

FACTS & FINDINGS**CLASS 3 SITE PLAN REVIEW / CLASS 2 DRIVEWAY APPROACH PERMIT
CASE NO. SPR-DAP18-15**

The subject property consists of approximately 23.96 acres and has frontage along Kuebler Boulevard, 27th Avenue SE, Boone Road SE and Battle Creek Road SE. In December 2018, after a public hearing, the City Council denied the Application for Site Plan Review for the development of the Kuebler Gateway Shopping Center, which includes plans for a 168,550 square foot building for a Costco Store, a retail fueling station with up to 30 pump positions also operated by Costco, and four proposed retail shop buildings with a combined total of 21,000 square feet that have no confirmed uses at this time.

The 2018 City Council decision was appealed to the Land Use Board of Appeals (LUBA). LUBA remanded to the City because LUBA found the City's decision failed to address the Applicants' position that it had a vested right to develop a shopping center as it proposed. LUBA's decision was appealed to the Oregon Court of Appeals by private citizens who participated in the proceeding before the City and LUBA. The Court of Appeals agreed with LUBA's decision and affirmed it.

The Applicants submitted a request for the City to issue a decision on remand for this Application. The proposed site plan is included as Attachment 2. The City Council reviewed the record, the submittals of all the parties and staff recommendations. After deliberations on Monday September 28, 2020, the City Council determined that the Applicants had a vested right to develop their shopping center as proposed. The findings herein is the City Council's final decision on remand.

FACTS AND FINDINGS:**Procedural Findings**

1. In December 2007, the City Council adopted a final order affirming a Comprehensive Plan Change and Zone Change Case No. 06-6-CPC/ZC for a portion of the subject property changing the Comprehensive Plan Map Designation from "Developing Residential" to "Commercial" and changing the zoning from RA (Residential Agriculture) to CR (Commercial Retail).
2. On June 6, 2018, Class 3 Site Plan Review and Class 2 Driveway Approach Permit Applications were submitted to the Planning Division. After receiving additional information, the Applications were deemed complete for processing on September 4, 2018.
3. On October 23, 2018, the Planning Administrator issued a decision approving SPR-DAP18-15 subject to conditions of approval.

4. On November 7, 2018, two Notices of Appeal were filed by Karl G. Anuta and the South Gateway Neighborhood Association.
5. At the November 13, 2018 regularly scheduled meeting, the City Council voted to initiate the review of the appeal of the Planning Administrator's decision.
6. On December 10, 2018, City Council held a public hearing, took public testimony, closed the public hearing, and voted to reverse the decision of the Planning Administrator, and deny the Applications. The City Council's decision became final on December 18, 2018.
7. The December 18, 2018 decision by the City Council was appealed to the Land Use Board of Appeals (LUBA).
8. On August 14, 2019 LUBA determined the City's decision contained errors and remanded the decision to the City. Specifically, LUBA decided that the City erred in determining the proposed shopping center violated Condition 14 from Comprehensive Plan Change and Zone Change Case No. 06-6-CPC/ZC, that the proposed development was a shopping center, a permitted use, and that the City's decision failed to address the Applicants' position that they have a vested right to approval of the proposed development by virtue of the Applicants' substantial investment in required traffic infrastructure improvements and other on-site improvements.

LUBA also found that the City did not err in determining the application failed to comply with SRC 808.030(a)(2)(L) regarding tree removal, but held that because the City decision failed to address the vested rights argument made by the Applicants, it was possible that SRC 808.030(a)(2)(L) could not be applied to deny the shopping center as proposed.

On remand, the City is required to address whether the Applicants have a vested right to the proposed shopping center and whether that means the proposal must be approved.

9. LUBA's decision was appealed to the Oregon Court of Appeals by private citizens who participated in the proceeding before the City and LUBA. On February 5, 2020, the Court of Appeals issued a decision affirming the decision by LUBA.
10. On June 16, 2020, the Applicants submitted a request for the City to respond to LUBA's remand.
11. On July 1, 2020, a Notice of Remand was sent to the public, providing for an initial comment period from July 1-July 28, 2020 and a public rebuttal period from July

29-August 12, 2020.

12. The Applicants submitted testimony on July 27, 2020, rebuttal testimony on August 12, 2020, and final written argument on September 10, 2020.
13. The notice stated that the City Council would review the record for this case and deliberate toward a final decision at its September 28, 2020 meeting and that a public hearing would not be held.
14. ORS 227.181 requires local governments to make a final written decision on remand from LUBA within 120 days of the date that the applicant makes a written request for the local government to take action. The 120-day mandated deadline for a final decision on remand is October 14, 2020. The Applicants provided an extension of that deadline to November 10, 2020 allow additional time for the City Council to adopt these findings.

Substantive Findings

The applicable criteria and considerations that must be satisfied for the approval of the Class 3 Site Plan Review and Class 2 Driveway Approach Permit are included within the Salem Revised Code (SRC) Site Plan Review chapter (SRC Chapter 220), under section 220.005(f)(3), and the Driveway Approach Permit chapter (SRC Chapter 804), under section 804.025(d).

The Application has not substantially changed since it was originally submitted in 2018; however, updated findings addressing the applicable approval criteria for the Applicants' Request for Remand of the proposed Class 3 Site Plan Review and Class 2 Driveway Approach Permit are included in this Decision. The only change to the Application is that on remand, the Applicants changed their site plan from removing the significant white oak trees on the site to transplanting and relocating them on the site. The City Council expressly finds that this change to the Application is not substantial; but rather is a reasonable response to expressed concerns in the record about removing these trees.

1. Public Comments.

- a. Objections have been raised to the time allowed for public comment and rebuttal, and requests have been made for City Council to allow public testimony at a public hearing for this remand.

Response: The Application has not substantially changed since it was originally submitted in 2018. The original Application had a public comment period prior to the Planning Administrator's decision and a public hearing before the City Council.

The City has no procedures that apply specifically to a remand from LUBA. The SRC typically provides for a 15-day public comment period before a land use decision is issued. Given the interest in this Application, a longer comment period was provided. Between the initial comment period and the rebuttal period, both of which were open to all interested persons, the City provided a 43-day comment period open to the public. The City Council finds that the time provided for public comment was adequate.

- b. Objections were raised about the validity of the Applicants' Traffic Impact Analysis (TIA) and to the increased traffic the proposed development would bring to the surrounding area.

Response: At the outset, and as explained later in this Decision in greater detail, the City Council finds that transportation infrastructure for a shopping center of up to 299,000 sq. ft on the subject property was analyzed in detail and mitigated by conditions of approval in the 2007 Decision. The City Council finds that the proposed shopping center is smaller than the shopping center that is approved in the 2007 Decision. Moreover, at the time of the 2007 Decision, the City did not have a subsequent site plan review process resulting in the 2007 Decision comprehensively analyzing and mitigating traffic impacts. The City Council finds that the comprehensive review and required mitigation for the shopping center that the City Council approved in the 2007 Decision, that the Applicants have significantly complied with, resulted in the Applicants having a vested right to approval of a shopping center of up to 299,000 sq. ft., without the need for further traffic infrastructure evaluation or mitigation. That means that the Applicants were not required to provide a TIA for their Site Plan Review proposal in the first place.

