

**BEFORE THE CITY COUNCIL OF
THE CITY OF BEAVERTON, OREGON**

AN ORDER AFFIRMING THE DIRECTOR'S DECISION) ORDER NO. 2762
TO APPROVE DI 2019-0003 (LIFE TIME FITNESS) APP2020-0001 APPEAL OF LIFE TIME FITNESS
BEAVERTON DIRECTOR'S INTERPRETATION),) DIRECTOR'S INTERPRETATION (DI 2019-0003)
THEREBY DENYING APP 2020-0001.)
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This matter came before the City Council on April 14, 2020 and May 12, 2020 on appeal of the February 4, 2020 LTF Real Estate Company ("Life Time") Life Time Fitness Director's Interpretation (DI2019-0003). Appellant Beaverton Business Owners, LLC asked the Council to reverse the Director's Interpretation, to declare the Sunset Station and Barnes Road Planned Unit Development (the "PUD") (CU2013-0003) expired, and to declare the Life Time Fitness approval (DR2018-0128 / LO2018-0005 / SDM2018-0007 / TP2018-0009) invalid.

The City approved the PUD on November 4, 2013. The PUD approval was extended twice, in Case Nos. EXT2015-0004 and EXT2017-0003. Following the extensions, the PUD was to expire on November 5, 2019, unless "the approval [was] enacted either through construction or establishment of the use within the specified time period," in accordance with BDC 50.90.

The Planning Commission approved the Sunset Surface Parking project (CU2018-0023 / DR2018-0167) on March 28, 2019. The Sunset Surface Parking approval was not appealed and became final on April 9, 2019. Sunset Surface Parking was the first project to be approved within the PUD that involves construction of physical improvements to a site. That project involves construction of one building, a guard structure, and a commercial surface parking lot. On October 10, 2019, the City issued a construction permit (BP2019-2788) for the foundation of the guard structure. On October 23, 2019, the City inspected the guard structure and verified that construction of the foundation, including the footings, was completed in accordance with the construction permit.

The Planning Commission approved the Life Time Fitness project on June 12, 2019. The Life Time Fitness project is also located within the PUD area. The appellant in this matter appealed the Planning Commission's approval of the Life Time Fitness project, and the City Council issued a final decision denying the appeal and affirming the Planning Commission on August 13, 2019 (APP2019-0002). The City Council's decision was appealed to the Oregon Land Use Board of Appeals (LUBA), and LUBA affirmed. ___ Or LUBA ___ (LUBA No. 2019-079, March 9, 2020). LUBA's decision was appealed and is now pending before the Oregon Court of Appeals (Case No. A173767).

The Director's Interpretation reached the following conclusions concerning the PUD and developments within the PUD area:

1. Construction of the footing of the guard structure authorized by the Sunset Surface Parking approval constituted "substantial construction," which vested the Sunset Surface Parking approval and the PUD pursuant to BDC 50.90.3.B.2;

2. It was unnecessary to determine whether commencement of construction of the Sunset Surface Parking project constituted a change in use, which vested the Sunset Surface Parking approval and the PUD pursuant to BDC 50.90.3.B.1; and

3. If the PUD expired on November 5, 2019, the expiration of the PUD would have no effect on the Life Time Fitness approval.

Pursuant to Ordinance 2050 (Development Code) sections 50.70 and 50.85 through 50.88, the City Council conducted a public hearing on April 14, 2020, took additional written testimony during a 7-day open record period (ended April 21), a 7-day rebuttal period (ended April 28), a final comment period (ended May 5). It reviewed final staff comments and deliberated on May 12, 2020, and considered testimony and exhibits on the Director's Interpretation. Parties were given opportunity to challenge any member of the City Council based on bias, conflict of interest, or ex parte contacts, and at the April 14 and May 12 hearings no challenge was made.

The appellant assigned error to all three conclusions made by the Director's Interpretation. The Council evaluated the appellant's assignments of error by considering facts in the record, and by objectively applying the applicable Development Code provisions to those facts, and interpreting them where appropriate. For the reasons explained below, the Council disagreed with and rejected each of appellant's alleged errors.

Based on statements at the April 14, 2020 public hearing, the appellant suggested that members of the City Council prejudged the appellant's assignments of error. The Council disagrees, because contrary to the appellant's assertion, the Council impartially assessed the arguments made on appeal, including the appellant's testimony submitted during the open record and rebuttal periods. Councilor Arnold affirmed that she did not make a decision on the appeal until the record was closed. Councilor Arnold further acknowledged the Council's role as a quasi-judicial body and declared her intent to make an unbiased decision, based on the facts under review. The Council voted unanimously to deny the appeal of the Director's Interpretation, and there is no evidence of any Council member bias. Accordingly, we find no bias or prejudgment, and that the Council's consideration of the appeal was impartial.

For all approval criteria, we adopt as our own findings the Director's Interpretation dated February 4, 2020, the Staff Memorandum dated April 6, 2020, the Supplemental Staff Memoranda dated April 10, 2020, April 13, 2020,

and April 14, 2020, May 7, 2020, and May 12, 2020, and the materials submitted by Life Time on March 2, 2020, April 13, 2020, April 21, 2020, and April 28, 2020. In addition, the Council adopts the following supplemental findings in support of the final action. To the extent there is a conflict, the findings in this order supersede the incorporated findings in any Staff memorandum or Life Time's materials

The Development Code states that final land use decisions shall expire according to the schedule in BDC 50.90.1, unless an extension is granted, or a vesting action listed in BDC 50.90.3.B occurs. The Development Code provides two methods to "vest" a final land use decision through commencement of development. First, under BDC 50.90.3.B.1, a decision will vest if "[t]he use of the subject property has changed as allowed by the approval." Second, under BDC 50.90.3.B.2, "[i]n the case of development requiring construction," a decision will vest if "a construction permit has been issued and substantial construction thereto has taken place[.]"

The Development Code defines "substantial construction" to mean, "[p]roviding there are buildings on the site, the completion of construction of footings for the building where the principal use will take place[.]" BDC Ch. 90. Principal use is defined as "[t]he main or primary purpose for which land or a structure is designed, arranged or intended or for which it is occupied or maintained."

