Community Development Department / Planning Division
12725 SW Millikan Way / PO Box 4755
Beaverton, OR 97076
General Information: (503) 526-2222 V/TDD
www.BeavertonOregon.gov

MEMORANDUM

TO: City Council

FROM: Jana Fox, Current Planning Manager

DATE: April 10, 2020

SUBJECT: APP2020-0001 Appeal of Life Time Fitness Director's Interpretation (DI2019-0003)

This Supplemental Memorandum is to provide the Council with the letter received by the Appellant, Beaverton Business Owners (BBO), after the Agenda Bill packet was turned in. The majority of assertions made by the appellant have already been addressed, in either the original Director's Decision or Staff's Appeal Memorandum, both provided in the Agenda Bill. One additional point is made in the April 6, 2020 BBO memorandum which staff responds to below.

Staff Finding:
In the finding below, staff only responds to the appellant's new claims of error and does not provide a re-analysis of the original Director's Interpretation decision (DI2019-0003) in full nor of the Staff Memorandum, dated April 6, 2020. Staff has provided references to where in the Director's Decision analyses of these topics are provided.

***BBO Assertion:* The Decision will lock the City into the PUD transportation mitigation measures in perpetuity regardless of the transportation infrastructure or conditions at the time of full build out of the PUD**

BBO raises this issue as if it is a unique issue to this particular PUD. However, all land use decisions, and PUDs in particular, have the same effect, they assign a number of trips and associated mitigation measures as part of the approval process and all other developments permitted after must take into account the trips that are now considered 'in process trips' in their own Transportation Impact Analysis (TIA). However TIA's of subsequent development do not take into account mitigations measures that have been conditioned unless they have already been constructed. This means that multiple developments are often conditioned to building the same mitigation measures and whomever goes first must build the mitigation.

The issue described here is the same as it would be for developments in other parts of Beaverton, such as South Cooper Mountain, where the first phase of a PUD may be built and vest the approval but future phases may be delayed by years and are entitled to continue at a later date through their PUD vesting during the first phase.

This is not an issue of whether the PUD is vested, but a discussion of how the land use process works, for all developments. This is essentially an attack on the land use process and not relevant to the arguments of whether the PUD itself is vested.

EXHIBITS:

Exhibit APP 1 – Appellant Materials:

APP 1.3 Submittal on behalf of BBO by Mike Connors, Hathaway Larson, dated April 6, 2020.

Exhibit APP 2 – Applicant Materials:

No additional agency comment received to date.

Exhibit APP 3 – Public Comment:

No additional agency comment received to date.

Exhibit APP 4 – Agency Comment:

No additional agency comment received to date.

EXHIBIT APP 1.3

HATHAWAY LARSON

Koback · Connors · Heth

April 6, 2020

VIA EMAIL (jfox@beavertonoreqon.gov)

City Council
c/o Jana Fox, Current Planning Manager
City of Beaverton
12725 SW Millikan Drive
Beaverton, OR 97076-4755

Re: **Appeal of Director's Decision to Approve Life Time Fitness Director's Interpretation, Casefile No. APP2020-0001**
LTF Real Estate Company, Inc.'s Application No. DI2019-003
Response to Life Time and Peterkort Comment Letters
Our Client: Beaverton Business Owners, LLC

Dear Mayor Doyle and Councilors:

As you know, this firm represents Beaverton Business Owners, LLC ("Beaverton Business Owners") with respect to the above-referenced appeal (the "Appeal") of the Director's Interpretation decision (the "Decision") regarding LTF Real Estate Company, Inc.'s ("Life Time") Application No. DI2019-003 (the "Application"). This letter responds to the comment letters on the Appeal submitted by Life Time, dated March 2, 2020 ("Life Time Letter"), and J. Peterkort and Company ("Peterkort"), dated March 13, 2020 ("Peterkort Letter").

A. The Decision will lock the City into the PUD transportation mitigation measures in perpetuity regardless of the transportation infrastructure or conditions at the time of full build out of the PUD.