As is also further explained below, that does not mean that the Applicants need not or did not comply with relevant subsequently adopted site plan review standards governing internal circulation and the driveway access to the site. As we explain below, the Applicants are still required to comply and have complied with SRC 220.005(f)(3)(B), but only to the extent of demonstrating "safe, orderly, and efficient circulation of traffic into and out of the proposed development." They need not also establish that negative impacts to the transportation system have been mitigated adequately – the latter part of SRC 220.005(f)(3)(B). This is because negative impacts to the transportation system have been mitigated adequately under the 2007 Decision's analysis and conditions, which as noted have been significantly complied with already. Therefore, the City Council finds that the adequacy of the Applicants' TIA to evaluate the increase in area traffic due to the proposed development is irrelevant.

In this regard, the City Council adopts the Public Works Director's Memorandum Decision dated March 27, 2020 and finds that the Public Works Director had authority to adopt that decision as the "Director" and that he correctly concluded that the conditions imposed by the 2007 Decision demonstrate that trips from the proposed shopping center have already been reviewed and mitigated by the 2007 Decision. Further, the Director's March 2020 Memorandum correctly decides that the proposed shopping center is already required to provide the transportation facilities necessary to accommodate the shopping center's traffic impacts. Accordingly, the City Council finds that the Director properly determined that, under the express terms of SRC 803.015(d), that the Applicants' Site Plan Review Application is exempt from having to provide a new Traffic Impact Analysis of the type contemplated under the City's Administrative Rule/Public Works Standards. This means that the City's Administrative Rule/Public Works Standards do not apply because the City's Administrative Rules/Public Works Standards at 6.33 "Traffic Impact Analysis (TIA)" expressly limit their application to TIAs required under SRC 803: "SRC¹ Chapter 803 identifies the threshold for requiring a TIA." Thus, the Applicants are exempted from having to provide a TIA under SRC 803, and this means that the public works standards governing the contents of a TIA do not apply.

SRC Chapter 803 concerns streets and right of way improvements and Section 803.015 governs Traffic Impact Analyses. On March 27, 2020, the Public Works Department forwarded a Memo to the City Attorney that determines the exception to the TIA requirement applies in this case. The Director explained:

"(d) Exception. An exception to the requirement for a traffic impact analysis may be granted for development that generates more than the trips specified in subsection (b)(1) of this section if the Director determines the traffic impact analysis is not necessary to satisfy the purposes set forth in subsection (a) of this section.

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

¹ "SRC" refers to the Salem Revised Code and "UDC" refers to the Unified Development Code. They are the same thing except that UDC is the newer reference.

Project opponents argued that the City Council must determine whether the Applicants' traffic impact study is sufficient to meet site plan review requirements. Project opponents also argue that City staff had no authority to grant the exception to the requirement for a TIA. The City Council finds that the Director's March 2020 Decision is appropriate and affirms its conclusions. The City Council finds that the 2007 Decision determines that a larger shopping center, with greater traffic volumes than is proposed in this remand Site Plan Review Application at issue, met all transportation standards. The City Council further finds that the 2007 Decision imposed comprehensive conditions of approval that exacted transportation infrastructure improvements for a greater volume of traffic than the proposed shopping center will generate, many of which the Applicants have complied with, vesting their rights under the 2007 Decision. As explained below, the Applicants have a vested right to the shopping center approved by the 2007 Decision and the traffic trips associated with that approved shopping center and cannot be required to further mitigate traffic impacts from that approved development or a smaller shopping center as proposed.

The City Council also expressly finds that the increase in traffic on the adjacent road system comes not from the proposed development, but from other growth in the City. The City Council finds that the use of the adjacent road system by others does not deprive the Applicants of their vested right to benefit from mitigation measures that they funded in order to mitigate the impacts of their future development.

In a situation like this, the City Council further finds that the Director has express authority to grant an exception to an applicant from the City's comprehensive traffic impact analysis regulations under SRC 803.015(d) when "the Director determines the traffic impact analysis is not necessary to satisfy the purposes set forth in subsection (a) of this section." The Director appropriately so decided. The City Council notes that the SRC authorizes only the Director to make such a determination. While the City Council is the decision maker regarding whether the Site Plan Review transportation standards are met, it is the Director who determines whether an exception to a comprehensive TIA is granted and the City Council determines that the Director properly did so.

Furthermore, as the Director's finding quoted above accurately concludes, a TIA in this instance is not necessary to satisfy the purposes of SRC 803.015, because those purposes have already been met by the analysis provided in the 2007 Decision and the 2007 Decision's conditions of approval.

SRC 803.015(a) provides:

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

The 2007 Decision exacted transportation improvements that more than fully mitigate for the worst-case traffic impacts that would generate from a larger unified shopping center of 314,000 square feet of GLA while authorizing development only of a 299,000 square foot GLA project.² Given that the Application is for a development of 228,062 square feet of GLA, significantly smaller in size than that authorized by the 2007 Decision and even smaller than the basis for the exacted transportation facility improvements, the City Council finds that there can be no reasonable question that the Applicants have already "provided the facilities necessary to accommodate the traffic impacts of the proposed development" as required by the standard.

The Applicants have improved and will shortly complete improvements to the transportation facilities sufficient to handle the worst-case traffic volumes from a 314,000 square foot GLA development. As the Director correctly concluded, the needed transportation improvements were identified and then made conditions of approval with the 2007 Decision, and many of those improvements have already been implemented. The remainder must be completed before the proposed use is allowed to operate. The basis for granting the SRC 803 exception has been satisfied.

Some project opponents argue that there are "traffic problems" in the area. This may be true, but it does not undermine the fact that the Applicants have a vested right to develop a shopping center of up to 299,000 sq. ft.; and that traffic impacts from that development have been mitigated by the requirements of the 2007 Decision.

Further, if there are any traffic "problems" nearby the proposed development, those problems are caused by impacts of development other than the proposed development. The Applicants have expended millions of dollars to improve the City's transportation system that vested their rights to develop the property under the 2007 Decision and are entitled to benefit from those expenditures. The Director properly applied the SRC 803.015(d) exemption from the requirement for the Applicants to

² See, e.g., 2007 Decision, p. 29 ("Further, the TIA evaluated a larger shopping facility than was ultimately proposed by the Applicant and allowed by the conditions of approval to this decision"); and p. 30 ("Based on the above, it is apparent that the TIA likely overstates rather than understates trips. This is because the TIA analyzes the same use categories under the Trip Generation manual, but for a greater square footage of gross leasable area than City Council allowed in this decision.").

prepare a TIA and, as a result, the Public Works Administrative or "Salem Administrative Rules" herein referred to as "SARs", in 6.33 do not apply to this Application govern the adequacy of the TIA that the Applicants did prepare.

