Salem Revised Code and Uniform Development Code dictate no particular remand procedures. The only limits are in UDC 300.1080 and ORS 227.181 requiring final action by the City on the remand within 120-days of this request.

While it is apparent that the City Council must open the record for additional argument and evidence on the vested rights remand topic, it may do so by either holding a public hearing or it may limit the remand proceeding to written submittals only. Written submittals are the most capable of resulting in an efficient, fair, and reasonably swift resolution, and are the Applicants' preference.

To aid the City's consideration on remand, the Applicants offer the specific legal analyses below.

1. <u>The Applicants have a vested right to develop the proposed shopping center</u>.

Applicants have a vested right to implement the 2007 Decision and that vested right includes approval of the current proposal. Under separate headings below, Applicants provide the legal framework for vested rights and an analysis under that framework based upon the existing record and then on additional evidence submitted with this remand request. Applicants then address the development impacts of the vested right and how the impacts from the current proposal do not exceed those that would flow from implementation of the vested right.

Much of the legal framework and analysis based on the existing record presented below is taken from the briefing to LUBA. The record citations below refer to the LUBA record.

Legal Framework for Vested Rights

As noted above, both City and opponents conceded at LUBA that the Applicants have a vested right to its shopping center. PacTrust has a vested right to approval of the shopping center site review proposed here because it is wholly consistent with the shopping center approved by the City in its 2007 Decision and PacTrust expended significant amounts of money toward developing that approved shopping center in good faith reliance on the City's decision and subsequent actions.

Vested rights is a well-established legal principle that holds that the owner of property pursuing development can reach a point in the process where it acquires a vested right to complete the development even when the local government has regulations that if applied, would restrict or prohibit the development that was started.

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 a decision-maker is to consider in determining whether a vested right exists. Oregon courts have reinforced 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). The Court of Appeals summarized four of those factors in *Ecklund v. Clackamas County* 36 Or App 73, 81, 583 P2d 567 (1978), 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*." (Emphasis supplied.)

Much attention has been paid to the "ratio of prior 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).

Related to this factor, the Court in *Holmes* explained that:

> "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 2011, the Oregon Supreme Court revisited the *Holmes* decision for the first time in 40 years. *Friends of Yamhill County v. Bd. of Com'rs of Yamhill County*, 351 Or 219, 237 (2011). In analyzing the *Holmes* factors, the Court observed that the nature of development of land has changed during that 40-year period, and "the amount of upfront costs that landowners must incur to build some projects has increased." *Id.*, at 237-38. The Court then added:

> "We cannot lose sight of those changes in applying the factors identified in *Holmes* to current conditions." *Id.* at 238.

The Court later explained that the "ultimate cost" also matters in the *Holmes* analysis, "because the weight to be given the expenditure may vary depending on the ultimate cost." *Id.* at 248. For example, $200 in expenditures to develop a $1,000 project is undoubtedly a high percentage of the final cost, but the expenditures would likely not be considered "substantial." The Court ultimately noted: "Conversely, when the ultimate cost of a project runs into millions of dollars, an expenditure may be substantial even though it is only a small percentage of the projected cost." *Id.*

Development Rights Created in 2007 Decision

Before applying the particular factors set forth in *Holmes* and its progeny, it is important to clearly identify the development that is the subject of PacTrust's vested rights claim. In 2006, PacTrust applied for a zone change on 18.4 acres of property to allow for the development of a retail shopping center. The 18.4 acres is adjacent to an approximate 10-acre parcel that was owned by the Salem Clinic, but not developed. In its 2006 submission to the City, PacTrust demonstrated that the specific development it proposed on the 18.4 acres was a community shopping center, which was an allowed use in the proposed zone. However, PacTrust also included the details of its more comprehensive development plan that included the adjacent 10 acres and proposed a unified development consisting of a medical clinic building and medical office space on the adjacent 10 acres and a retail shopping center on the 18.4 acres. At that time, the universal sentiment was that the area needed a new medical clinic building, and that a medical clinic could survive if developed in a larger shopping center environment. Accordingly, PacTrust included the medical office/clinic development in its 2006 request illustrating a unified community retail and medical office/clinic center. However, PacTrust made clear that it would not develop the Salem Clinic or other medical offices standing alone, rather only as a part of a unified shopping center.

As part of its zone change request, PacTrust was required to, and did show through conceptual development plans, the proposed retail shopping center. PacTrust's drawings depicted development buildings and parking, which overlaid the existing oak trees, making clear that to construct the proposed retail shopping center, the oak trees would have to be removed.

The City approved Pac Trust's zone change based upon the general depictions of the retail facilities on the 18.4 acres and medical offices on the 10 acres. In doing so, the City confirmed that the proposal was a community shopping center, which the City defined as a

shopping center with less than 300,000 gross leasable area. The 300,000 GLA limitation was important to the overall development plan because the City recognized the proposal as a unified center that had both a retail shopping center and a medical clinic/office space component and applied that limitation to the overall project.

Not only did the City approve PacTrust's zone change based upon the unified development proposed, it required a certain minimum amount of development. In Condition 14 of the 2007 Decision, the City required that the:

> "subject 18.4-acre property shall be developed with a retail shopping center. The maximum amount of gross leasable area (GLA) for the shopping center on the subject property shall be 240,000 GLA. If the subject property is developed in conjunction with the abutting approximate 10-acre property currently owned by Salem Clinic *** the total amount of retail GLA and medical/dental office of the two properties shall not exceed 299,000 GLA."