Before addressing the specific arguments and issues raised in Life Time and Peterkort's comment letters, it is important for the City Council to understand the broader practical impacts of affirming the Decision. If, as Life Time and Peterkort propose, the PUD vested upon the construction of footings for a single 200 square foot guard shack, then the transportation mitigation measures adopted as part of the Sunset Station and Barnes Road PUD (the "PUD") which covers 80 acres will be the only transportation improvements the City can impose on the development of the PUD regardless of the transportation infrastructure or conditions at the time of full build out. All parties agree that vesting the PUD will fully vest the transportation impacts and mitigation measures that can be

E. Michael Connors
1331 NW Lovejoy Street, Suite 950
Portland, OR 97209
mike@hathawaylarson.com
(503) 303-3111 direct
(503) 303-3101 main

imposed for the remaining development of the PUD **in perpetuity**. Decision, p.7-8;[1] Application, p.5;[2] Peterkort Letter, p.3; Life Time Letter, p.7. **Literally, the PUD could be developed 50 years from now when there is significantly more traffic congestion in the area and changes to the transportation infrastructure studied at the time of the PUD and the City would be limited to the transportation mitigation measures identified in 2013**. Therefore, the City Council's decision in this appeal will have long term impacts on the transportation infrastructure in this area and its ability to support the full buildout of the PUD.

The City Council should not hamstring the City by limiting the transportation mitigation measures to those identified under 2013 conditions when virtually no development has occurred in the PUD over the last seven (7) years. Since 2013, the only construction that occurred in the PUD is the foundation footings for a 200 square foot accessory guard shack. And that is the extent of the PUD development during good economic times. The whole reason for imposing an expiration date for the PUD was to ensure that the PUD development did not occur so far into the future that the transportation assumptions and mitigation measures were outdated. Adopting the Decision will result in precisely that outcome.

Peterkort should be required to refile the expired PUD and justify its plans for developing this area given the lack of any development over the last seven (7) years. It is particularly important in light of the current poor economic conditions. The City should require Peterkort to provide an updated transportation impact analysis to ensure that the transportation mitigation measures are adequate to accommodate the full build out of the PUD under the current conditions. Life Time and Peterkort's assertion that the City should allow them to game the system by deeming the PUD, which covers an 80-acre area and assumes the development of over 1,250,000 square feet of commercial space, hotels consisting of 500 rooms and 2,175 residential units, vested based solely on an accessory guard shack foundation is not only inconsistent with the City code and the applicable law as explained below, it is bad policy that will have adverse long term ramifications on the development of this PUD area.

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[1] The Decision quoted the following PUD findings which explain the impact of vesting the PUD: "If CU 2013-0003 is approved, once a subsequent development approval 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**." Decision, p.8. (Emphasis added).

[2] Life Time's Application quoted this same section of the PUD findings and elaborated with the following: "In other words, staff explained that **all property within the PUD**, regardless of its development status, **will be vested in the PUD's assumed trip generation and transportation mitigation measures upon substantial construction on any parcel within the PUD**." Application Narrative, p.5. (Emphasis added).

B. Neither the temporary surface parking lot nor the accessory guard shack can vest the PUD.

1. The mere fact the parking use category has the word principal in its title does not mean the surface parking lot is a "principal use" for purposes of vesting the PUD.

Life Time and Peterkort's assertion that the surface parking lot is a principal use for purposes of vesting the PUD is based on a single argument - it was approved as a "Parking, as a Principal Use" and therefore it must be a principal use that vests the PUD because it includes the term "principal". Peterkort Letter, p.3; Life Time Letter, p.3-4. That is literally the sole basis for their argument.

The mere fact the term "principal" appears in the title of this particular use category does not determine if it is a "principal use" for purposes of vesting the PUD. The Development Code defines seven different types of parking uses – principal, excess, long term, public, structure, surplus and tuck-under. BDC Chapter 90. The Parking, as a Principal Use merely refers to a stand-alone surface parking lot per the definition of this term. It does not mean that a surface parking lot will always vest a development approval no matter the circumstances simply because it has the term principal in its title. If that were true, does that mean it is the only use that can qualify as a principal use because no other use categories in the City's Development Code include the term principal? Of course not.