- c. Objections were raised to the Applicants' plans for transplanting and relocating all eight of the significant trees located on the subject property. Objections were also raised to the Applicants' claim that there are no reasonable alternatives to develop the site in a way that would result in preservation of all of the significant trees in their current location.

Response: The City Council finds that there are eight *significant trees* located on the subject property, which are defined as Oregon white oaks (*Quercus garryana*), with a diameter at breast height of 24 inches or greater. SRC 808.015 provides that no person shall remove a significant tree, unless the removal is undertaken pursuant to a tree and vegetation removal permit, undertaken pursuant to a tree variance or meets the exceptions of SRC 808.030(a)(2).

At the outset, the City Council rejects the claim that there are any "Heritage" trees on the subject property. The assertion that there are Heritage Trees on the subject property is factually and legally incorrect. As expressly defined by SRC 808.005, the Oregon White Oak Trees are "Significant trees" but are not "Heritage trees".³ The term "Heritage tree" is defined by SRC 808.005 and 010(a). The City Council finds that no tree on the subject property meets the definition of "Heritage tree" under the City SRC definition. A "Heritage tree" requires the (1) nomination of the property owner that a particular tree be considered a "Heritage tree", and (2) a specific designation of the nominated tree as a "Heritage tree" by the City Council must also occur. Neither has occurred. The claim that any tree on the subject property is a "Heritage tree" is incorrect and is rejected by the City Council.

³ SRC 808.005 provides, in relevant part:

"Heritage tree means a tree designated as a heritage tree pursuant to SRC 808.010(a).

* * * * *

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

In addition, while largely irrelevant, some asserted that the Oregon White Oak Trees on the property are "ancient" or "200-300" years old. The City Council finds more credible the testimony of Monarch Tree Services, that established the oldest onsite "Significant" tree is approximately 188 years old and the youngest is 140 years old. Monarch Letter, August 12, 2020, p. 4.

The Applicants' Site Plan Review Application on remand has been modified to include a plan to transplant and relocate each of the eight significant trees to an open space area at the east side of the subject property. The Applicants have also provided additional information demonstrating that it is "necessary" to remove the significant trees in order to develop the shopping center they propose, that is their vested right. The City Council finds that the Applicants' proposal to transplant the eight significant trees does not "remove" them within the meaning of SRC 808.015 and in the alternative the City Council also finds that it is necessary for the trees to be removed for the Applicants' vested commercial development to proceed.

Some have argued that transplanting the significant trees will adversely affect their "ecosystem." The City Council finds that the Applicants' expert, Monarch Tree Services, directly addressed this issue in their August 12, 2020 rebuttal. See, Applicants' Rebuttal, Attachment 3, p. 4. Monarch noted that, "there is nothing unusual or unique about the area within which the trees at issue survive. They can be transplanted to the proposed location on the property with the reasonable expectations of their survival that we explained in our report." Monarch further explained that the trees' ecosystem will not be adversely affected because the transplanting will occur on the same property where the trees now exist. The City Council agrees with Monarch's ultimate conclusion that, "The best protection for these trees is for a careful effort to relocate them to a sustainable portion of the property, by competent, experienced arborists, such as ourselves, in the mindful manner we have proposed." Applicants' Rebuttal, Attachment 3, p. 4. The City Council finds Monarch's evidence to be the most persuasive and credible, rejects contrary evidence/argument and finds that the eight significant trees can be transplanted as proposed and that there is nothing about their "ecosystem" that will diminish their survival.

The City Council addresses below whether the proposed transplant constitutes "removal" under the SRC and, in the alternative, the Applicants' compliance with the tree removal "necessary" standard, in detail below.

Applicants' Proposal to Transplant the Eight Significant Trees does not "Remove" them

The City Council finds that the Applicants' proposal to transplant the eight significant trees to an open space area within the subject property does not constitute

"removal" under the terms of the SRC. Because transplanting trees does not meet the definition of "removal" under SRC Chapter 808, therefore, there is no requirement for a tree removal permit and the City tree removal standards are not triggered at all.

SRC 808.005 defines the term "removal" to mean:

"to cut down a tree or remove 30 percent or more of the crown, trunk, or root system of a tree; or to damage a tree so as to cause the tree to decline or die. The term 'removal' includes, but is not limited to, topping, damage inflicted upon a root system by application of toxic substances, operation of equipment and vehicles, storage of materials, change of natural grade due to unapproved excavation or filling, or unapproved alteration of natural physical conditions. The term 'removal' does not include normal trimming or pruning of trees."

The proposal to transplant the eight "significant" trees does not cut the trees down, does not remove more than 30% of the crowns, trunks or root systems, and will be done with the care and experience outlined in the arborist reports such that it will not "damage the trees so as to cause them to decline or die." Because the SRC limits "removal" to cutting down a tree, removing 30 percent or more of important components of the tree, or otherwise damaging a tree causing it to decline or die, the transplanting proposal is not "removal." Specifically, the City Council expressly finds that the proposed transplant is none of these - the tree is not "cut down," there is no removal of crown, trunk or root, and the tree is not mortally damaged (to the contrary, it continues to live). The point of the proposed transplant is so that the trees survive.

The City Council rejects the claims that it is not possible to transplant the eight significant trees. The City Council finds the written testimony of the Applicants' expert arborist to be more credible and persuasive than the claims asserting that the trees cannot be transplanted or will necessarily die. The Applicants' arborist report indicates that seven of the significant trees are currently in fair to good condition, with one significant tree (Tree 2838) in poor health. Tree 2838 has the lowest chance of surviving transplant but also has a low chance of survival in its current state. The transplant proposal aims to save all of the trees including Tree 2838.

SRC Chapter 808 does not address the process to transplant an existing mature tree nor does it require permits for transplant. The Applicants' arborist has provided a detailed report that outlines the steps that will be taken through each step of the transplanting process to ensure that critical root systems are preserved.

The Applicants have offered to accept an additional condition of approval for the Site Plan Review decision on remand requiring the Applicants to transplant and care for each of the significant trees consistent with the recommendations and steps outlined in the arborist's report. To ensure that the proposal to transplant the eight

significant trees results in the greatest chance for survival with minimum impact to the trees, the City Council adopts the following condition of approval:

Condition 18: The eight (8) 'significant' white oak trees on the subject property shall be transplanted and maintained after transplant, consistent with the recommendations of the PacTrust Remand Letter, Exhibit B, Arborist's Report. A report containing final recommendations shall be submitted to the City's Urban Forester prior to any tree transplanting activity.