With respect to the existing oak trees, the City Council was plainly aware that the conceptual plans for the 2007 Decision illustrated a retail shopping center that would require not only the eight oak trees to be removed, but also approximately 70 other trees. With that knowledge, the Council found that there were no significant natural resources that would be impacted the proposed development.[6] In doing so, the City applied a long-standing interpretation of its code that to develop the approved commercial development it was "necessary" (emphasis added) to remove "all" trees and PacTrust was not required to make any further showing.

Subsequent City actions confirm that it considered PacTrust's proposed development to be the larger combined development discussed in the 2007 Decision and specifically referred to in Condition 14. In 2009, after PacTrust acquired the approximate 10-acre parcel upon which the Salem Clinic is now situated, the City approved a zone change for that property from Commercial Office and Residential Agriculture to Commercial Retail and Commercial Office. The zone change was to facilitate a property line adjustment that effectively moved about 2.5 acres of the 10-acre parcel into the former 18.4-acre parcel to be used as part of the retail shopping center component of the proposed unified development.

Then, in 2012, the City approved a site plan review application applicable to the 7.49 acres of the former 10-acre parcel that resulted from the property line adjustment. In its approval, the City treated the 2012 site plan approval application as the first phase of a two-phase development with the second phase being the retail shopping center of up to 240,000 square feet on the approximate 22-acre adjacent parcel (the former 18.4-acre parcel).

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[6] "The Subject Property is primarily a vacant field. There are no identified natural resources on the Subject Property. Development of vacant land is expected. The proposed change will have no significant negative impact on the quality of the land." 2007 Decision, p 19.

Furthermore, in the 2018 proceedings in this matter leading to the decision that LUBA remanded, to demonstrate that it had a vested right to complete the 240,000 square foot retail shopping center component, PacTrust provided evidence of $3.7 Million in significant expenditures toward completion of the approved retail shopping center. This sum, while significant in its own right, was only a small portion of PacTrust's expenditures on the overall approved project, which totaled over $13.4 Million plus land dedications. On remand, the City should evaluate PacTrust's vested right considering all of the expenditures PacTrust made in furtherance of developing the unified retail/medical office development the City approved (and in fact required in Condition 14) because it is that unified development the City approved and PacTrust made expenditures specifically related to completing that larger development. However, significant expenditures sufficient to compel a finding that a vested right exists occurred, regardless of whether one analyzes only the retail shopping center element of the project, or the larger development as a whole.

Analysis of the Holmes Factors Based on Existing Record

Ratio of Expenditures to Total Costs

PacTrust provided expenditure calculations and rough estimated project costs for the Kuebler Gateway Shopping Center focused on the 18.4 acres in its November 29, 2018 letter to the City Council. Rec-622. The record establishes that Applicants have spent $3,765,190 on transportation facility improvements mandated by the 2007 Decision to serve a 299,000 square foot shopping center. Rec-622. The total sum to complete all transportation exactions required by the 2007 Decision is anticipated to run $6.25 Million. Rec-627. Even though the $3,765,190 expenditures addressed impacts from the overall project, it was proper to use that number to show that PacTrust had a vested right to complete the retail shopping center because the vast majority of the traffic impacts were attributable to the retail shopping center and because the two components were intrinsically connected. Without the retail shopping center there would have been no medical office/clinic development and thus no impacts to mitigate.

The total estimated project cost for the Kuebler Gateway Shopping Center includes the combined construction development costs for PacTrust and Costco plus the transportation exactions. Costco has estimated its costs to develop the proposed store and site improvements at $40 Million. Rec-628. Costco's development is for 168,550 square feet GLA (Rec-650) of the new development's 189,550 square feet of GLA, with the other new retail development amounting to 21,000 square feet of GLA. Dividing Costco's estimated costs by its GLA ($40 Million divided by 168,550 square feet) Costco's development cost equals $237.32 per square foot GLA. Assuming the same per-square foot cost for the retail shops,[7] the cost of the retail shops is $4.98 Million ($237.32 x 21,000).

[7] The square foot development costs for the retail shops is actually higher given: (1) that they are smaller size; (2) that they are designed to a higher level of detail and finishing than the Costco structure; (3) cost inflation factors such as later construction and (4) only represent the shell construction cost. Additional monies will be required for tenant improvements. That would tilt the ratio farther in the Applicants' favor.

The total cost of the retail shops ($4.98 Million), Costco development ($40 Million) and transportation exactions ($6.25 Million) is $51.23 Million.

Calculating the ratio of expenditures already made to total cost – $3.765 Million to $51.23 Million – yields a ratio of 1:13.6. That is almost identical to the 1:14 ratio that the *Holmes* Court found established a vested right.[8] *Webber v. Clackamas County*, 42 Or App 151, 155, 600 P2d 151 (1979) (noting 1:14 ratio in *Holmes* decision).

Pac Trust's expenditures take on greater magnitude in light of the court's discussion in *Friends of Yamhill County.* The court noted there that expenditures can be considered "substantial," even if the ratio is the same or less than the ratio in *Holmes* if the overall scope and cost of the development is larger. Given the changes in development and particularly the scope and expense involved, the court noted that expenditures that produce a lower ratio in the context of a multi-million-dollar project can nonetheless be substantial. In *Holmes,* the expenditures were $33,000, and the total cost of the development was estimated at between $400,000 and $500,000. Here, the total cost of the retail shopping center development is $51.23 Million. Not only does PacTrust fall in line with the *Holmes* ratio, it does so in the context of a multi-million-dollar development where the court has acknowledged that lesser expenditures can be substantial in a vested rights analysis.