The issue before the City Council is whether the surface parking lot is a "principal use" for purposes of vesting the PUD. The resolution of that issue depends on far more than the mere title of the use category. It depends on the intent and purpose of the PUD. The City Council must decide whether the surface parking lot is one of the "main or primary purpose(s)" for which the PUD was "designed, arranged or intended." Definition of Principal Use, BDC Chapter 90. A surface parking lot use that was never proposed, contemplated or approved as part of the PUD Approval cannot qualify as a "principal use" for purposes of vesting the PUD.

2. A use that was approved as a temporary use because it conflicted with multiple Station Community-Sunset (SC-S) zone requirements cannot qualify as a principal use for purposes of vesting the PUD.

Peterkort is attempting to pull a bait-and-switch. There is no dispute the surface parking lot was not a use proposed, contemplated or approved as part of the PUD, and it is fundamentally inconsistent with the pedestrian-oriented and mixed-use requirements of the Station Community-Sunset (SC-S) zone and the PUD. The SC-S zoning district requires that development include "a **mix of commercial, residential, employment, and civic uses** at relatively **high densities** to create vibrant, walkable areas **where many activities can be accomplished on foot or by bike or transit**." Comprehensive Plan Goal 3.6.1, Policy a. The SC-S zoning district also expressly "**limit(s) or prohibit(s) auto-oriented** commercial uses" and specifically "**limit(s) surface parking to encourage compact development**." Comprehensive Plan Goal 3.6.1, Policy c & Comprehensive Plan Goal 3.6.4, Policy d. The surface parking lot was clearly well below the

minimum FAR requirements.[3] Surface Parking Lot Staff Report, attached as Exhibit C to Life Time Letter, p.FR-10 & DR-1.

The PUD, which covers properties predominately zoned SC-S, similarly anticipated dense, pedestrian-oriented and mixed-use development consistent with the SC-S zone requirements. PUD Staff Report, attached to appeal letter from E. Michael Connors, dated February 14, 2020, p.2, 10 & 20-25. Peterkort and Life Time do not dispute the fact that a surface parking lot was not proposed or contemplated as part of the PUD Approval.

Notwithstanding these fundamental inconsistencies with the SC-S zone and PUD, Peterkort represented to the City that the surface parking lot could still be approved because it was only an interim or temporary use that would soon be redeveloped with the principal uses intended by the SC-S zone and PUD. Staff explained why Peterkort maintained that the City could approve this use notwithstanding the inconsistencies with the SC-S zone policies and standards noted above as follows:

> [T]he applicant has stated that **the surface parking lot is intended as an interim use** and that the parking lot has been designed to allow for continued intensification of the site, as well as **future redevelopment of the parking lot into urban style development**. * * * The applicant has further provided a **Design Review Build Out Concept Plan** which **identifies how the site can be further intensified to meet the intended development identified above**." Surface Parking Lot Staff Report, p.CU-2. (Emphasis added).

Peterkort repeatedly emphasized during the planning commission hearing that the surface parking lot was only "**a temporary use**". Planning Commission Transcript, attached to letter from E. Michael Connors, dated March 16, 2020, p.5 & 10.

It is clear from the planning commission hearing transcript that several commissioners were deeply concerned about the concept of approving a use so antithetical to the PUD and SC-S zone and were only willing to approve it if they had assurances it was truly a temporary use. Planning Commission Transcript, p.6-10. To address these concerns, Commissioner Uba asked if Peterkort would agree to "a [Condition of Approval] somewhere here to clarify that this is **only temporary**." Planning Commission Transcript, p.10. Peterkort responded "we completely agree." Planning Commission Transcript, p.10. To ensure the surface parking lot was only approved as an interim or temporary use, staff proposed a condition of approval clarifying that it will "expire should the active use of the surface parking facility cease for a period of one year or greater." Surface Parking Lot Staff Report, p. CU-2 & Condition of Approval No. 2.