DIRECTOR'S INTERPRETATION CONCLUSION NO. 1

The appellant in its written and oral testimony contended that construction of the guard structure foundation was not "substantial construction" that vested the Sunset Surface Parking approval and the PUD, based upon appellant's interpretation of principal use, substantial construction and accessory use/structure. As detailed below, the Council carefully evaluated and now rejects all of appellant's arguments, and finds that construction of the guard structure foundation constituted "substantial construction" of the Sunset Surface Parking approval, which vested the Sunset Surface Parking approval and the PUD.

"Substantial Construction" of a Development in the PUD Area Vests the Entire PUD.

As a threshold matter, the City Council interprets Condition 42 of the PUD in Order No. 2337 to mean that that substantial construction of any development within the PUD area automatically vests the entire PUD. Condition 42 of the PUD land use order states:

"In accordance with Section 50.90.1 of the Development Code, Planned Unit Development approval shall expire 2 years after the date of approval unless, prior to that time, a construction permit has been issued and substantial construction pursuant thereto has taken place, or an application for

extension has been filed, pursuant to Section 50.93 of the Development Code, or authorized development has been otherwise commenced in accordance with Section 50.90.3.B of the Development Code.”

Order No. 2337, p. 16 (Nov. 5, 2013).

Section 50.90.3.B proscribes multiple methods to vest a development approval. One method is to complete “substantial construction.” BDC 50.90.3.B.2. The findings in the Staff Report for the PUD further explains how the PUD vests:

“[O]nce a subsequent development approval [within the PUD area] is granted, and Substantial Construction, as defined in Chapter 90 of the Development Code, has taken place, the PUD and associated transportation trips will be vested for the full build out of the PUD area.”

Staff Report for Sunset Station and Barnes Road PUD (CU2013-0003), p. 6 (Oct. 10, 2013); *see also id.* at 36 (“In order to vest the authorizations of the PUD, the property owner will be required to construct a structural improvement consistent with the development Code’s definition of substantial construction within the valid time frame of the PUD.”). The findings in the Staff Report were adopted and incorporated in the final land use order approving the PUD. Planning Commission Order. No 2337, p. 5 (Nov. 5, 2013).

The PUD is a final decision regulated by BDC 50.90, which means that it expires on the schedule in BDC 50.90.1 unless an extension is granted under BDC 50.90.3.A or development commences as described in BDC 50.90.3.B. BDC 50.90 does not establish additional requirements to prevent expiration of a final decision. The Council interprets these provisions to mean that if an action in BDC 50.90.3.B occurs, the final decision vests automatically. BDC 50.90.3.B also means that vesting of any development within the PUD area vests the entire PUD approval, which is also consistent with Condition 42 of the PUD land use order in Order No. 2337 and the findings in the Staff Report for the PUD.

The Sunset Surface Parking project was the first development application approved within the PUD area that involved construction of physical improvements. For that reason, the City Council finds that once “substantial construction” of the Sunset Surface Parking project vested in accordance with Section 50.90.3.B of the Development Code, the entire PUD approval vested.

Parking is the Principal Use of the Sunset Surface Parking Approval.

Chapter 90 of the Development Code defines “substantial construction” to mean:

Providing there are buildings on the site, the completion of construction of footings for the building

where the principal use will take place shall constitute substantial construction.

The appellant argued that construction of the guard structure foundation was not substantial construction of the Sunset Surface Parking approval, because parking is not the “principal use.” The Council evaluated the appellant’s argument, interprets its code, and rejects the argument because parking is the principal use of the Sunset Surface Parking project for the reasons described below.

Application of the “Principal use” Definition

Chapter 90 of the Development Code defines “Use, Principal” to mean:

The main or primary purpose of which land or a structure is designed, arranged or intended or for which it is occupied or maintained.

As a threshold matter, the appellant asserted that the Council must decide whether the surface parking lot is one of the “main or primary purpose(s)” for which the PUD approval was “designed, arranged, or intended.” Connors Letter, p. 3 (Apr. 6, 2020). The Council rejects the argument. It interprets the definition of “Use, Principal” to mean that the “substantial construction” test must be applied to the Sunset Surface Parking approval, and not to the PUD. The PUD is comprised of multiple sites, each of which will likely contain different uses. Further, the PUD did not approve any specific uses for development. Therefore, based on this interpretation, it concludes that in order for the PUD to vest, a subsequently approved use within the PUD area must vest. The initial question before the City Council is whether the surface parking facility is one of the “main or primary purpose(s)” for which the *Sunset Station Parking* approval was “designed, arranged, or intended.”

The title of the use category, “Parking, as a Principal Use,” is Not the Sole Basis for Finding that Parking is the Principal Use

The appellant argued that title of the use category approved by the Sunset Surface Parking approval, which was “Parking, as a Principal Use,” is the only evidence in support of or basis for an interpretation that parking is the principal use of the project. The City Council rejects that argument.

“Use, principal” is defined in the BDC to mean “[t]he main or primary purpose of which land or a structure is designed, arranged or intended or for which it is occupied or maintained.” BDC Ch. 90.

When the Planning Commission approved the Sunset Surface Parking project it adopted Staff’s findings that “[t]he applicant proposes a 460 space surface parking lot with an approximately 200 square foot guard structure. The proposed parking is the primary use of the site; therefore, it is classified as ‘Parking, as a Principal Use.’” Staff Report for Sunset Surface Parking, at CU-1 (Mar. 6, 2019). The final order approving the Sunset Surface Parking application

further stated that “[t]he matter came before the Planning Commission on March 13, 2019, on a request for a New Conditional Use application for Parking as the Principal Use,” which was granted. Order No. 2685, p. 1 (Mar. 28, 2019). That approval was not appealed. The Council interprets that final order to be a final land use decision, and concludes the appellant’s challenges to the use characterization are a collateral attack that cannot be the basis for challenging vesting.

In the alternative, even if the City Council could revisit the Planning Commission’s use characterization, we reject appellant’s assertion that the sole basis for concluding that the Sunset Surface Parking development is a principal use is the title of the use. Instead, the Council interprets its code, including the definition of “Use, Principal” to reach the conclusion that parking is the principal use of the Sunset Surface Parking project for the same reasons as the Planning Commission. The Council also notes that parking is the only use proposed for the Sunset Surface Parking project. Therefore, parking is the only use for which the site is “designed, arranged or intended,” and once complete, the only use for which it will be “occupied or maintained,” in compliance with the definition of “Use, principal.”