This factor weights in favor of a vested right.

Good Faith of the Land Owner

PacTrust's good faith in making the expenditures cannot be seriously challenged. All expenditures were made pursuant to a condition of approval imposed by the 2007 Decision and in furtherance of subsequent City approvals/actions. The City imposed exactions to improve the transportation facilities to mitigate for the additional traffic generated by the 299,000 sq. ft. community shopping center approved by that decision. The expenditures implement those conditions with the ultimate aim of establishing the development.

The timing of the expenditures and the relationship to other City actions is appropriate as well. All expenditures were made after the 2007 Decision in order to implement that decision. In 2009, the City approved a second zone change to allow for part of the development approved in 2007 to proceed. It rezoned the 10-acre parcel (by then owned by PacTrust) to facilitate a property line adjustment that increased the size of the retail shopping center site and reduced the medical clinic/office site. In 2012, the City approved the Site Plan Review for the medical clinic/office development. When the City made those decisions, the conditions from 2007 requiring PacTrust to make off-site public improvements to mitigate impacts from the retail shopping center remained in place. The City did not give any indication that PacTrust's approval to develop the retail shopping center would be reversed or restricted. The City never suggested that it might in the future adopt a different interpretation of its code foreclosing development

[8] If the calculations also included the cost of other completed improvements not included in the record, the ratio would be even further in the Applicants' favor.

consistent with the conceptual site plans presented in the 2007 proceedings because of the oak trees that it was fully aware could not remain.

In fact, in 2015, after the medical office/clinic component of the development required in Condition 14 was completed, the City desired to expedite major improvements to Kuebler Blvd. and the trigger for PacTrust having to make the major improvements had not occurred. Thus, the City approached PacTrust requesting that it provide $3 Million in funds to complete the improvements before PacTrust would otherwise be required to do so. In good faith reliance on the City's 2007 Decision and subsequent City actions, PacTrust voluntarily provided early funding for the improvements required to mitigate impacts of the retail shopping center. It should not now be penalized for contributing $3 Million towards the total cost of $3.21 Million (i.e., 94% of the City's cost for the project) and cooperating with the City throughout the process.

Holmes also considers whether an owner had notice of changing conditions before the expenditures. *Holmes*, 265 Or at 198. Here, there was no notice until the City Council voted in December 2018 to reverse the Planning Director approval of the Applicants' site plan that the City would apply the 2007 Decision contrary to its prior practice and the decision's plain language, or that it would interpret the tree preservation standards in a different manner than those standards had consistently been applied in the past. As noted above, the City approved interim applications for land use actions specifically related to completing the proposed development required by Condition 14. The City also requested and received help from PacTrust in the timing and funding of City transportation improvements, and PacTrust had no reason not to trust the City. Significantly, as noted above, after PacTrust completed significant steps toward completion of the project, the City, through its Planning Director concluded that the proposal satisfied all of the approval criteria and was consistent with the 2007 Decision. Rec-157. If Applicants had any notice or other reason to suspect that its site plan would not be approved, it certainly would not have funded early transportation improvements from which it would receive no benefit. The improvements provide no benefit because without the right to develop the shopping center that the City approved in the 2007 Decision (see Condition 14), there is no viable retail shopping center Pac Trust can develop on the property and it would not proceed to do so.

The good faith factor weighs in favor of a vested right.

Relationship of Expenditures to Completed Project

Under *Holmes*, it is not required that the expenditures would only benefit the specific development the applicant commenced. Indeed, in that case the applicant expended money on a new well that could have been used for agricultural uses but also added capacity to support the proposed processing plant. Nonetheless, the well expenditures were considered as part of the analysis of whether or not the applicant had a vested right to build the processing plant. Here, as discussed above, both the nature and the scale of the transportation improvement expenditures by PacTrust are directly related to the 2007 Decision, the use it approved, and the conditions of approval. Rec-666-69. The expenditures in the record were made specifically to satisfy obligations that the City required from PacTrust to mitigate transportation impacts of the

shopping center approved in 2007. But for the conditions of approval tied to the 2007 shopping center project approval, those expenditures would not have been made. All of the expenditures are directly related to conditions of approval and directly further the completion of the community shopping center approved by the 2007 Decision.

Importantly, the expenditures are directly related to a community shopping center up to 299,000 sq. ft. GLA – the 2007 Decision allows no other use on the subject property. The expenditures cannot apply to other potential permitted uses on the property – there are none allowed.

This factor weighs in favor of a vested right.

Nature of the Project, Location and Ultimate Cost

The 2007 Decision established that the 18.4-acre site can only be developed as a shopping center of 240,000 sq. ft. GLA or less and if developed with the adjacent 10-acre parcel could only be developed as an integrated shopping center of up to 299,000 sq. ft. The subject property is a large vacant site, now zoned Commercial Retail, that in 2007 was surrounded by growing residential neighborhoods that still exist. The subject property is also located on a major transportation facility, Kuebler Boulevard, which is identified as a parkway and is projected to carry approximately 50,000 trips per day. Rec-679 n4.