The planning commission's findings further demonstrate that the planning commission specifically relied on the temporary status of the surface parking lot and the assurance that it would not be "a

[3] At the planning commission hearing, Peterkort acknowledged that the surface parking lot did not satisfy the FAR requirements: "None of our plans for this site are to meet the minimum FAR for this site." Planning Commission Transcript, attached to March 16, 2020 letter, p.5.

principal use of the site" as the basis for approving a use that so clearly conflicted with the pedestrian-oriented and mixed-use requirements for the PUD:

> **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 3.6.1 (Support pedestrian-oriented mixed use areas) and 3.6.4 (Station Communities), including policies related to providing vertically mixed uses, limiting auto-oriented uses, and promoting walkable areas. * * * 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**, that the proposal met the Comprehensive Plan policies. Planning Commission Order No. 2685, CU2018-0023 Order Approving Sunset Surface Parking, New Conditional Use ("Surface Parking Lot Approval"), attached to comment letter on Application from E. Michael Connors, dated December 26, 2019, p.2. (Emphasis added).

As Life Time acknowledged, the planning commission relied on Peterkort's Design Review Build Out Concept Plan as the basis for determining compliance with the SC-S zone standards and conditioned the approval as a temporary approval that will expire to ensure this future development actually occurs: "Peterkort applied for a Design Review Build-out Concept Plan (DRBCP), which shows how future intensification of the site can be provided to meet the envisioned intensity of development." Life Time Letter, p.4. The Design Review Build-out Concept Plan development is the principal or intended use for this site, not the temporary surface parking lot.

Peterkort's position for purposes of the Surface Parking Lot Approval is completely contradictory to their position in this Appeal. During the former process, Peterkort argued that the surface parking lot was merely an interim or temporary use, not the principal use for the site, in order to get a noncompliant use approved. Now Peterkort and Life Time are taking the opposite position - the surface parking lot is not only a principal use for this site, it is a principal use for the entire PUD. Peterkort and Life Time are also taking the ridiculous position that the PUD should be deemed vested based solely on a use that was never proposed, contemplated or approved as part of the PUD Approval.

The City Council cannot allow this bait-and-switch maneuver. The City specifically limited the surface parking lot to a temporary use because it is inconsistent with the pedestrian-oriented and mixed-use requirements of the SC-S zone and PUD, and such a use was not contemplated as part of the PUD. An interim or temporary use that was never proposed, contemplated or approved as part of the PUD Approval and is fundamentally inconsistent with the core SC-S zoning requirements cannot qualify as a principal use for purposes of vesting the PUD.

3. The guard shack was clearly an accessory use or structure that cannot vest the entire PUD.

Although Life Time attempts to downplay staff's references to the 200 square foot guard shack as an accessory use or structure, there is no question it was proposed as an accessory use or structure. Staff repeatedly referred to the guard shack as an accessory use or structure during the

Surface Parking Lot Approval process. The Staff Report noted that the "applicant states that the **proposed guard structure is intended to be an accessory use** in support of the surface parking area" and emphasized that it is merely an "**auxiliary structure** to the primary surface parking use and is proposed to be an interim use." Surface Parking Lot Staff Report, p. DR-6 & DR-9. (Emphasis added). During the planning commission hearing, staff explained that the guard shack "is just intended as an **accessory use** to have someone onsite for security or if there are issues with the mechanical gates to assist people" and is "a fairly short structure **intended to be accessory to the parking lot**." Planning Commission Transcript, p.2-3. (Emphasis added).

Peterkort and staff had to take this position because the guard shack also did not comply with several approval standards. As previously stated, the 200 square foot guard shack clearly did not comply with the minimum FAR requirements. Surface Parking Lot Staff Report, p. DR-1. The guard structure was also inconsistent with numerous Design Review Guidelines, including but not limited to BDC 60.05.35.1.D, 60.05.35.6.A, 60.05.35.6.C, 60.05.35.7.A and 60.05.40.6.A. Surface Parking Lot Staff Report, p. DR-5-6, DR-8-9 & DR-14. Notwithstanding these noncompliant issues, Peterkort argued that it did not matter if the guard shack violated these standards because it was only an accessory use or structure that was part of the temporary surface parking lot proposal. Once again, Peterkort and Life Time are now taking the opposite position by claiming that the foundation footings for the guard shack alone can vest the entire PUD.

An accessory use or structure cannot vest the PUD because it is not a principal use or structure under the express terms and definitions of the City Code. "Substantial construction" only applies to "the building where the principal use will take place." BDC Chapter 90. A "Building, Principal" is defined as a "structure within which is conducted the principal use of the lot." BDC Chapter 90. In contrast, an "Accessory Structure or Use" is defined as a "structure or use incidental, appropriate, and subordinate to the main structure or use." BDC Chapter 90. Therefore, an accessory use or structure cannot be a "building where the principal use will take place" as required by the definition of "substantial construction" because it is incidental and subordinate to the principal use of building.