The City Council finds credible and persuasive evidence that large trees have been successfully transplanted around the country. While it is unknown if all eight significant trees will survive after being transplanting, the Applicants have described the processes they will undertake to ensure that the significant trees will not have damage inflicted on them that will cause them to decline or die. Because the City Council finds that the act of transplanting as proposed is not tree removal as defined by SRC Chapter 808, and then because no significant trees are proposed for removal, the Applicants' request for a Class 3 Site Plan Review complies with all requirements of SRC Chapter 808.

The City Council finds that the act of transplanting a significant tree as outlined in the Applicants' Arborist Report and in a manner that is consistent with Condition 18 stated above, does not "damage" a tree within the meaning of SRC 808.005. In the alternative, if one of the eight transplanted significant trees dies within a period of one year from the date of transplant, the City Council finds that even if that could constitute "removal," that no permit would be required because the City Council also finds that such removal is "necessary" for a commercial development under SRC 808.030(a)(2)(L).

Exception Allowing Removal of Significant Trees.

As stated above, in the alternative only, the City Council finds that even if the proposed transplant constitutes "removal" of the eight significant oak trees, the Applicants meet the requirements for an exception to the permit requirement under SRC 808.030(a)(2)(L), because it is not possible to construct the proposed shopping center (a commercial development), for which they have a vested right, within the subject property without removing the eight significant trees and still comply with code requirements applicable to the development of the property.

To be exempt from the tree removal permit requirement in SRC 808.030(a)(2)(L), it must be "necessary" to remove the trees in order to construct a commercial or industrial facility. The City Council interprets the term "necessary" as used in this Code section and in light of the Applicants' vested right, to mean that the

proposed development cannot be constructed with all of the trees in place and still meet the applicable city code standards which apply to the Applicants' proposed shopping center for which they have a vested right. Moreover, the City Council interprets this standard to mean it is "necessary" to remove the trees if they cannot all be saved. Development standards include requirements for minimum drive aisles, minimum parking spaces, setbacks, required landscaping, and sidewalks, among other requirements. The City Council also finds credible the Applicants' evidence and argument that the minimum required parking under the SRC is insufficient for the Applicants' needs. The SRC requires at least 4 spaces per 1000 sq. ft. of GLA, but the Applicants propose 5.6 stalls per 1000 sq. ft. GLA, which is within the range of parking the SRC allows. SRC 806.005(a)(1); 806.015(a) and Table 806-1; Applicants' Remand Submittal, Exhibit E, p. 2. The City Council finds that in evaluating whether it is "necessary" to remove the eight significant trees to enable the Applicants to develop their shopping center to which they have a vested right, the Applicants' commercial needs/objectives are relevant.

In evaluating site development "options", the City Council observes that it is noteworthy that the entire site is covered with either the allowed structures, parking, required landscaping or buffer areas. And this is with only 189,550 square feet GLA of the 240,000 square foot GLA retail shopping center use authorized by the 2007 Decision. The City Council finds that a retail shopping center of 240,000 square feet of GLA would be impossible on the site, without a variance or adjustment to other development standards, as there would be no room to meet the City's minimum parking requirement, not to mention additional loss of land due to landscaping and buffer areas, and the resulting unsafe and inefficient layout. The City Council finds that these facts demonstrate that it is "necessary" to remove the eight significant trees to implement either the proposed shopping center here, or the much larger center authorized by the 2007 Decision.

The City Council finds that this is unsurprising because in this or any other scenario where the eight significant trees are preserved in their current location, an estimated 65,000 square feet of land or about 1.5 acres (approximately 7.1% of the entire site), located in a central portion of the subject property, cannot practically be used for anything else without endangering the trees, given the Applicants vested rights.⁴ The amount of GLA authorized by the 2007 Decision simply cannot be established given the other development standards required by the SRC and the terms of the 2007 Decision itself, when the area needed to protect the eight significant trees

⁴ Applicants Rebuttal August 12, 2020 Attachment 7, August 10, 2020 Bullock Letter.

is exacted from the subject property, even if that area is used to meet minimum landscaping requirements. Furthermore, given the central location of the eight significant trees, they cannot be simply “designed around,” as opponents suggest.

The transcript of Ms. Mayer’s testimony from the City Council’s December 2018 public hearing exposes another problem with many of the development options. As Ms. Mayer testified, “if you pave around them, you’re going to kill them anyway.” That subjective opinion is confirmed by Monarch Tree Service’s rebuttal memorandum, which explains, “Allowing the trees to remain in their current location and building around them has a far greater potential to adversely affect their health.”⁵ Monarch Tree Service’s August 12, 2020 memorandum, p. 4. The City Council finds that statement is credible and true for any proposal that would surround the trees with development, such as that proposed by Wildwood/Mahonia in their August 11, 2020 letter.⁶

In this regard, the City Council rejects the opponents’ arguments that with “creativity” and a “slightly smaller store” or a “smaller fueling depot” or “less parking” one could design a shopping center that overcomes the significant hurdle the eight significant trees present for development of the site. These claims are wrong and also irrelevant because a smaller shopping center store or smaller fueling depot or less parking is inconsistent with the Applicants’ vested right to a shopping center of the size and with the components proposed.

The City Council rejects the claim that with “just” the loss of another 16% of GLA the eight significant trees could be accommodated in place. The City Council finds more credible and persuasive the Applicants’ tree expert, Rick Sartori of Monarch Tree Services, who explains that keeping the trees in their current location but building around them has a far greater potential to adversely affect their health than responsibly transplanting them on the site as Applicants propose. Applicants’ Rebuttal, Attachment 3, p. 4. The City Council also finds that a 16% reduction in store GLA is not an

⁵ Monarch Tree Services, August 12, 2020 memorandum also states at page 4:

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

⁶ *See also*, Altered Site Plan, Unattributed, Public Comments 2020-07-23 to 2020-07-28, p. 125 (site plan showing building wrapping around trees).

insignificant reduction – it would reduce the proposed 168,550 square foot Costco store to 141,582 square feet and such a demand is inconsistent with the Applicants’ vested right. A smaller anchor store is not what the Applicants propose and the City Council finds credible that the anchor retailer has made clear that a smaller store is insufficient to meet its needs to properly service their Salem customers – Costco is leaving a site with a smaller store (existing store is 145,363 sq. ft.⁷), to establish the larger store proposed here, not an even smaller one.

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

The City Council rejects all other site plan options proposed by any person in these proceedings and finds they are unpersuasive and do not demonstrate that the Applicants’ proposed shopping center can be developed consistent with the Applicants’ vested right, and the significant trees saved.

The City Council finds that the location of the significant trees means that it is impossible to keep the trees where they are and simultaneously develop the shopping center approved in the 2007 Decision while also meeting the minimum City parking standards, complying with the terms of the 2007 Decision, designing a safe and efficient layout, and meeting the Applicants’ needs. Therefore, the City Council finds that it is necessary to remove the eight significant trees – SRC 808.030(a)(2)(L).