As the 2007 Decision concluded, the surrounding vicinity "represents a logical geographical area for the proposed community commercial facility based on the existing and emerging residential growth in the area and the key adjoining transportation corridors." Rec-680. As discussed above, the ultimate cost of the project is substantial, running in excess of $51.23 Million dollars.[9] In a multi-staged development process such as this one, much of the development expenditures must occur to implement earlier decisions prior to or as part of subsequent application stages. At some point, those expenditures become substantial enough to establish a vested right for the property owner to develop the use as approved. In this instance, at an expenditure of at least $3.765 Million, this project has well crossed that vested rights line.

This factor weighs in favor of a vested right.

Summary

As the above analysis demonstrates, the Applicants' expenditures presented in the record of the decision that LUBA remanded, establishes a vested right to develop the property as required and authorized by the 2007 Decision and as implemented by the site plan review proposal under review.

[9] As the Applicants explained, in this part of the analysis, it is focusing only on the existing record. For the reasons articulated previously, in earlier proceedings the Applicants focused on the development of just the retail shopping center on the 18.4 acres (later expanded to about 22 acres). The Applicants expand on the total cost of the entire community center that includes the medical office/clinic buildings below.

Additional Evidence and Analysis

The analysis below follows the same *Holmes* analysis presented above but provides greater detail and incorporates additional evidence provided by PacTrust for inclusion into the record.

As discussed above, PacTrust has spent significantly more toward completion of the project than the $3.765 Million identified above. As part of what the City identified as Phase I of the unified development, PacTrust completed significant site work including the mass grading, constructed a medical clinic building, completed tenant improvements on that building, upgraded an existing water line, designed elements of the retail shopping center and designed more of the public roadway improvements. PacTrust would not have made any of these expenditures but for the 2007 Decision and its promise of the retail shopping center that it approved.

Ratio of Expenditures to Total Costs

In addition to the $3,765,190 in expenditures currently confirmed in the record, PacTrust expended an additional $9,602,177 toward completion of the project approved in the 2007 Decision. Most of the additional costs relate to the medical office/clinic component that the Applicants would never have started had the City not approved the larger retail shopping center component of the project. However, as is evident in some of the cost descriptions, some of the expenditures also related to preliminary work on the retail shopping center component. The breakdown of those expenditures is as follows:

- $789,990 on mass grading to prepare a portion of the site for construction of the medical clinic and office buildings, and to market the remaining retail shopping center portion of the site;
- $3,370,960 to complete the Salem Clinic medical center building;
- $1,657,956 to complete tenant improvements necessary to lease the Salem Clinic medical center building;
- $2,066,320 to complete the second medical office building on the site;
- $615,393 to complete tenant improvements necessary to lease that second medical office building;
- $558,952 on additional mass grading in preparation for developing a shopping center on the 18.4-acre parcel;
- $253,142 to complete waterline improvements in Kuebler Blvd.;
- $78,747 on design work and application material for development of the retail shopping center; and
- $210,717 on design work for remaining future public roadway improvements.

Accordingly, to date PacTrust has expended at least $13,367,367 toward completing the development the City approved in 2007. With the above expenditures included, the total integrated retail project cost to date is approximately $61,422,737.

These additional expenditures dramatically change the *Holmes* ratio, from 1:13.6 to 1:4.5. That means PacTrust has already expended about 22% of the total cost to complete the unified community shopping center the City approved in 2007 and substantially enhances the Applicants' vested rights position. Moreover, as discussed above, under *Friends of Yamhill County*, expenditures for larger projects that are not necessarily a high percentage of the overall cost can still be deemed legally significant. In this case, PacTrust made more than $13 million in expenditures towards completion of the larger project. Under any fair reading of *Holmes* and *Friends of Yamhill County*, PacTrust's expenditures are significant.

Good Faith of the Land Owner

As discussed above, there is no basis for finding that PacTrust did not proceed with all of the above expenditures in good faith. In the proceeding that led to the 2007 Decision, PacTrust openly presented its plan for the unified development on both the 18.4-acre parcel and the adjacent 10-acre parcel. The City, in Condition 14, included the development of the 10 acres in reaching the 299,000 square foot limitation on GLA. More importantly, in exacting public improvements to existing transportation facilities, the City used anticipated impacts from the unified 299,000 square foot project. In 2009, the City approved a second zone change to facilitate the overall development including both parcels approved in the 2007 Decision. In 2012, the City approved development of part of the unified project approved in the 2007 Decision when it 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 that had been approved by the 2007 Decision. Thus, the City's approvals throughout the years provided a reasonable basis for PacTrust to believe the City authorized all of the development, justifying the expenditures detailed above. Or stated differently, PacTrust would not have willingly made those expenditures if it had reason to believe its ability to develop the unified shopping center was in jeopardy.

Significantly, in 2015, the City accepted the benefits of its approval of the unified development project when it negotiated an agreement from PacTrust to fund substantial public improvements to Kuebler Blvd., well in advance of the time at which PacTrust was required to complete them. As noted, PacTrust's obligation to make the improvements to Kuebler Blvd only existed because it had an obligation to mitigate the impacts of the unified development of the medical office/retail shopping center with 299,000 square feet of GLA on both parcels – the 18.4 acres and the 10.0 acres. In other words, without the shopping center approval, the City would have had no basis to ask PacTrust to pay for the improvements in 2015, and PacTrust would have no reason to agree. Asking PacTrust to pay for the 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 development that PacTrust presented in its 2006 zone change request and was approved in the 2007 Decision.

In addition, even as late as September 2018, the City took the position that PacTrust was authorized to proceed with the retail shopping center component of the project. In September 2018, the City planning director approved PacTrust's site plan review that illustrated the retail shopping center with a Costco store and additional retail pads.