Whether Parking is a Temporary or Interim Use

The appellant contended that the findings in the Sunset Surface Parking approval demonstrate that the Planning Commission did not intend for parking to be a principal use of the site, because the use was not permanent. The appellant also argued that there is no basis in the Development Code for concluding that an interim use can qualify as a principal use for vesting purposes, and that the parking cannot be the principal use of the site, because it was approved as a temporary use. In support of this position, the appellant pointed to the following findings:

“The Commission discussed their concern that the proposed surface parking lot as a principal use of the site and whether that was consistent with the Comprehensive Plan Policies * * * The Commission found that with a condition of approval to ensure that the conditional use was intended [to] help facilitate full buildout of the site and not a permanent principal use of the site[.]”

Order No. 2685, p. 1-2 (Mar. 28, 2019).

The City Council rejects those two arguments for the following reasons. As a threshold matter, the City Council finds that the Development Code provides a single definition of principal use (“Use, Principal”), which is applied throughout the code. Thus, it interprets the term “Use, Principal” to not have a different meaning when applied to the definition of “substantial construction” than when applied elsewhere in the Development Code.

Contrary to the appellant's argument, the Planning Commission never found that parking is not the principal use of the site. The City Council finds that the Planning Commission approved parking as the principal use of the Sunset Surface Parking approval, and that the quoted finding relates to the duration of that principal use. In accordance with the finding, the Planning Commission imposed Condition of Approval No. 1 to the Sunset Surface Parking approval, which provides that the approval will expire under the following conditions:

"a. If CU 2013-0003 (Sunset Station & Barnes Road PUD) expires.

"b. 5 years after issuance of a certificate of occupancy unless there is an active land use entitlement for a minimum of 80,000 square feet of non-residential floor area or 200 dwelling units on the station site.

"c. 10 years after issuance of a certificate of occupancy."

Order No. 2685, p. 3 (Mar. 28, 2019). The City Council finds that Condition of Approval No. 1 was intended to ensure that parking is not the *permanent* use of the site. The Planning Commission did not impose Condition of Approval No. 1 to ensure that parking is not the *principal* use of the site. The Planning Commission approved "Parking, as a Principal Use" as the primary use for the project, and the Council interprets Order No. 2685 to be consistent with the code and mean that parking is the principal use of the site.

The definition of "Use Principal" does not include a temporal component. See BDC Ch. 90. For that reason, the Council interprets that definition to mean that whether a use qualifies as a principal use does not depend on the duration of the use. A principal use can also be an interim use. BDC 10.65 gives the City broad authority to impose conditions of approval on a final land use decision to ensure that the proposal complies with appropriate approval criteria. The Council interprets BDC 10.65 to mean that Condition of Approval No. 1 to the Sunset Surface Parking approval does not prevent parking from being the "Use, Principal" of the site.

The Development Code defines "temporary use" as a "short-term, seasonal, or intermittent use." BDC Ch. 90. Although parking may be described as "temporary," because it is conditioned to cease no later than 10 years after issuance of a certificate of occupancy, the Council interprets this definition to mean that the approved parking is not a "temporary use" as that term is defined in the Development Code. The terms "short-term," "seasonal," and "intermittent" are not defined in the Development Code, so pursuant to BDC 10.20.6.B, these undefined terms "shall have the meaning set forth in the *Webster's Third New International Dictionary*, 1993.

The applicable dictionary definition of “intermittent” is “coming and going at intervals: not continuous.” *Webster’s Third New Int’l Dictionary* (unabridged ed 1993). The dictionary definition of “seasonal” is “affected by or dependent on a season: not continuous (as in activity or availability).” *Id.* The relevant dictionary definition of “short-term” is “occurring over or involving a relatively short period of time.” *Id.* The City Council finds that “short-term” is relative, and therefore could refer to different time periods depending on the context in which it is used. The Development Code provides for five types of temporary use applications. BDC 40.80.15. The Development Code prohibits any temporary use type from existing for a period greater than 2 years; three of the temporary use types have much shorter expiration periods. Given the context in which “temporary use” is used, the City Council interprets “temporary use” to not mean a use that may occur for up to 10 years.

We further find that Condition of Approval No. 1 (imposing time restrictions on the Sunset Surface Parking approval) does not automatically convert the use to a “temporary use,” as we interpret that term. Nowhere do the Sunset Surface Parking approval findings state that the surface parking facility, while in place, would not be a principal use of the property. Nor was the facility approved pursuant to a temporary use permit, which permits are governed by BDC 40.80. See BDC 40.80.10 (“Uses and activities that are determined to be temporary in nature shall be subject to the provisions of [Section 40.80].”)

Finally, the appellant further argued that oral statements by the applicant’s representatives, by Staff, and by the Planning Commissioners at the Sunset Surface Parking public hearing prove that parking is a temporary use. The Council rejects that argument and finds that oral statements at the hearing are not a sufficient basis for concluding that parking was approved only as a temporary use, because such statements are not findings that are part of the final decision. See *Allen v. Grant County*, 39 Or LUBA 232 (2000) (oral discussion by the local decision makers reflected in the tape of the hearing do not constitute findings).

The PUD Did Not Approve Uses for Sites within the PUD Area.

The appellant argued that parking cannot qualify as the principal use of the Sunset Surface Parking approval, because surface parking was never proposed, contemplated, or approved by the PUD. The Council rejects the argument because it finds that the lack of approval alleged by the appellant is misleading. Surface parking was not a proposed use, because the PUD did not propose any specific uses: “No new development or physical improvements are proposed in conjunction with this Planned Unit Development.” Order No. 2337, p.1 (Nov. 5, 2013). The Council interprets this order to mean that no land uses were specified, nor needed to be specified, in the PUD approval, and therefore the argument fails. Further, the PUD did not include any conditions of approval that limited the permitted uses, either in correlation to the uses that were assumed as the basis for transportation assumptions or otherwise. As explained in the Staff Report for the PUD, that “[f]uture development proposals will be required to show continued compliance with the standards of Chapter 20 [Land

Uses].” PUD Staff Report, p. 15 (Oct. 23, 2013). The Sunset Surface Parking approval, which is final, concluded that the surface parking facility complied with the standards of Chapter 20. Any challenge to the Sunset Surface Parking project’s compliance with Chapter 20 is a collateral attack on the final approval of that project.