As is illustrated below in detail, the alternative site plan options also make it impossible to develop safe and adequate vehicular and pedestrian circulation within the shopping center, in contravention of SRC 220.005(f)(3)(B) and (C) regarding safe and

⁷ Applicants’ August 12, 2020 Final Evidentiary Submittal, Attachment 5, p. 8.

efficient movement of vehicles and pedestrians, and SRC 800.065(a)(3) and (5) regarding connections through off-street parking areas and to abutting properties, thereby increasing the risk of vehicle-pedestrian and vehicle-vehicle accidents. *See also* Remand Request, Exhibit E (letters from Jeff Olson, Commercial Realty Advisors Northwest, LLC, and Frank Schmidt, Tiland/Schmidt Architects, PC (discussing, among other things, fire access, traffic safety, impaired visibility, and loss of parking spaces issues flowing from the Northwest Option)).

Finally, the City Council notes that the location of the roundabout is fixed and may not be moved as the right of way for it has already been secured.

The Applicants have provided five alternative site plans along with analysis of each alternative which graphically demonstrate that it is not possible to develop a shopping center with the square footage GLA permitted by the 2007 City Council decision on the subject property in compliance with all applicable zoning standards and preserve all of the significant trees. Therefore, the City Council finds that the exception provided in 808.030(a)(2)(L), which allows the removal of the eight significant trees where the removal is necessary in connection with construction of a commercial or industrial facility, is met.

The following is the City Council's analysis of the Applicants' alternative site plans that demonstrate the "necessary" to remove standard in SRC 808.030(a)(2)(L), is met:

Site Plan Alternative 1 – NW Option

This alternative site plan shows the proposed Costco building moved to the northwest corner of the subject property, the fueling station moved to the southeast corner, and the retail building moved to the northeast. The total floor area for this option includes 174,650 square feet for the uses on the eastern portion of the development site, as well as the approximately 14,900 square feet of retail floor area on the western portion of the site, for a total of 189,550 square feet. This option retains all eight of the significant trees, however, the City Council finds that this plan fails to meet development standards of the Salem Revised Code and could not be approved.

Minimum Off-street Parking

The minimum off-street parking requirement for a shopping center approximately 189,550 square feet in size is 758 spaces ($189,550 / 250 = 758.2$). The NW Option shows 693 off-street parking spaces provided for the shopping center, including the 147 off-street parking spaces on the west side of the development site; 65 spaces fewer than the minimum requirement and therefore the City Council finds that it does not comply with the approval criteria for a Class 3 Site

Plan Review. It also provides far fewer parking spaces than the Applicants have a vested right to and so does not meet the Applicants' needs and is inconsistent with their vested right.

Vehicle Use Area Setback Adjacent to Buildings and Structures

The proposed site plan does not adequately demonstrate that vehicle use area separation, required by SRC 806.035(c)(4) is provided around the proposed Costco building and therefore the City Council finds that it does not comply with the approval criteria for a Class 3 Site Plan Review.

Internal Pedestrian Access

The proposed site plan does not adequately demonstrate that sidewalks are provided at each driveway entrance to the development site as required by Condition 13 of CPC/ZC06-6.

The NW option alternative plan also provides a less desirable site configuration for the following reasons:

- Vehicle and pedestrian circulation are poorly coordinated with the connected development site to the west.
- The fueling facility is moved closer to the residential neighborhood south of Boone Road SE, fuel trucks would use Boone Road to access the site.
- Loading docks would face residential areas.

Site Plan Alternative 2 – NE Option

This alternative site plan shows the proposed Costco building moved to the northeast corner of the subject property, the fueling station moved to the southwest corner, and the retail building moved to the north portion of the site adjacent to Kuebler Boulevard. The total floor area for this option includes 174,650 square feet for the uses on the eastern portion of the development site, as well as the approximately 14,900 square feet of retail floor area on the western portion of the site for a total of 189,550 square feet. This option retains all eight of the significant trees, however, the City Council finds that this plan fails to meet development standards of the Salem Revised Code and could not be approved.

Minimum Off-street Parking

The minimum off-street parking requirement for a shopping center approximately 189,550 square feet in size is 758 spaces ($189,550 / 250 = 758.2$). The NE Option shows 707 off-street parking spaces provided for the shopping center, including the 147 off-street parking spaces on the west side of the development site;

51 spaces fewer than the minimum requirement and therefore the City Council finds that it does not comply with the approval criteria for a Class 3 Site Plan Review. The City Council further finds that it does not provide adequate parking to meet the Applicants' needs and a part of the Applicants' vested right.

Vehicle Use Area Setback Adjacent to Buildings and Structures

The proposed site plan does not adequately demonstrate that vehicle use area separation, required by SRC 806.035(c)(4) is provided around the proposed Costco building and therefore the City Council finds that it does not comply with the approval criteria for a Class 3 Site Plan Review.

Internal Pedestrian Access

The City Council finds that this site option plan does not adequately demonstrate that sidewalks are provided at each driveway entrance to the development site as required by Condition 13 of CPC/ZC06-6.

Roundabout Driveway Access to 27th Avenue SE

This option makes an access driveway to 27th impossible and so is inconsistent with the condition of approval to the 2007 Decision requiring an entrance on 27th Avenue. It is also inconsistent with the requirement of SRC 220.05(f)(3)(B) that "safe, orderly, and efficient circulation of traffic into and out of the proposed development." The City Council finds that the evidence establishes that under this option no traffic can enter or leave the shopping center safely from that required entrance to 27th, and results in serious conflicts between traffic entering and exiting, pedestrians and store delivery traffic.

Further, the City Council finds that the proposed roundabout provides the most efficient access to the site. The City Council further finds that this option requires removing the roundabout access from 27th and so is not consistent with the City site plan review standard requiring safe, orderly, and efficient circulation for site access. Therefore, the City Council finds this option violates the approval criteria for a Class 3 site plan review regarding adequate driveway access as well as the conditions of approval from CPC-ZC06-06.

The NE option alternative plan also provides a less desirable site configuration for the following reasons:

- Inefficient vehicle and pedestrian circulation.
- The fueling facility is moved closer to the residential neighborhood south of Boone Road SE, fuel trucks would use Boone Road to access the site.
- Loading docks would face residential areas.

Site Plan Alternative 3 – SE Option 1

This alternative site plan shows the proposed Costco building moved to the southeast corner of the subject property, the fueling station moved to the northwest corner near the right-in access from Kuebler Boulevard, and the retail building moved to the northeast corner. This option results in the removal of five significant trees and one of the significant trees that would be retained (Tree 2838) is in poor health. Specifically, the trees that would remain are Tree 2823 (51" dbh in fair condition), Tree 2832 (29" dbh in good condition), and Tree 2838 (30" dbh in poor condition). The City Council finds that this option does not preserve the significant trees and so does not meet City Code requirements.