Life Time's claim that *any* structure can vest a development approval, even if it is only an accessory or auxiliary structure, is inconsistent with the plain language of the City Code and would create a horrible precedent that would effectively render expiration dates and vesting meaningless. If the PUD approval for a development of this size and scale can be vested by a 200 square foot accessory guard shack that was not even contemplated by the PUD, other developers can use the same approach to easily vest their development and avoid expiration of approvals. Using the same rationale, other developers could vest their development approval by obtaining a construction permit and constructing a foundation for any number of accessory structure (construction guard shack, garden shed, gazebo, tool shed, storage building, restroom, etc.), even if they admit it is only temporary and was not proposed or contemplated as part of the approved development. Once vested, these developers will be able to construct the approved development whenever they want, potentially years or decades after the approval because their entire development would be vested. Such a liberal approach would make a mockery of vesting and make approval expiration dates meaningless.

4. The planning commission's approval of the surface parking lot did not and cannot determine the PUD vesting issue.

Life Time erroneously suggests that the Surface Parking Lot Approval already resolved the vesting issue because "Staff and the Planning Commission contemplated and intended that construction of the guard structure footing would vest the entire PUD." Life Time Letter, p.7. There are two flaws with Life Time's assertion.

First, the planning commission did not address or resolve the vesting of the PUD. Life Time does not cite to any findings in the Surface Parking Lot Approval decision to support its claim. Nor are there any. Instead, Life Time cites exclusively to a condition of approval that allows a foundation only permit for the guard shack, which does not even mention the PUD. This is a far cry from a vesting decision. If the planning commission intended for the Surface Parking Lot Approval to vest the PUD, surely it would have adopted specific findings addressing that issue.

Second, even had the planning commission attempted to vest the PUD as part of the Surface Parking Lot Approval, it would not be binding on the City Council. The planning commission's Surface Parking Lot Approval decision was limited to the application before it – a conditional use application to approve a surface parking lot. Peterkort did not request nor did the planning commission have the authority to determine if the PUD vested. If Life Time truly believed this issue had already been resolved it would not have filed the Application requesting a Director's Interpretation. Life Time's Application is the procedural mechanism to address this important question. That issue is squarely before the City Council on appeal and therefore the City Council must decide it as part of this appeal.

5. LUBA did not determine that all traffic related issues have been resolved in favor of the PUD nor is it relevant to the issue of whether the PUD expired.

Peterkort erroneously claims that LUBA's decision on the appeal of the Life Time project approval, *Beaverton Business Owners, LLC v. City of Beaverton*, LUBA No. 2019-079, "is substantial evidence that all traffic issues have been favorably resolved in favor of both the PUD and Life Time" and "any further challenges regarding traffic issues are a collateral attack on final land use decisions that approved all aspects of the PUD, the Sunset Surface Parking and the Life Time project." Peterkort Letter, p.3. Notably, Peterkort does not cite or quote any language from LUBA's decision to support this contention because that is not at all what LUBA determined in that case.

The sole issue addressed by LUBA was Beaverton Business Owners' contention that Life Time's mini-traffic impact analysis was flawed because it relied predominantly on an outdated and flawed 2007 traffic study of Life Time facilities (the "2007 TIA"). That was the only issue LUBA addressed or resolved. LUBA did not consider or address the adequacy of the PUD traffic generation and transportation mitigation measures, nor did it consider or address the Surface Parking Lot Approval. Neither the PUD nor the Surface Parking Lot Approval were before LUBA to consider in this appeal.

LUBA's decision has no bearing on whether the PUD expired or the impact of an expired PUD Approval on Life Time's project. Those are independent issues that were not before LUBA and can only be determined by the City Council as part of this Appeal process.

6. The start of some construction activity does not constitute a "change in use" that vests the PUD.

BDC 50.90.3.B.1 provides that an approval can vest if "The **use** of the subject property **has changed** as allowed by the approval." (Emphasis added). Unlike BDC 50.90.3.B.2, which applies "in the case of development requiring construction" and requires a construction permit and substantial construction to have taken place in order to vest, BDC 50.90.3.B.1 focuses on a change in the "use" of the property.