The Sunset Surface Parking is Consistent with the SC-S Zone.

The appellant asserted that parking cannot be the principal use of the Sunset Surface Parking approval, because it is inconsistent with the Station Community-Sunset (SC-S) zone. We reject appellant’s assertion, because the Planning Commission found that the Sunset Surface Parking project, as conditioned, met all applicable approval criteria, including requirements for the SC-S zone. Order Nos. 2685, 2686 (Mar. 28, 2019). That decision is final. The Council finds the argument that the Sunset Surface Parking project is inconsistent with the SC-S zone requirements is an impermissible collateral attack on the Sunset Surface Parking approval.

Relevance of Whether the Guard Structure is an Accessory Use or Structure to Vesting the Sunset Surface Parking Approval

The appellant argued that the guard structure is an “accessory use or structure,” and therefore cannot be the “building where the principal use will take place” as that phrase is used in the definition of “substantial construction.” The City Council rejects the argument and finds, first, that the guard structure is not an accessory use or structure, and, second in the alternative, that *even if* it is an accessory use or structure, the guard structure can still vest the Sunset Surface Parking approval.

Whether the Guard Structure is an Accessory Use or Structure

“Accessory Structure or Use” means “[a] structure or use incidental, appropriate, and subordinate to the main structure or use.” BDC Ch. 90.

“Parking, as a Principal Use” is defined as a “facility providing for the temporary parking of automobiles and transportation vehicles which arrive and depart daily.” BDC Ch. 90 (emphasis added).

The Council interprets “Accessory Structure or Use” to mean a secondary use on a site that has a different “Use, Primary”. It finds the Sunset Surface Parking facility does not have a “Use, Primary” that is different from the parking, and concludes that the guard structure is not an “accessory structure or use,” because it is a part of Sunset Surface Parking facility.

The Council interprets “Parking, as a Principal Use” to mean a facility for daily parking that exclusively occupies an area, and does not mean a parking facility on a site with another approved “Use, Principal.” “Facility” is not defined in the Code. Webster’s Third New International Dictionary, 1993, which applies to undefined terms (BDC 10.20.6.B), defines “facility” as “something (as a

hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end.” Based on this definition, we interpret the term “facility” in this context to include the guard structure because the function of and end served by the surface parking project is to provide vehicle parking, and the guard structure is an element of performing that function. The guard structure includes an office with windows and a restroom, and is intended to house a security guard to provide security for and to attend to any issues concerning the parking facility. Because the guard structure is part of the parking facility, which is the principal use of the site, the Council concludes the guard structure is neither “incidental” nor “subordinate” to the “Parking, as a Principal Use” of the site.

Further, the Planning Commission did not approve the guard structure as an “accessory use or structure.” The criteria for review of “Accessory Uses and Structures” are specified at BDC 60.50.05. The Council affirms the Planning Commission decision to not apply those criteria to the guard structure, and concludes the raising of that issue now is a collateral attack on the Sunset Surface Parking approval.

The appellant argues that the guard structure must be an accessory use or structure, because at the Sunset Surface Parking public hearing, Staff and the applicant’s representatives referred to the guard structure as “accessory.” The Council disagrees and rejects the argument that staff and applicant statements made at the Planning Commission hearing are dispositive proof that the guard structure is an accessory use or structure. The Sunset Surface Parking approval is only the final written decision, not what staff may have stated during the proceedings. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588, 591 (1991).

The appellant also asserts that the guard structure is an accessory use or structure because it is referred to as such in the Staff Report for the Sunset Surface Parking project. The Council disagrees and rejects the assertion. It finds that use of the terms “accessory” and “auxiliary” in the Staff Report are not a conclusive determination that the guard structure is an accessory use. The word “accessory” is only used once in the entire staff report and is applied in the context of Design Review criteria. Staff Report for Sunset Surface Parking, p. DR-6 (Mar. 6, 2019). Nowhere does the Staff Report say that the guard structure is a non-parking use. The Council interprets the terms “accessory use” and “auxiliary” used in the Staff Report as descriptors and finds they do not automatically or impliedly classify the guard structure as an “accessory use or structure,” as that term is defined in the Development Code.

Finally, the appellant argues that the guard structure *must* be an “accessory use or structure,” because it does not comply with the applicable Design Review requirements. The Council rejects the argument and affirms the Planning Commission decision that the Sunset Surface Parking project, including the guard structure, complied with all applicable criteria, including Design Review requirements. The Council finds that asserting that the guard structure does not

comply with Design Review criteria is a collateral attack on the Sunset Surface Parking approval.

In the alternative, if the Guard Structure is an Accessory Use or Structure, Construction of the Guard Structure Foundation Qualifies as “Substantial Construction” of Sunset Surface Parking.

The definition of substantial construction states: “Providing there are buildings on the site, the completion of construction of footings for the building where the principal use will take place shall constitute substantial construction.” BDC Ch. 90. In the alternative to the findings above, the Council interprets this definition to mean that completing the footings of the guard structure, even if it is an accessory use or structure, qualifies as “substantial construction” in this situation for vesting for two reasons.

First, we interpret the definition of “substantial construction” to not require that the principal use take place *within* the building, because that definition specifies “the building *where* the principal use will take place.” “Building” means “[a]ny structure built for the support, shelter or enclosure of persons, animals, chattels, or property of any kind.” The guard structure is located on the same site as, and is integrated with, the surface parking facility, so the building is located “where the principal use will take place.” See BDC Ch. 90. Had we meant for the principal use to be required to be conducted within the building, BDC Ch. 90 would have used the term “within the building” instead of the phrase “the building where the principal use will take place.” The Council analogizes the Sunset Surface Parking to a public park, where the principal use occurs outdoors. A park may have small buildings for storage and restrooms, but the principal use does not occur in those buildings. Accepting the appellant’s argument that the principal use must take place within the building would lead to the absurd result that for a park, the principal use would be deemed storage or restrooms. The argument requires us to read terms into the definition which are not there, and is inconsistent with the plain text of the definition.