As previously discussed, it was not until December 2018, when City Council reversed direction and decided to reinterpret the 2007 Decision and place restrictions on development that were not included in the 2007, 2009 or 2012 decisions and that made development consistent with the 2007 Decision impossible. Even then, City officials (including members of the City Council and mayor) familiar with the 2007 decision and subsequent City actions, confirmed that the City's decision to deny PacTrust's site plan review application was a dramatic change in the City's position. The Mayor cautioned other Council members that disavowing the 2007 Decision exposed the City to potential damages in litigation.

Relationship of Expenditures to Completed Project

The additional expenditures identified above, all directly relate to required mitigation of the development the City approved in its 2007 Decision, and that the City consistently reaffirmed in subsequent years. In fact, on September 12, 2012, the City Administrator approved the Site Plan Review application to develop the medical clinic building and separate medical/office building. The City Administrator acknowledged the proposed development as Phase I of a larger multi-phase unified development. The expenditures on mass grading and build-out of the medical clinic building and medical/office building were integral parts of the approved development and specifically related to that unified development approved by the 2007 Decision. Indeed, but for the City's approval and ongoing facilitation of the development of the larger retail shopping center component of the unified project, the Applicants would never have spent money on the medical office/clinic component of the project.

Nature of the Project, Location and Ultimate Cost

As noted above, the 2007 Decision established that the whole site (18.4 acres and 10 acres), can only be developed as a unified community shopping center of up to 299,000 square feet of GLA. That development was approved in an area where the City found a need for the unified development, including the medical office/clinic. There was never any question that the site was to be developed with the uses PacTrust intended, and expended money in reliance upon.

It was consistently understood by all concerned that it would never be feasible to proceed with just the medical offices portion of the development. In light of the extensive off-site improvements the City required, developing just the medical clinic and office component was simply not economically viable. The project needs the retail component to justify expending the costs the City required to provide the medical clinic/office building component.

Similarly, there was never any question that the project is in the location where the citizens and the City government desired to have a medical clinic and retail shopping opportunities. The City found a need for the retail shopping center component of the

development. The location drove a large portion of the expenditures because, as discussed above, the City required substantial improvements to the existing transportation facilities in the area to serve the overall development.

In approving the Site Plan Review for the medical clinic/office building component of the development first, the City acknowledged that in a development the size of that approved in 2007, any developer/owner would have to phase in improvements expending money on work in one phase to facilitate the ultimate completion of the project. Logically, it would have taken longer for any developer to complete the larger retail shopping center component of the project, particularly in view of the recession that gripped the state and nation shortly thereafter. Here, the expenditures detailed in the above cited evidence were all made to complete the larger project as approved. The total estimated cost of the completed project is approximately $61,422,737. Clearly, PacTrust has proceeded far enough in completing what the City approved/required in Condition 14 of the 2007 Decision, to have a vested right to complete the project.

Impacts of Development

The vested right PacTrust has under the 2007 Decision as detailed above, entitles it to complete the development that was proposed in the 2018 site plan review application. The fact that PacTrust proposed a retail shopping center with 189,550 square feet of GLA (less than the approved 240,000 square feet) does nothing to detract from its vested right, since 240,000 is a ceiling not a floor. The smaller center does, however, demonstrate that the impacts of the proposed shopping center are far less than the City contemplated, allowed, and required mitigation for, in the 2007 Decision.

As part of its presentation in 2006/2007, PacTrust demonstrated that due to site access issues, neighborhood impact concerns and other factors, any retail shopping center consistent with that approved in Condition 14, had to be located on the site as PacTrust presented in 2018; and any retail shopping center it contemplated and the City approved, required removing the eight oak trees on the site.

The fact that the final plan presented for site plan review in 2018 was for a smaller shopping center does not change PacTrust's vested right. The City still required mitigation for the full impact of a 299,000 sq. ft. GLA unified commercial shopping center.[10] To date, PacTrust has incurred substantial expense addressing that mitigation. The mass grading and other site work was required for any retail shopping center consistent with Condition 14. PacTrust was required by the City to expend the additional money on the integrated medical clinic/office building components of the larger development whether the shopping center had 240,000 square feet or 189,550 square feet. The relevant fact is that implementing its vested right through the 2018 proposed site plan would result in lesser impacts to the City; but the City still received the mitigation associated with the larger approved 299,000 sq. ft. development.

[10] As noted in Exhibit C, p 2, PacTrust in fact was required to mitigate for a shopping center composed of 314,000 sq. ft. GLA.

Vested Rights Conclusion

The evidence in the record and the above analysis demonstrates that the Applicants have established a vested right to develop the proposed retail shopping center.

2. <u>The evidence in the record demonstrates the proposal complies with the tree preservation requirements provided in UDC 808.030(L)</u>.

As demonstrated in the Salem Tree Retention Site Plan "Options," attached as Exhibit A, it is impossible to develop a viable shopping center that is consistent with PacTrust's vested rights under the 2007 Decision, preserves the eight significant oak trees in their current locations and also complies with relevant City standards. Importantly, UDC 220.005(f)(3)(B) and (C) require the following findings:

> "(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[.]"

As is explained in the Kittelson supplement (Exhibit C), there is no site plan "option" that can meet these requirements, other than the shopping center layout depicted on the proposed site plan.