Peterkort attempts to conflate the "use" and "substantial construction" standards for vesting by claiming that the mere commencement of construction, regardless of whether it qualifies as substantial construction, results in a "change in use" that vests the development approval. Peterkort Letter, p.2. There are multiple problems with this position. The plain language of the code makes it clear that the standards in BDC 50.90.3.B.2 apply "in the case of development requiring construction," not BDC 50.90.3.B.1. Peterkort's interpretation would also render BDC 50.90.3.B.2 meaningless because it would mean that commencement of *any* construction, not substantial construction, is sufficient to vest. Nor is there any reason to conflate these two standards since the City has long used the substantial construction standard to determine if a development approval has vested. The only reason Peterkort wants the City to change this long-standing policy now is to benefit its interest in its project, not the City's interest.

The plain language of BDC 50.90.3.B.1 and its applicability to this case is clear and unambiguous. A development approval only vests under BDC 50.90.3.B.1 if the "use" of the property has changed. The use in this case – surface parking lot – did not commence before the PUD expired nor has it commenced now. Therefore, the PUD did not vest under BDC 50.90.3.B.1 because there was no "change in use" on the property prior to the expiration of the PUD Approval.

C. The Life Time project approval was contingent on the PUD and therefore it is no longer valid if the PUD expired.

1. The Life Time project approval is contingent on the PUD because it established the transportation standards and mitigation requirements for the Life Time project.

Although Life Time attempts to down play the importance of the PUD Approval and the Life Time project's reliance on the PUD Approval, the Decision clearly affirms that the PUD Approval established the transportation standards and mitigation requirements for the Life Time project. The Decision acknowledged that the purpose of the PUD Approval was to "provide a consistent framework for determining transportation improvements for future development in the PUD itself and in the surrounding area by identifying in-process trips and mitigations for the PUD overall." Decision, p.DI-15. The Decision further noted that: "The PUD approval established trip assumptions and mitigation measures with which future development within the area must comply." Decision, p.DI-11.

This understanding of the PUD is consistent with the PUD Approval findings. The PUD Approval findings explained the purpose of the PUD as follows:

> If approved, **CU 2013-0003 will establish a range of uses authorized to be located on specific parcels within the boundaries of the proposed PUD**. Moreover, an approval of **the PUD will establish the range of necessary mitigation measures to the transportation system in the area**. In order to act on the entitlements granted by [this] PUD on the specific parcels, the property owner will be required to submit appropriate **land use application in the future which demonstrate how the proposed development will meet** the Development Code in effect at the time of the application submittal and **the conditions of CU 2013-0003**. * * * If CU 2013-0003 is approved, once a subsequent development approval 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. PUD Staff Report, p.6. (Emphasis added).

Contrary to Life Time's suggestion otherwise, the PUD clearly impacts the types of uses allowed because it established the "range of uses authorized to be located on specific parcels" and it provided "the range of necessary mitigation measures to the transportation system" to support those uses. *Id.* In other words, the PUD Approval superseded the standard transportation requirements and imposed different transportation requirements (hence the requirement for only a supplemental or mini TIA) and limited the transportation mitigation measures to those specifically adopted as part of the PUD Approval.

Life Time's project was contingent on the PUD Approval because, as stated in Life Time's own words, it relied on "the PUD's assumed trip generation and transportation mitigation measures" to demonstrate compliance with the transportation standards. Application Narrative, p.5. Once the PUD expired, Life Time is no longer able to rely on the PUD's assumed trip generation and transportation mitigation measures to review projects within the PUD area. That means the transportation standards have changed since the City approved the Life Time project. As Life Time acknowledged, a change in the land use approval standards applicable to a development project triggers a vested rights review.