In the alternative, in the context of land use approvals involving construction of only one building, we interpret the definition of “substantial construction” to require construction of footings for that building. We interpret BDC 50.90.3.B to be a method to demonstrate commencement of the development for all of the final decision types listed in BDC 50.90.1 We further find that BDC 50.90.3.B.2 applies to development requiring construction, and that BDC 50.90.3.B.1 applies to development not requiring construction.

For a development requiring construction, where only one building is proposed to be constructed and if that building is an “accessory use or structure,” the Council acknowledges there is some ambiguity as to how BDC 50.90.3.B.2 applies. Stated another way, does construction of the footings of a building vest a final land use decision under BDC 50.90.3.B.2, if the building is the *only* building constructed as a part of the development, and if the building fits the definition in the Development Code of “accessory use or structure”? On one hand, BDC 50.90.3.B.2 requires “substantial construction,” which requires

“construction of footings for the building where the principal use will take place[.]” See BDC Ch. 90 (emphasis added). The “principal use” requirement could be interpreted to preclude vesting in the one-building hypothetical presented above. On the other hand, if that interpretation were adopted, vesting would be an impossibility. Further, the term “accessory use or structure” creates ambiguity by failing to distinguish the terms “use” and “structure.” For example, a “structure” that is incidental and subordinate to the “main structure” could still be a structure where the principal use takes place.

The Council takes this opportunity to resolve the ambiguity through interpretation of the code and applying it to the facts of this case. We find it noteworthy that the definition “substantial construction” uses the plural word “buildings” and thereby assumes that there are multiple buildings on a site. See BDC Ch. 90 (“Providing there are buildings on the site...”) (emphasis added). Where a development includes more than one building, the definition dictates *which* of the multiple buildings will vest the project. See *id.* (“...the building where the principal use will take place shall constitute substantial construction.”). The definition assumes that there are multiple buildings on a site, and the Council finds this text does not provide clear direction in this situation in which there is only one building.

We interpret the definition to mean that the purpose of defining substantial construction by reference to the “building where the principal use will take place” is to prevent applicants from forestalling expiration of a final land use decision by constructing only a subordinate building, instead of constructing the primary building. This interpretation is consistent with the definition of “substantial construction,” which assumes that multiple buildings exist on a site and dictates *which* building must be constructed to vest the land use decision. This aim must be balanced against the purpose of BDC 50.90.3.B, which is to provide a method by which to vest the decision types listed in BDC 50.90.1. As stated earlier, vesting provides certainty to project applicants that they may rely on final land use decisions issued by the City, even if Development Code provisions underlying those decisions are subsequently amended.

Considering the text and weighing those competing purposes, we conclude that, where a land use decision approves construction of a development that includes only one building, construction of the footings of that building is sufficient to vest the decision, *even if* the building is an “accessory use or structure.” This interpretation is consistent with the directive that the Development Code “shall be interpreted reasonably, reading questioned regulations in relation to other sections such that an interpretation most fully effectuates the intent and purpose of the regulations.” BDC 10.20.6. This interpretation is reasonable, because it prevents the outcome where vesting is an impossibility. In this context, the Sunset Surface Parking project involves only one building: the guard structure. There can be no question that the purpose of the guard structure is serve the principal use of the site, which is parking. Since the guard structure is the only building, *even if* the guard structure is an “accessory use or structure,” construction of the guard structure footings

constitutes “substantial construction” of the Sunset Surface Parking approval, which vests the approval under BDC 50.90.3.B.2.

If the Guard Structure is an Accessory Use or Structure, Allowing the Guard Structure to Vest the Sunset Surface Parking Approval Does Not Create Bad Precedent.

The appellant argues that allowing the guard structure to vest the Sunset Parking Approval would set a precedent, which in the appellant’s opinion is a bad precedent. The Council disagrees for the following reasons. First, as previously stated, the Council finds that the guard structure is not an accessory use or structure. Second, *even if* the guard structure was an accessory use or structure, we find in the alternative that this decision would have limited precedential value because the nature of the use is unusual. That is because, if we agree that the guard structure is an accessory structure, the Sunset Surface Parking approval involves the unusual circumstance of an accessory structure being the only building. The examples provided by the appellant (e.g., gazebo, tool shed) do not fit this profile. It is difficult to imagine, for example, a final land use decision in which the only building approved is a tool shed. Similarly, the appellant’s argument that any development could vest by simply installing a guard structure to prevent theft and vandalism at a site is also distinguishable and rejected. In the appellant’s example, the guard structure would be constructed prior to, but in addition to, other building(s) approved to be constructed on site (e.g., apartment building). In that scenario, the guard structure is not the only structure approved for development. To the extent that this decision establishes a precedent for vesting a development that has a single building which is an accessory use or structure, we reject appellant’s premise that the precedent is bad. Instead, for the reasons previously discussed, the precedent is consistent with the purpose of BDC 50.90.3.B to provide a method by which to vest the decision types listed in BDC 50.90.1.

Additional Issues Related to “Substantial Construction”

The Size of the Guard Structure is Irrelevant to Vesting the PUD

The appellant asserted that the guard structure is too small to vest the PUD. The Council rejects the assertion. As previously stated, the threshold question is whether construction of the guard structure foundation vested the Sunset Surface Parking approval. If so, the PUD vested automatically.

Moreover, the Council finds that neither the Development Code nor the PUD land use order establish a size threshold for the “substantial construction” test. The appellant’s argument would effectively insert a new minimum size requirement in the code that does not exist in the text. Therefore, the size of the guard structure is irrelevant to determining whether the guard structure is adequate to vest the Sunset Surface Parking approval (and by vesting the Sunset Surface Parking approval, also vest the PUD).

Conversion to a Phased PUD

The appellant argued that the PUD cannot be vested by the guard structure because doing so would convert the PUD to a phased development approval. The Council disagrees with appellant, and interprets Order No. 2337 to mean the PUD approval clearly anticipated subsequent site-specific development proposals when that approval stated that: “No new development or physical improvements are proposed in conjunction with this Planned Unit Development.” The appellant also fails to articulate any procedural or substantive distinction, other than the applicable term for the PUD, between a single or multi-phased PUD, or the significance of whether a PUD is phased.

The Planning Commission Anticipated that Construction of the Guard Structure Foundation Would Vest the PUD

The appellant claimed that the Planning Commission did not anticipate that construction of the guard structure foundation would vest the PUD at the time it approved the Sunset Surface Parking approval. The Council disagrees, because contrary to the appellant’s assertion, the transcript for the Sunset Surface Parking hearing shows that the Planning Commissioners anticipated that construction of the guard structure foundation would vest the PUD.