The "option" with the fewest fatal flaws – the "NW Option" - fails to provide the parking that is necessary under the City's code or that is adequate to support a viable shopping center. According to the City code, a 189,550 SF Retail Shopping Center City Code requires a **<u>minimum</u>** of 759 parking stalls. (SRC 806.005(a)(1)/806.015(a) Table 806-1). The parking needed to allow for maximum retail leasing opportunities (shops, cafes, fast-casual and sit-down dining, etc.), on the western portion of the shopping center, is 104 parking stalls (7/1,000), and 147 stalls (9.9/1,000) are provided, resulting in 43 spaces theoretically available for the eastern portion of the project. The eastern portion of the project requires under the city code, a minimum of 699 (4/1,000 sf) parking spaces, but only 546 (3.13/1,000) parking stalls are provided under this "option" creating a total deficit of the minimum parking required by the city code of 110 parking spaces (153 east shortfall minus 43 west theoretical extra spaces = 110 parking spaces). Therefore, the "NW Option" fails to meet SRC 806.005(a)(1)/806.015(a) Table 806-1 as well as SRC 220.005(f)(3)(a). The site plan application submitted for the Council's consideration, meets all city standards and includes 1053 parking stalls, which for the entire integrated 189,550 sq. ft. retail shopping center, amounts to just 5.6 parking stalls per 1000 sq. ft of retail, which is the minimum parking necessary for an economically viable shopping center as the evidence in the record makes plain. *See* Exhibit E.

That means to the extent such a showing is required, that it is "necessary" to remove the eight trees for the vested commercial development on the property.

3. The evidence in the record demonstrates the proposal complies with the transportation requirements set forth under UDC 220.005(f)(3).

Relevant to the transportation requirements for site plan review, LUBA explained that the City could, but was not obligated to, review the proposal's compliance with transportation requirements. LUBA stated:

> "On remand, the City may choose to address intervenor's arguments presented in the cross petition for review." Slip op at *30.

Revisiting the transportation requirements is unnecessary, but should the City Council nonetheless decide to address the transportation requirements set forth under UDC 220.005(f)(3), Applicants present the following arguments. If the City decides to revisit the proposal's compliance with UDC 220.005(f)(3) site review traffic standards on remand, then the following is offered.

Site Plan Transportation Criteria

UDC 220.005(f)(3) provides, in relevant part, that site plan review shall be granted if:

> "(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[.]" (Emphasis supplied.)

Further, UDC 220.001, the purpose statement for site plan review, provides:

> "The purpose of this chapter is to provide a unified, consistent and efficient means to conduct site plan review for development activity that requires a building permit, to ensure that such development meets all applicable standards of the UDC, including, but not limited to, standards related to access, pedestrian connectivity, setbacks, parking areas, external refuse storage areas, open areas, landscaping, and transportation and utility infrastructure."

The plain language of the above code provisions makes clear that the site review transportation standard evaluates *only* the transportation systems that are *internal to the site and that are immediately adjacent to it that provide ingress and egress and that are directly related to the site*. The standard *does not require* any further areas be analyzed and does not require a replication of the much broader TPR-level review which was undertaken as part of the 2007 Decision. As discussed below, the scope of Applicants' transportation analysis meets the requirements of UDC 220.005(f)(3).

Examined more broadly, the UDC establishes a framework for transportation analysis that looks at different aspects of transportation planning and issues depending upon the type of application submitted as well as the nature and scope of the proposal. The code also explains when a TIA is required to be conducted and administrative rules provide the required elements of TIAs. But the TIA requirements and approval criteria for a plan or zone change application are not the same as those for a site review application.

Using the different applications related to the subject property as an example, the approval criteria for the 2007 application and decision required compliance with the comprehensive plan (which includes the TSP) as well as with the statewide planning goals (which include Goal 12 Transportation planning and the transportation planning rule ("TPR")). As part of that application and review process, PacTrust was required to look well beyond the boundaries of the property and to examine the existing and planned transportation system, and to assume the highest permitted trip volumes for the existing zoning of undeveloped properties (including the subject property) in its calculations. As a result of that analysis, the City imposed conditions of approval (the trip cap and required transportation facility improvements), to ensure that development of the property with 299,000 sq. ft. GLA as a unified commercial shopping center would be consistent with both the TSP and Goal 12, and that the transportation infrastructure would be adequate to accommodate the traffic impacts from any development consistent with that size limitation. Furthermore, subsequent amendments to the City's TSP were adopted that factored in the requirements and limitations imposed by the 2007 conditions and related exactions because they will apply to future development of the subject property. Consequently, development of a shopping center of up to 299,000 sq. ft. on the subject property is now contemplated by, and accounted for in, the City's TSP.

In short, the 2007 Decision required PacTrust to fund transportation system improvements to accommodate the broader traffic impacts from the authorized 299,000 sq. ft. GLA commercial retail center. As demonstrated above, PacTrust has already spent significant amounts to fully implement those transportation improvements to the greater transportation system.

By comparison, as the site plan review approval standards make clear, the transportation focus for site plan review is limited to the safe, orderly and efficient movement into and out of the development site (UDC 220.005(f)(3)(B)) and the safe and efficient movement within the development site (UDC 220.005(f)(3)(C)). This makes total sense. With the greater transportation system improvements already studied and addressed at the plan/zone change stage, all that remains at the site plan review stage is to examine and design for transportation circulation into, within and out of the development site, and to examine, as was done in this instance, whether there may be any additional transportation impacts that arise from the proposed anchor tenant that would require additional mitigation not previously accounted for by the TIA for the 2007 Decision. *See*, Kittelson & Associates, Nov. 29, 2018 Response, p. 2 (Rec-1085).