The total floor area for this option includes 174,650 square feet for the uses on the eastern portion of the development site, as well as the approximately 14,900 square feet of retail floor area on the western portion of the site for a total of 189,550 square feet. This plan fails to meet development standards of the Salem Revised Code (including the City tree code) and could not be approved.

Internal Pedestrian Access

The City Council finds that the proposed site plan does not adequately demonstrate that sidewalks are provided at each driveway entrance to the development site, such could not be safely provided and does not provide and cannot provide adequate internal pedestrian pathways as required by Condition 13 of CPC/ZC06-6.

Roundabout Driveway Access to 27th Avenue SE

This option also makes an access driveway to 27th impossible and so is inconsistent with the condition of approval to the 2007 Decision requiring an entrance on 27th Avenue. It is also inconsistent with the requirement of SRC 220.05(f)(3)(B) that "safe, orderly, and efficient circulation of traffic into and out of the proposed development." The City Council finds that the evidence establishes that under this option, no traffic can enter or leave the shopping center safely from that required entrance on 27th and results in serious conflicts between traffic entering and exiting, pedestrians and store delivery traffic.

Further, the City Council finds that the proposed roundabout provides the most efficient access to the site. The City Council further finds that this option requires removing the roundabout access from 27th and so is not consistent with the City site plan review standard requiring safe, orderly, and efficient circulation for site access. Therefore, the City Council finds this option violates the approval criteria for a Class 3 site plan review regarding adequate driveway access as well as the conditions of approval from CPC-ZC06-06.

The SE Option 1 alternative plan also provides a less desirable site configuration for the following reasons:

- Inefficient vehicle and pedestrian circulation.
- Increased traffic and additional driveways needed along Boone Road SE.

Site Plan Alternative 4 – SE Option 2

This alternative site plan shows the proposed Costco building moved to the east side of the subject property, the fueling station moved to the northwest corner near the right-in access from Kuebler Boulevard, and the retail building moved to the north next to the fueling station. The total floor area for this option includes 174,650 square feet for the uses on the eastern portion of the development site, as well as the approximately 14,900 square feet of retail floor area on the western portion of the site for a total of 189,550 square feet. This option results in the removal of one of the eight significant trees on the subject property: Tree 2526 (28" dbh in good condition). The City Council finds that this plan fails to meet the City's tree preservation requirements and fails to meet City development standards of the Salem Revised Code and could not be approved.

Internal Pedestrian Access

The City Council finds that the proposed site plan does not adequately demonstrate that sidewalks are provided at each driveway entrance to the development site and does not provide adequate internal pedestrian pathways as required by Condition 13 of CPC/ZC06-6.

Roundabout Driveway Access to 27th Avenue SE

This option also makes an access driveway to 27th impossible and so is inconsistent with the condition of approval to the 2007 Decision requiring an entrance on 27th Avenue. This site plan is inconsistent with the roundabout because it does not provide enough space for the building or the entering ramp. It is inconsistent with the requirement of SRC 220.05(f)(3)(B) that "safe, orderly, and efficient circulation of traffic into and out of the proposed development." The City Council finds that the evidence establishes that under this option, that no traffic can enter or leave the shopping center safely from that required entrance and results in serious conflicts between traffic entering and exiting, pedestrians and store loading traffic.

Further, the City Council finds that the proposed roundabout provides the most efficient access to the site. The City Council further finds that this option requires removing the roundabout access from 27th and so is not consistent with the City site plan review standard requiring safe, orderly, and efficient circulation for site access. Therefore, the City Council finds this option violates the approval criteria for a Class 3 site plan review regarding adequate driveway access as well as the conditions of approval from CPC-ZC06-06.

The SE Option 2 alternative plan also provides a less desirable site configuration for the following reasons:

- Inefficient vehicle and pedestrian circulation.
- Increased traffic and additional driveways needed along Boone Road SE.

Site Plan Alternative 5 – SW Option

This alternative site plan shows the proposed Costco building moved to the west side of the subject property, the fueling station moved to the northeast corner, and the retail building moved to the north. The total floor area for this option includes 174,650 square feet for the uses on the eastern portion of the development site, as well as the approximately 14,900 square feet of retail floor area on the western portion of the site for a total of 189,550 square feet. This option results in the removal of six of the eight significant trees on the subject property and the preservation of two significant trees; Tree 2238 (34" dbh in good condition) and Tree 2526 (28" dbh in good condition). Accordingly, the City Council finds that the plan fails to meet the City tree code as well as other development standards of the Salem Revised Code and could not be approved.

Internal Pedestrian Access

The City Council finds that the proposed site plan does not adequately demonstrate that sidewalks are provided at each driveway entrance to the development site and does not provide adequate internal pedestrian pathways as required by Condition 13 of CPC/ZC06-6. The City Council finds that this plan does not provide adequate east-west pedestrian connectivity with the western portion of the development site.

Access is Inadequate

The City Council finds that this option causes the right-in driveway off Kuebler Boulevard to provide inadequate access to the site as the access aisle is located behind the Costco building. Similarly, the City Council finds that the western driveway off Boone Rd in this option provides inadequate access to the site as it is also located behind the building. The City Council finds that this option requires two new accesses off of Boone Rd, directly across from Riley Ct and Bow Ct, to mitigate for the loss of adequate access off Kuebler Boulevard and Boone Rd SE. However, new accesses are inconsistent with Conditions 5 & 8 of the 2007 CPC/ZC Decision. Accordingly, this site plan does not meet either the requirements of the 2007 Decision or SRC 220.05(f)(3)(B).

Parking

The City Council finds that the parking provided on this site plan does not meet the Applicants' needs and so is inconsistent with their vested right.

The SW Option alternative plan also provides a less desirable site configuration for the following reasons:

- Inefficient vehicle and pedestrian circulation contrary to SRC 220.05.f(3)(B).

Conclusion

The City Council finds that each of the alternative plans provided by the Applicants fail to comply with one or more of the development standards of the SRC, including City Trees standards, and therefore do not comply with the approval criteria for a Class 3 site plan review. Moreover, the City Council finds that the alternative site plans do not allow the Applicants to develop the shopping center that is consistent with their vested right.

The City Council notes above that some opponents proposed other site plans suggesting how the property could be developed. The City Council finds that those alternative proposals do not allow the Applicants to develop the shopping center that the Applicants seek that is their vested right and those alternatives are rejected.

2. Remand Items.

a. Vested rights.

The Applicants' position is that they have a vested right in the development that was approved in the 2007 Decision based on its substantial expenditures including investment in public transportation facilities that were required by the 2007 Decision and in on-site improvements, including the Salem Clinic facility. The Applicants contend that their proposed site plan is an expression of their vested right and must be approved. LUBA remanded to the City to address this issue. The City Council agrees with the Applicants that they have a vested right to the shopping center approved in the 2007 Decision, that the proposal is consistent with that approval and that the Applicants have a vested right to approval of their proposed site plan.