This intent is further evidenced by a condition imposed on the Sunset Surface Parking approval. Specifically, Condition of Approval No. 30 to the Final Order approving the Sunset Surface Parking Design Review Three (DR2018-0167) application requires issuance of a Site Development Permit prior to building permit issuance. Order No. 2686, p. 8 (Mar. 28, 2019). Typically, building permits, including foundation permits, can be issued only after issuance of a Site Development Permit. However, staff modified that typical permitting sequence to allow “[a] foundation only permit for the guard structure [to be] issued prior to full Site Development Permit issuance if the City’s review is complete and subject only to outside agency permit issuance required for full Site Development Permit issuance.” The City Council finds that the purpose of this provision was to allow early issuance of a construction permit for the guard structure foundation, with the intent of completing substantial construction and vesting the Sunset Surface Parking approval and the PUD. The Sunset Surface Parking approval, including Condition of Approval No. 30 allowing for early issuance of a foundation-only permit, were not appealed and are now final.

DIRECTOR’S INTERPRETATION CONCLUSION NO. 2

As stated, the Council finds that, where a development requires construction, BDC 50.90.3.B.2 applies and requires that commencement of development be demonstrated by “substantial construction.”

DIRECTOR’S INTERPRETATION CONCLUSION NO. 3

The Director’s Interpretation concluded in the alternative that if the PUD expired, that expiration would not impact the Life Time Fitness approval. By

contrast, the appellant argued that if the PUD expired, the City must declare the Life Time Fitness approval invalid, construction on the approval must cease, and no permits implementing the approval (e.g., building, grading and site development permits) can be issued. For the reasons stated in the incorporated findings and those below, the City Council rejects the argument and affirms the Director's Interpretation.

If the PUD has Expired, Expiration of the PUD does Not Invalidate the Life Time Fitness Approval

The appellant argued that the Life Time Fitness Traffic Impact Analysis (TIA) relied on and was contingent on the PUD, and therefore must be invalidated if the PUD expired. More specifically, the appellant argued that the PUD superseded the transportation standards set forth in the Development Code and imposed different transportation requirements on the Life Time Fitness TIA. The appellant also asserted that, if the PUD expired, Life Time may no longer rely on the trip generation and transportation mitigation measures assumed by the PUD. Although the appellant argued that expiration of the PUD would cause the Life Time Fitness project to be noncompliant with transportation approval criteria, the appellant did not argue that the Life Time Fitness project is noncompliant with any other approval criteria in the Development Code. For the following reasons, the Council rejects those arguments.

The Council finds that expiration of the PUD, if it occurred, does not vitiate the Life Time Fitness approval because approved prior to the potential expiration date of the PUD. The Life Time Fitness application was filed on September 5, 2018 and approved by the City on August 13, 2019. Both the application and the approval occurred before the potential expiration date of the PUD, which was November 5, 2019.

The City's approval of the Life Time Fitness project on August 13, 2019 was a final land use decision. BDC 50.90.1.B allows a developer two years from the effective date to enact an approval through construction, with the possibility of two additional two-year extensions. The appellant has identified no legal precedent for the conclusion that expiration of a PUD, after issuance of a final land use decision, is grounds for invalidating the land use decision and the two-year approval specified by BDC 50.90.1.B. We have found no such authority and interpret the Development Code and Order No. 2337 to mean Life Time's final land use decision cannot be invalidated by the expiration of the PUD.

The appellant asserts that the Life Time Fitness approval relied on and was contingent upon the PUD, and therefore the approval must be invalidated if the PUD is no longer valid. As a threshold matter, we reject the assertion because the PUD is focused primarily on transportation-related issues. To the extent that the PUD includes conditions of approval that are not transportation-related (e.g., density, open space), those conditions apply only to residential development. See Order 2337 (Condition of Approval Nos. 41 and 43). Thus, the Council interprets Order No. 2337 to mean that to the extent that the Life Time Fitness approval, which is not a residential development, relied on the

PUD, that reliance was limited to issues related to transportation. Likewise, the appellant's arguments regarding the Life Time Fitness approval are limited to the effect of the PUD on transportation approval criteria that applied to the Life Time Fitness project, and we reject those arguments for the reasons explained in these findings.

To evaluate the effect of the PUD on the Life Time Fitness approval, an understanding of planned unit developments generally, and this specific PUD is warranted. The Development Code authorizes planned unit developments to modify site development standards in the underlying zoning district (which are found in Chapter 20), such as reducing minimum lot sizes or setbacks, in exchange for addressing other site opportunities, such as preserving natural resource features on site. BDC 40.15.05; BDC 40.15.15.C.8. Another purpose of a planned unit development is "within the SC-S (Station Community Sunset) zoning district, a Planned Unit Development is required to ensure that specific development requirements are satisfied." BDC 40.15.05. Those specific development requirements are identified in BDC 20.20.40.2 and BDC 20.20.40.3, and relate to a required residential density range and total cap on non-residential square footage. BDC 40.15.15.C.10.

The PUD at issue in this case includes land that is zoned SC-S, as well as land within other zoning designations. For example, the Life Time Fitness site is zoned Corridor Commercial (CC), but is within the PUD. This PUD did not approve any modifications to Chapter 20 site development standards. Instead, the PUD was a required pre-requisite to development of SC-S zoned land and was directed at evaluating the potential transportation impacts of development within the PUD and identifying the needed transportation mitigation measures to offset those impacts. Because the Life Time Fitness site is not zoned SC-S, the Council finds the requirement for a planned unit development in that zone does not apply. Moreover, the PUD did not propose or approve any development: "No new development or physical improvements are proposed in conjunction with this Planned Unit Development." Order No. 2337.

The PUD application included a TIA, which estimated trip generation for the entire PUD. Based on an assumed but non-binding mix of uses, the PUD TIA estimated the number trips that would be generated upon full buildout of the PUD, which was estimated to occur in 2035. PUD Staff Report, p. 10 (Oct. 23, 2013). The TIA then analyzed how those trips would impact roads and intersections, and identified mitigation measures (transportation system improvements) to ensure that intersections impacted by the PUD buildout would meet city, county, and state operational standards. *Id.* at 11.