Opponents have argued that UDC 803.015(b)(1) requires a TIA which in turn would trigger other requirements in the City Department of Public Works Administrative Rules

(PWAR) 6.33, because the proposed site plan is for a permitted development that generates 1,000 daily trips onto an arterial or parkway. Opponents are incorrect. UDC 803.015 does not require a TIA because those trips were already evaluated in the 2007 TIA and addressed by the resulting mitigation. Stated differently, because impacts of a 299,000 sq. ft. unified commercial shopping center had been fully mitigated under the 2007 Decision, no further TIA was or is required. *See also* UDC 803.015(d). PWAR 6.33 is not an independent approval standard for anything, including site review, and is only triggered when the UDC 803.015 conditions are met – which is not here. Moreover, the type of TIA envisioned by PWAR 6.33 does not inform the required site review criteria of UDC 220.005(f)(3)(B) or (C).

As part of PacTrust's 2018 application, the City properly required a traffic memorandum showing compliance with the City's site plan review standards and a sensitivity check to confirm that the 2007 Decision traffic assumptions remained valid given the passage of time. This information was provided by PacTrust as requested, and both confirmed compliance with the site plan review standards and confirmed the ongoing viability of the 2007 analysis. LUBA Record at 1084-1106.

This is consistent with well-established rules for site plan review traffic studies. The Oregon Supreme Court has recognized the differing focus of transportation analysis between site plan review applications and other types of applications such as zone change applications. In *Siporen v. City of Medford*, 349 Or 247, 263-65, 243 P3d 776 (2010), the Oregon Supreme Court sustained the City of Medford's explanation that the TIA required for zone changes looks at the broader adequacy of traffic services for the area as provided by the TSP by asking whether the street system in the surrounding area is adequate to serve the subject property developed with uses permitted by the code. *Id.* at 264-65. Site plan and architectural review, however, has a much narrower focus as does the TIA for such applications. The TIA for those types of applications limits analysis to the traffic flow on the site, points of ingress and egress, and the street improvements needed to access the site. *Id.* at 263. Note also that the site plan criteria under the Medford code are largely similar to those under UDC 220.005(f)(3) and require additional examination of existing and proposed off-street parking (none is proposed for this project) and "loading" considerations.

Evidence in the Record Demonstrates the Proposal Complies with the Site Review Transportation Approval Criteria

Based upon the evidence already in the record, there is and can be no serious dispute that the internal transportation systems and circulation "in and out of the proposed development" are wholly adequate. As the Kittelson & Associates' traffic memoranda and related analysis demonstrates, all "negative impacts" are mitigated, and the arrangement of circulation into and out of the property, as well as within and around the project site, is safe, orderly, and efficient.

Not only are the proposed transportation systems adequate, the evidence already in the record in fact demonstrates that the traffic impacts from the tenant mix proposed here results in *significantly fewer traffic impacts than what the City approved* in 2007 and required the Applicants to mitigate. The Applicants have funded mitigation for a *significantly larger unified*

commercial shopping center, than is proposed. At a proposed 228,062 sq. ft. GLA versus an approved maximum of 299,000 sq. ft. GLA for the entire site, the proposal is approximately 24% smaller than it could be. The 2007 Decision required mitigation for 9,660 net new daily trips, 990 net new weekday pm peak hour trips, and 1,350 net new Saturday mid-day peak hour trips. *See* 2006 TIA, p. 3. The proposed 189,550 sq. ft. retail shopping center will generate only 7,743 daily trips, 747 weekday pm peak hour trips, and 986 Saturday mid-day peak hour trips. *See* May 21, 2018 Traffic Memorandum, p 2. Even with the combined trips associated with the approved medical and office uses on the greater site, the proposal generates *12% fewer daily trips*[11] than the Applicants are mitigating for under the 2007 Decision. There is no basis to require Applicants to mitigate impacts not generated by the proposed use, especially when the Applicants are already mitigating for greater impacts than the proposal will create. In fact, requiring that would violate the nexus and proportionality obligations of *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The transportation analyses conducted by Kittelson & Associates for this application, and for the application leading to the 2007 Decision, are comprehensive and complete for the different purposes that they serve. Those analyses plainly demonstrate that the proposal complies with the site plan review requirements set forth under UDC 220.005(f)(3)(B) and (C), the application meets all relevant standards and has significantly fewer trips than the 2007 Decision required be mitigated. Based on the above, if the City Council decides to consider the issue, it should conclude that the application complies with the UDC 220.005(f)(3)(B) and (C) site plan review transportation requirements.

Opponents' Arguments

At LUBA, opponents argued, among other issues, that the application materials failed to adequately evaluate traffic impacts under UDC 803.015, UDC 803.035, UDC 200.055, Salem Area Comprehensive Plan (SACP) policies, and City administrative rules. The interposition of the vested rights issue and the fact that traffic had been fully studied and mitigated for in the 2007 Decision for a much larger shopping center, demonstrate there is no traffic issue. Regardless, opponents' arguments do not pass close scrutiny and are improper.