Response: As noted, the City Council finds that the Applicants have a vested right to develop the shopping center that they propose – in fact, they have a vested right to develop a shopping center of up to 299,000 sq. ft. The City Council reviewed a memorandum from the City's special land use counsel in this matter, Jeff Condit, of the law firm Miller Nash regarding the Applicants' vested right. Mr. Condit served as City staff on this Application. The City Council agrees with his conclusion and analysis regarding the Applicants' vested right to a shopping center of up to 299,000 sq. ft. The City Council also finds as an alternative and independent ground for finding that the Applicants have a vested right to a shopping center of up to 299,000 sq ft, that Mr. Condit is correct that:

“*** this same result is also dictated by the law of the case doctrine. *See, e.g., Beck v. Tillamook Cnty.*, 313 Or 148, 153, 831 P2d 678 (1992). The 2007 Decision was a quasi-judicial comprehensive plan amendment and zone change applicable to a specific property, and thus had to be judged under the standards and criteria in effect at the time of application. *See* ORS 227.173(1) & 227.178(3).”

The City Council notes that the 2007 Decision is unusual in many respects. The decision changed the plan designation and zoning classification for the subject property, which every decision of that type does. But it also expressly identified a single use (a shopping center), that is the only use allowed and further recognized that the subject property would likely be developed as a unified shopping center. Furthermore, the 2007 Decision specifically imposed limits as to the scale of the only allowed use, imposing exactions based upon the maximum impacts of that use. All of the above was supported by express findings about the lack of natural resources on the subject property and the design considerations to which subsequent development proposals would be subjected. As a result, the 2007 Decision was not a typical site-specific plan and zone change that leaves most development considerations to subsequent land use applications, as would likely occur today. It was instead a comprehensive approval, much more specific in what it reviewed and allowed, which was appropriate given that, at the time, the City lacked any site or design review processes to later apply. Furthermore, the specific types of subsequent reviews contemplated for the approved shopping center were expressly identified in the 2007 Decision.⁸

The City Council finds that the Applicants’ vested right is the right to complete the development authorized in the 2007 Decision – a shopping center up to 299,000 square feet of GLA, as the Applicants have laid it out. The Applicants’ proposal falls well within the approved development parameters and contains no impacts that exceed those expressly contemplated, mitigated, and authorized by the 2007 Decision. Under vested rights law, the City cannot apply standards that would otherwise now apply, to deny the Application now before us.

With respect to eight significant trees, the 2007 Decision, p 19, expressly found:

“The Subject Property is primarily a vacant field. There are no identified significant natural resources on the Subject Property. Development of vacant urban land is expected. The proposed change will have no significant negative impact on the quality of the land.”

⁸ 2007 Decision, p. 38.

The 2007 Decision also expressly approved development of 299,000 square feet of GLA and its required parking. Regardless, the City Council need not base its decision upon this aspect of the Applicants' vested right, but on the fact that (1) no significant trees will be removed, rather they will be transplanted per the professional protocols outlined in the Applicants' arborist's reports, and (2) even if the proposed transplant constituted "removal," that the removal of the eight significant trees is necessary and so allowed either way.

Regarding transportation facilities, the City Council finds that the evidence in the record demonstrates that the City exacted transportation improvements in the 2007 Decision, many of which have been completed, to mitigate for a greater volume of transportation trips and related impacts than will be generated by the proposed development. Thus, as noted above, the City Council finds that any evidence of potential problems with the City's transportation system is not "caused" by the proposed development and any further transportation exactions imposed on the Applicants raise significant Constitutional takings issues, because they would be mitigating for the impacts of others, not the proposed development.

b. Vested Rights Legal Framework

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

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

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

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

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

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

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

With that background in mind, the City Council turns to the *Holmes* factors as they apply to this proceeding.

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

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

a. Ratio of Expenditures to Total Costs

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

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

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

b. Good Faith of the Landowner

The City Council concludes that the Applicants proceeded with all of the above expenditures in good faith. The City Council expressly rejects claims otherwise. In the proceedings that resulted in the 2007 Decision, the Applicants openly presented their plan for the unified development on the 18.4-acre parcel that was the subject of the Application and the adjacent 10-acre parcel. The 2007 Decision itself repeatedly recognizes this. For example, Condition 14 included the development of the adjacent 10 acres in reaching the 299,000 square feet of GLA limitation. More significantly, the 2007 Decision used the scale of the unified development as a basis for imposing the conditions of approval, which exacted the estimated \$6.25 million for public improvements to existing transportation facilities discussed above.

The Applicants' good faith is further exemplified by the 2009 Application and City approval for the zone change to the medical center property, which is consistent with

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

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

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

Additionally, even as late as October 2018, the City took the position that the Applicants were authorized to proceed with the retail shopping center component of the project. That year, the City Planning Administrator approved the Applicants' Site Plan

Review, which illustrated the retail shopping center with a Costco store and additional retail pads. LUBA Record 6042.

Opponents suggested that the Applicants fail the “good faith” factor “if they have misled the City and neighbors about their intent for use of the land.” The City Council finds that the Applicants never misled the City about the shopping center that would be established on the property. As the court of appeals explained:

“[Applicants] also submitted a list of potential tenants that could move into the development and their associated square footage. Among those listed were Costco (150,000-200,000 square feet); grocery stores such as Safeway, Albertsons, Target, or Fred Meyer (45,000-200,000 square feet); and ‘soft goods’ such as Kohl’s and JC Penny (5,000-100,000 square feet).”

Further, the City Council acknowledges that both LUBA and the Court of Appeals agreed that the present proposal, specifically the inclusion of a Costco is consistent with the 2007 Decision, and both rejected the opponents’ argument that current proposal was inconsistent with representations the Applicants made to the City Council in 2006-2007. The City Council rejects arguments about the Applicants’ lack of good faith.

The City Council finds that each of Applicants’ expenditures in furtherance of the shopping center approved by the 2007 Decision was made in good faith. This factor weighs in favor of recognizing that the Applicants has a vested right to develop the project.

c. Relationship of Expenditures to Completed Project

All of the expenditures presented by the Applicants in this proceeding relate directly to implementing either the proposed development expressly approved by the 2007 Decision or to the required mitigation of that development as specified in the 2007 Decision’s conditions of approval. *See*, Request for Remand Proceeding Exhibit G (PacTrust June 15, 2020 letter). In fact, on September 12, 2012, the City Planning Administrator approved the Site Plan Review Application to develop the medical clinic building and separate medical/office building. In that decision, the City Planning Administrator acknowledged the proposed development as part of the unified shopping center development. The expenditures on mass grading and build-out of the medical clinic building and medical/office building were integral parts of the unified shopping center approved by the 2007 Decision. As City Council found above, the Applicants would not have proceeded with a development that consisted only of the medical clinic and separate medical office building. The City Council finds credible the evidence that

but for the City's approval and ongoing facilitation of the development of the unified shopping center, the Applicants would never have spent money on the smaller medical office/clinic part of the center for the reasons explained in the above quote from page 20 of the 2007 Decision. *See also* Applicants' Remand Letter, Exhibit G, p 2.