2. The vested rights doctrine does apply and Life Time cannot demonstrate a vested right to complete the project.

Vested rights refer to the right to complete a development that is no longer consistent with the current applicable land use regulations. *Clackamas Co. v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973); *O'Shea v. City of Bend*, 49 Or LUBA 498, 501 (2005). A vested right is essentially the right to finish construction or to fully implement a use that is, or will be, a nonconforming use or development when completed. *WalMart v. City of Hood River*, 72 Or LUBA 1, *aff'd* 274 Or App 261, 363 P3d 522 (2015). Vested rights are a type nonconforming use or development that is different from a traditional nonconforming use in that it becomes nonconforming before the construction is complete and the use established. *Fountain Village Development Co. V. Multnomah County*, 176 Or App 213 (2001). In other words, nonconforming use rights protect

uses in existence at the time of changes to the approval standards and vested rights arises when a use is not fully established before the changes to the approval standards.

The Life Time project approval is no longer consistent with the City's land use regulations because it was approved based on different transportation standards than those that apply now that the PUD expired. The PUD Approval superseded the standard transportation requirements and imposed different transportation requirements and limited the transportation mitigation measures to those adopted as part of the PUD Approval. Since the PUD expired and is no longer valid, Life Time's project is subject to different transportation standards today. Life Time must prove it has a vested right to complete the construction of the project given the the different transportation standards that apply now that the PUD expired.

As we explained in our Appeal, Life Time is required to demonstrate that it has a vested right to complete the project under the vested rights ratio test set forth in *Holmes*. The Court in Holmes explained that: "in order for a landowner to have acquired a vested right to proceed with the construction, the commencement of the construction must have been substantial, or substantial costs toward completion of the job must have been incurred. *Holmes*, 265 Or at 197. Life Time did not even attempt to demonstrate that it can satisfy the "ratio test" established in *Holmes* which requires a comparison of the expenditures incurred prior to the change that made the development nonconforming to the total cost of the project. *Id*. at 197-98.

Life Time did not attempt to demonstrate that it can satisfy the *Holmes* ratio test because it is clear it cannot do so. Life Time did not commence any construction activity prior to the expiration of the PUD. Life Time knew when it was pursuing its land use permits that the PUD was scheduled to expire on November 5, 2019 and could not be extended any further. It pursued this project understanding that there was a risk the PUD would expire before Life Time could even commence construction of its project. Therefore, Life Time cannot demonstrate that it has a vested right to commence and complete the construction of its project.

In an attempt to avoid having to address the vested rights requirement, Life Time raises a number of red herring defenses. Life Time argues that the expiration of the PUD would have absolutely no bearing on the standards and criteria previously applied to the project. Not only is that inconsistent with the plain language of the PUD Approval, but such a theory would render the PUD meaningless. Why would Peterkort go through the extensive effort of getting the PUD approved, extended multiple times and attempt to vest with a parking lot if the PUD did not impose *any* different standards on the individual development projects within the PUD? Of course the PUD imposed different transportation standards that made it easier for the individual developments within the PUD like Life Time to satisfy the transportation requirements.

Life Time argues that it is not required to demonstrate a vested right because its project is subject to the "goal post" rule under ORS 227.178(3). ORS 227.178(3) is not applicable because it only applies to the "approval or denial of the application," not an action that occurs after the approval. After a project is approved, the vested rights doctrine applies to projects that are not yet complete and the nonconforming use doctrine applies to projects that have been completed and established. Otherwise, there would be no reason for the vested rights or nonconforming use doctrine because ORS 227.178(3) would prohibit a local government from ever applying new standards after an application is approved. It is particularly inapplicable in this case because it

was the property owners failure to timely vest the PUD, not the City's deliberate attempt to change the standards, that created the problem for Life Time.

Conclusion

Both the PUD Approval and Life Time project approval have expired. The mere construction of a foundation for a 200 square foot accessory guard shack associated with a temporary surface parking lot that was not contemplated under and is inconsistent with the PUD and SC-S zoning standards cannot possibly vest a PUD of this size, scope and intensity. Since the Life Time project relied on and is contingent upon the PUD Approval, Life Time must demonstrate that it has a vested right to continue the project development. Life Time cannot establish a vested right because it did not commence any construction activity and it knew there was a risk the PUD would expire when it was seeking land use approval for the project. Therefore, the City Council should reverse the Decision and declare both the PUD Approval and the Life Time project approval invalid.

Very truly yours,

HATHAWAY LARSON LLP

/s/

E. Michael Connors

cc: Client