In effect, the PUD created a menu of transportation improvements that would be required to mitigate the full build out of the PUD. As development occurs within the PUD area, applicants must prepare a supplemental TIA to determine which of the improvements identified in the PUD conditions of approval are necessary to mitigate the impacts of that development. *Id.* at 12. The PUD Staff Report explains: "In conjunction with future land use applications for physical development the applicant will be required to submit a supplemental

transportation analysis which evaluates the proposed development phase to determine which of the mitigation measures, enumerated in the conditions of approval [to the PUD], are warranted as a result of the proposed development phase.” *Id.* at 36-37. Future development applicants must also “assess compliance of the proposed development phase with the [PUD].” *Id.* at 37. If future development exceeds the trip generation assumed in the PUD TIA, then the PUD must be modified accordingly. *Id.* at 29.

The Council finds that the trip generation assumptions in the PUD are facts, and expiration of the PUD constitutes a change in facts, similar to the change in facts in *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990) and *Westlake Homeowner’s Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993). As in those cases, the Life Time Fitness project was approved while the PUD was still in effect, and the Life Time Fitness approval is unaffected by a subsequent change in facts.

The City Council rejects appellant’s argument that the Life Time Fitness approval was subject to less rigor or different transportation standards because of the PUD. Although the appellant alleged that the PUD superseded transportation standards set forth in the Development Code, the appellant has not identified a single transportation approval criterion that was superseded, changed, or not applied to or satisfied by the Life Time Fitness project due to the PUD. Likewise, the appellant does not identify any element of the Life Time TIA scope that was altered because of the PUD, and does not identify any transportation mitigation that would have been required for the Life Time Fitness approval but for the existence of the PUD. In sum, there is no evidence in the record that the Life Time Fitness TIA does not comply with Development Code standards. Nor is there evidence in the record that the Life Time Fitness approval does not include adequate conditions to ensure that traffic impacts of the project are fully mitigated. Therefore, the Council rejects the argument for lack of supporting evidence, among other reasons.

As detailed above, the PUD did not modify site development standards, which are specific to a base zone and found in BDC Chapter 20. The Development Code does not authorize a planned unit development to modify the transportation facilities standards in BDC 60.55. Therefore, from both a factual and legal perspective, the PUD did not and could not have modified approval criteria in BDC 60.55, as applied to the Life Time Fitness approval. Further, the Life Time Fitness approval, as affirmed by LUBA, concluded that all of the project’s impacts on the transportation system were mitigated by the mitigation measures that Life Time is required to construct or fund.

Finally, the appellant’s argument—that expiration of the PUD nullifies a prior, final land use decision—undercuts the preference for and emphasis on the importance of finality of land use decisions, and therefore is contrary to state and city land use policy. The Council rejects the argument.

If the PUD Expired, Life Time Is Not Required to Demonstrate a Vested Right to Develop

The appellant argues that, if the PUD expired, continued development of the Life Time Fitness project may only be permitted if Life Time demonstrates that it has a common law vested right to continue. The Council disagrees with the appellant and finds that the vested rights doctrine is inapplicable in this context, so there is no reason to reach the issue of whether Life Time can establish a vested right.

First, the Council finds that the PUD is not a land use regulation, and so expiration of the PUD is not a change in law which triggers the vested rights doctrine. The PUD did not amend the standards in the Development Code that apply to traffic impact analyses. Neither did the PUD did relieve Life Time Fitness from compliance with any Development Code provisions, transportation-related or otherwise. Development applications within the PUD area are “required to comply with adopted City codes and standards[.]” PUD Staff Report, p. 18 (Oct. 23, 2013). In the alternative, if a reviewing body disagrees with the City and determines that the PUD is a land use regulation, then application of the vested rights doctrine is still premature. Assuming for the sake of argument that the PUD is a land use regulation, then pursuant to ORS 227.178(3)(a), the Life Time Fitness project is vested in the PUD as approval criteria even if the PUD later expired because the PUD was effective on the date that Life Time’s application was submitted. As already stated, BDC 50.90.1.B allows a developer two years from the effective date to enact an approval through construction, with the possibility of two additional two-year extensions. The Council finds that the appellant’s argument fails to account for the time period in BDC 50.91.1.B and the allowance of extensions, and therefore rejects the argument. Even if the PUD was considered to be a land use regulation, the vested rights doctrine would not be relevant until the Life Time Fitness project approval and any extension(s) expires.

Second, the Council finds that expiration of the PUD does not cause the Life Time Fitness project to be a nonconforming use. The appellant argued that the Life Time Fitness project is no longer consistent with the Development Code, because it was approved based on different transportation standards than those that apply now that the PUD expired. As detailed above, we reject that argument. The appellant did not identify any provision in the Development Code that is not met by the Life Time Fitness project, so the project is not nonconforming. Moreover, the appellant has not explained why characterizing the Life Time Fitness project as nonconforming has any significance on the project’s ability to proceed in accordance with BDC 50.91.1.B if the PUD has expired.

We understand the appellant to argue, in essence, that the Life Time Fitness project did not provide adequate traffic transportation mitigations. In other words, the appellant implies that if the PUD had not existed at the time the Life Time Fitness project was approved, then Life Time would have been required to provide additional transportation improvements (beyond those

identified by the final approval). The Council rejects the argument because it is a speculative, hypothetical example since the PUD did exist when the Life Time approval was issued. The appellant does not point to any evidence in support of this assertion, and the Council concludes such arguments are a collateral attack on the Life Time Fitness project.

When approving the Life Time project, the City found that the transportation improvements proposed by Life Time adequately mitigated impacts from the Life Time Fitness project, and LUBA affirmed this finding. There is no evidence that Life Time, the City or any party in that contested approval process identified mitigation measures that would have been required but for the existence of the PUD. We acknowledge that the PUD places a cap on the mitigation measures that may be required for development within the PUD area. There is no evidence, however, that Life Time benefited from that cap. The PUD explains: “The full build-out of the transportation improvements may take years but the majority of the transportation improvements will likely occur with the initial stages of the future development given the conclusions of the Traffic Impact Analysis.” Order No. 2337, p. 3-4. The Life Time Fitness project was only the second project involving physical development within the PUD area. Therefore, based on the PUD TIA, the Life Time Fitness project could be expected to provide a large number of transportation mitigations.