At the outset, it is important to understand that within the land use decision-making framework are certain basic legal principles that promote efficiency and sequential decision-making. One of these is the principle that prohibits collateral attacks on matters resolved in related prior land use decisions in a subsequent permit that relies on the prior decision. *Just v. Linn County*, 59 Or LUBA 233, 236 (2009). Related to this proceeding, the 2007 Decision had required PacTrust to study the impacts to the greater transportation system as part of its application and the City Council imposed a condition of approval that limited the size of development permitted on the site as well as conditions that imposed exactions to pay for the

[11] The 2007 Decision conditions mitigate for the 314,000 combined retail/office development because that was the amount of GLA anticipated in the TIA supporting the 2007 Decision. The total number of trips the KAI report for the 2007 Decision assumed was 9,660. The total number of trips KAI assumes in its site review analysis is 8,558. The proposal will therefore have 1,102 fewer trips than the 2007 Decision mitigates for.

transportation impacts from the maximum amount of development allowed under the approval (299,000 sq. ft. GLA). Those conditions of approval in final land use decisions are also insulated from collateral attack. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25, 34-35 (2015) (challenge to condition of approval imposed in prior zone change approval that allowed development of property prior to adoption of area concept plan constitutes an impermissible collateral attack on the decision).

Furthermore, the underlying information used to reach that prior decision is also protected from collateral attack. Particularly instructive here, LUBA has held that the principles of collateral attack apply to challenges to the traffic count numbers and other transportation system analysis that underlie a previous final land use decision. In *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016), *aff'd*, 284 Or App 314 (2017), LUBA held that opponents could not challenge the adopted and acknowledged TSP on the grounds that it had underestimated the amount of traffic that would be generated by full build out when challenging a subsequent decision to adopt an area concept plan. In short, not only may parties not collaterally attack prior decisions and conditions of approval, parties also cannot collaterally attack the underlying data and analysis of the TIA that formed the basis of a prior land use decision.

Several of opponents' arguments constitute improper collateral attacks on matters resolved by the 2007 Decision. These include arguments that the scope of the TIA analysis should be enlarged and the "need" to reevaluate alternative solutions for the Battle Creek Road/Boone Road intersection. These matters were resolved by the prior decision and are final. As discussed above, the plan change/zone change TIA from 2007 examined a significantly greater area than what is necessary or appropriate for a site plan review application, and nothing in the UDC or applicable law requires or even allows a revisiting of that broader perspective. Indeed, the City's TSP was amended consistent with the 2007 Decision, its conditions of approval and the TIA that supported that decision. Furthermore, the traffic light at the Battle Creek Road/Boone Road intersection that will be installed under the 2007 Decision's conditions was an express condition of approval for the 2007 Decision. A demand to deviate from that condition is an impermissible collateral attack of the 2007 Decision.

Other of opponents' transportation related objections represent unlawful collateral attacks on the 2007 Decision because the allegations contend that the approved shopping center will have additional and unmitigated traffic impacts. Arguments that there are other types of impacts that would flow from a 299,000 sq. ft. GLA retail commercial center could have been raised during the 2007 proceedings, but either were not or were resolved against the opponents. *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008). As the Court of Appeals recognized, the 2007 proceedings fully discussed and anticipated impacts from large, similarly sized stores such as Costco, Albertson's, Target, and Kohl's that were envisioned as possible anchor stores in the approved retail shopping center. Court of Appeals Slip Op at *15. Opponents' arguments represent a collateral attack on the 2007 Decision and there is no basis in the site plan review transportation standards to shoehorn in the additional analysis opponents want.

Opponents have also argued that the traffic memo prepared by Kittelson & Associates during the initial site plan review proceeding is inadequate in a number of ways. However, the work was completed following close consultation with the City and ODOT. Furthermore, as the Kittelson & Associates' June, 2020 and November 29, 2018 Response to Appeal of Decision Comments explain, and despite opponents' repeated assertions otherwise, the methodology, scope, analysis years, study time periods, seasonal adjustments, right-turn-on-red adjustments, saturation flow rate, background growth rate, trip generation determinations, pass-by rate, signal timing re-coordination, queuing analysis, and trip type analysis by Kittelson all follow and satisfy all applicable City standards and ODOT guidelines. *See* LUBA Record at 1084-1106. City staff and ODOT concur with Kittelson & Associates, not with opponents.

The City Council should reject opponents' TIA arguments and conclude that the proposal satisfies the transportation-related requirements of UDC 220.005(f)(3)(B) and (C).

4. Further Traffic Mitigation

As provided in the 2007 Decision Condition 6, Applicant shall commit up to $5,000 for traffic calming devices to be used in the residential neighborhood south, if a need is determined. Regardless of whether it is strictly necessary or even warranted, PacTrust agrees to install 3 speed bumps in the adjacent neighborhood on Cultus St. and Foxhaven Dr., SE, and a pedestrian refuge on Boone Rd. SE as shown on Exhibit F attached to this letter, at an estimated cost of $65,000.

Conclusion

Based upon the evidence in the record and the above analysis, the City Council should conclude that Applicants have a vested right to develop the subject property as proposed and approve the site plan review application.[12] The City Council should conclude, on a separate and independent basis, that the evidence in the record demonstrates that the Applicant has a vested right to develop a shopping center consistent with the application, the application satisfies all of the site plan review approval criteria and approve the application.

Very truly yours,

Wendie L. Kellington

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

[12] Similarly, the City should approve the Type II Driveway Approach Permit.

Attachments
Exhibit A - Site Plan “Options”
Exhibit B - Arborist Report
Exhibit C - Kittelson Traffic Memorandum
Exhibit D - Updated Landscape Plan
Exhibit E - Jeff Olson and Frank Schmidt Letters
Exhibit F - Traffic mitigation (speed bumps and pedestrian refuge)
Exhibit G - Executive Transmittal
Exhibit H - Overall Plan