ADDITIONAL ARGUMENTS

Impacts to Transportation System

The City Council considered and rejects appellant's arguments that the PUD should not vest, because vesting the PUD would limit the transportation mitigations that could be required of developments within the PUD area to those mitigations that are identified as conditions of approval to the PUD Order No. 2337, which could result in inadequate transportation infrastructure when the PUD is built out over years. The appellant alleges that as congestion increases in the area and impacts the transportation system, the vested PUD will be allowed to ignore the increase in background traffic and that the mitigation measures the PUD is required to build will be outdated. The appellant offers no evidence or expert opinion that supports this argument, and does not identify a segment of the transportation system that is expect to fail in the appellant's speculated scenario.

The Council rejects the arguments and first finds that the Development Code and PUD Order No. 2337 must be applied as written, and that appellant's argument effectively would unlawfully insert new conditions into that order. Thus, the issues before the City Council are whether the PUD approval is vested in accordance with Section 50.90.3.B of the Development Code, and, if it expired, whether that has any impact on Life Time's approved project. The appellant's arguments regarding why the PUD “should” or “ought to” expire and speculative outcomes of what may occur if the PUD is vested are irrelevant to application of the Development Code. The arguments are rejected, again because they would insert new text into the code and Order No. 2337. The appellant did not

characterize its arguments as correlating to a purpose or policy of any of the applicable approval criteria, and therefore the arguments are not based on the code and must be rejected.

Although not necessary for the vesting analysis, the City Council further finds that the appellant misrepresents the effect of the PUD and that its transportation impacts will not be mitigated. We reach this conclusion based on our interpretation of the Development Code provisions applicable to TIAs and the City Transportation Engineer's, Jabra Khasho, staff memorandum dated May 11, 2020. The Development Code requires a TIA to forecast Total Traffic at the time of completion of the development. BDC 60.55.20.4.D. "Total Traffic" is defined as the sum of existing traffic, "Added Traffic," and site-generated traffic at the build out of the proposed development. BDC Ch. 90. "Added Traffic" is defined as traffic generated by developments or phases of developments that have received final development approval but are not yet occupied. BDC Ch. 90. "Added Traffic" is sometimes also referred to as "In-Process Trips." Subsequent development applicants that are required to complete a TIA must identify methods of mitigating on-site and off-site deficiencies for present and proposed phases of the development. BDC 60.55.20.4.F. Those mitigation measures must consider Buildout Year impacts, for Total Traffic, which includes Added Traffic. As a result, the City Engineer explained that subsequent development applicants are required to mitigate for traffic impacts of prior developments that have not yet been constructed.

The PUD's mitigation measures were based upon the combined transportation impacts of the Total Traffic. Thus, until the PUD is occupied (and the PUD's trips enter the transportation system), future developments that impact the same intersections that the PUD has been identified to impact must assume the trips that will be generated by the PUD as "Added Traffic," and that future development must mitigate for the impacts of the Total Traffic. As a result, the PUD's impacts are not ignored. The PUD's traffic impacts are assured to be mitigated, regardless of when development within the PUD is complete.

Policy for Imposing Expirations on Development Approvals

The Council also considered the appellant's argument that allowing the guard structure to vest the PUD thwarts the purpose of imposing an expiration date on the PUD, which is to ensure that development does not occur so far in the future that transportation assumptions are outdated. The appellant similarly argued that expiration dates are rendered meaningless by the vesting that is approved in this proceeding. We note that the appellant does not identify any source supporting this asserted purpose of imposing deadlines on development approvals. And, as explained above, regardless of when the PUD is developed, its transportation assumptions will not be outdated.

The Council finds that appellant's argument is an attack on the vesting requirements in the Development Code and in the PUD land use order. In other words, opponent argues that more should be required to vest the PUD. The argument seems to focus on an appellant's sense of what is enough or ought to

vest the PUD, and is not based in the text, purpose or policy of the code or prior land use approvals, as stated, interpreted and applied above.

Filing of the Director's Interpretation Application is Not Evidence that the PUD did not Vest.

The appellant argued that Life Time's decision to apply for the Director's Interpretation is persuasive evidence that the PUD did not vest. We disagree. The Council finds that the appellant's repeated challenges to the Life Time project reasonably caused Life Time to seek clarification of issues disputed by appellants for the record. It concludes that filing of the Director's Interpretation application is not relevant evidence as to whether the Sunset Surface Parking approval and PUD vested. There are multiple reasons why Life Time may have applied for a Director's Interpretation, none of which constitute substantial evidence of expiration. For example, Life Time testified before the Council that the Director's Interpretation application was filed in anticipation of a challenge by the appellant and to ensure that such a challenge would be addressed in a public hearing. Consistent with this expectation, within one week of the PUD expiration date, the appellant submitted a letter to the City demanding that the PUD and the Life Time Fitness approval be declared invalid.

Other Arguments.

The City Council expressly finds that any arguments that were raised during the proceedings below but are not addressed in these findings are irrelevant to the approval criteria. For example, a public comment was submitted opposing the extension of the PUD based upon natural resources impacts. The proceeding before the City is whether the PUD is vested, not an extension, and the criteria for vesting do not consider the impacts of the development.

ORDER

Therefore, **IT IS HEREBY ORDERED** that **APP2020-0001** is **DENIED** and the Director's **APPROVAL** of **DI2019-0003** is **AFFIRMED**, based on the testimony and evidence presented during the public hearing and the supplemental materials provided prior to the hearing and the findings contained herein.

Motion **CARRIED**, by the following vote:

AYES: Mitchell, Fagin, Arnold, Beaty, San Soucie.

NAYS: None.

ABSTAIN: None.

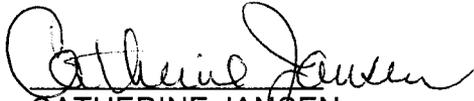
ABSENT: None.

Dated this 3rd day of June, 2020.

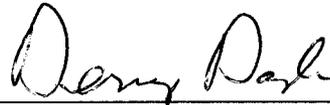
CITY COUNCIL
FOR BEAVERTON, OREGON

ATTEST

APPROVED:



CATHERINE JANSEN
City Recorder



DENNY DOYLE
Mayor