Opponents argued that the expenditures made by the Applicants "are necessary for whatever development they make on that land" and, consequently, "it is not like the improvements they have made would be for nothing." The City Council finds that the opponents misunderstand this factor. The requirement to demonstrate the relationship of expenditures to a completed project is whether the expenditures are in furtherance of implementation of the approved project. It matters not whether the expenditures could be used for another development on that same site as opponents contend. That is not a basis for concluding the factor is not satisfied.

The City Council finds that the expenditures listed by the Applicants are directly related to completing the unified shopping center approved by the 2007 Decision. This factor weighs in favor of recognizing a vested right.

d. Nature of the Project, Location and Ultimate Cost

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

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

In the 2012 City Decision approving the site plan review for the medical clinic/office building, the City acknowledged that in a development the size of that approved in 2007, any developer/owner would install improvements over time to facilitate the ultimate completion of the project.⁹ The City Council finds credible the evidence establishing that it would have taken longer for any developer to build out the shopping center, in view of the recession that gripped the state, nation and world, shortly after the 2007 Decision. The City Council finds that the expenditures detailed in the above-cited evidence were all made to complete an approved shopping center of up to 299,000 square feet GLA. The City Council finds that the total estimated cost of the completed project is approximately \$61.4 million and that such is a reasonable cost for a development of this size.

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

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

The City Council further finds that all four *Holmes* factors weigh overwhelmingly in Applicants' favor and that none weigh against it. Furthermore, given that the expenditures the Applicants have already made are in the millions of dollars, those expenditures are significant, and the City Council finds that weighs further in Applicants' favor. The City Council concludes that the Applicants have a vested right to implement the development approved by and, in fact, required by the 2007 Decision and that the proposed development is entirely consistent with it.

2. Applicants' Vested Right Means the Application as Submitted May Not be Denied

While some opponents concede that the Applicants have a vested right, they erroneously claim that it essentially gives the Applicants nothing. This is incorrect, as Mr. Condit's memo explains.

The fact that the vested right entitles the Applicants to develop their property as they propose – which proposal is entirely consistent with the 2007 Decision – is what led LUBA to explain that, despite the City's 2018 denial based upon present site plan review approval criteria, if the Applicants have a vested right to develop the Applicants' shopping center as requested, the bases asserted in the 2018 Decision for denial are unlawful. In addition, LUBA recognized the limited land use decision aspect of site plan review greatly constrains the City's discretion to deny the proposed use. The City Council agrees that the Applicants' vested right means that the proposed Site Plan Review may not be denied. The City Council also agrees that the fact the Site Plan Review is a limited land use decision that is "permitted outright" further constrains the city ability to deny Site Plan Review as a matter of state law.

3. The Arrangement of the Proposed Shopping Center is Vested

The 2007 Decision was approved not just based on the described uses, but also based on the site plan examples and other evidence for the proposed development that described potential configurations for the development. 2007 Decision, p. 7.¹⁰ Those

¹⁰ The relevant passage states:

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

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

“The developer shall provide a brick or masonry wall with a minimum height of six (6) feet along the interior line of the landscaped setback along Boone Road SE and 27th Avenue SE, opposite residential uses. *The applicant/developer may provide a landscaped berm within the setback in lieu of a wall.*” 2007 Decision, p. 3. (Emphasis added).

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

The City Council rejects the Opponents’ assertions that the City Council did not see proposed site plans as part of the plan and zone change proceedings which are contradicted by the 2007 Decision’s findings.

The emphasized language above directly reflects the berms shown in the landscape buffer concept diagram discussed above. The fact that the City Council not only cited the materials, but also imposed conditions of approval that reflected the submitted conceptual plans, is evidence that the City Council was aware of and considered the potential arrangement of the shopping center in approving it; the current proposal is consistent with the conceptual plans City Council considered in 2007. The City Council finds that the Applicants' right to an arrangement of the shopping center portion of the development is consistent with the 2007 Decision and is vested.

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

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

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

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

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

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

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

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

The City Council observes that the mitigation measures, imposed by the 2007 Decision’s conditions of approval, are for the greater traffic volumes approved by that Decision. The first seven conditions of approval to the 2007 Decision impose measures that mitigate for the impacts generated from traffic levels greater than what is allowed by the 2007 Decision and for significantly greater traffic levels than what the proposed

development will generate. It is in large part the Applicants' good-faith implementation of these mitigation measures, at a cost of several million dollars, that has vested the Applicants with the right to develop a shopping center per the 2007 Decision. The traffic volumes generated by the proposed development at issue here, and its impacts on the City's overall transportation system, fall well within the volumes allowed by the 2007 Decision. Again, the 2007 Decision explains, "Therefore, the proposal and its required mitigation efforts will improve the transportation system adequately mitigating its own impacts[.]". 2007 Decision, p. 24. *See also*, Applicants' Rebuttal Attachment 5 (Kittelsohn & Associates p. 2 ("The Transportation Planning Rule section within the 2006 TIA established that even with a 314,000 square foot GLA shopping center, with the approved mitigation, in 2025 that larger transportation system was predicted to function better than it would function without the development and its required mitigation[.]").¹¹

If the Applicants are not allowed to utilize the traffic volumes for which the exactions were based to establish the proposed development, then those conditions which exacted off-site improvements already completed by the Applicants and that required additional off-site public improvements be completed before the shopping center was built, would constitute unlawful exactions violative of the Fifth Amendment to the United States Constitution.

In sum, the City Council concludes that there can be no reasonable doubt that the Applicants have a vested right to the traffic volumes that were approved by the 2007 Decision and the corresponding transportation system mitigation measures imposed by that decision's conditions of approval. The Applicants have a vested right to traffic levels that would be generated by a 299,000 square foot GLA unified shopping center, and the proposal is for only 228,062 square feet GLA. That right cannot be taken away by other traffic generators. Nor can opponents challenge the City's finding in 2007 that the mitigation measures imposed are adequate to offset the transportation system impacts that would flow from a 299,000 square foot GLA unified shopping center. Opponents' reiteration of the arguments made in *Lufkin v. City of Salem* that challenged the adequacy of the TIA and the City Council's conclusions in the 2007

¹¹ The 2007 Decision, p 39, similarly states: "As explained in the TIA, Kuebler Boulevard is able to accommodate the traffic from the proposed use and in fact under the proposal the area transportation system including Kuebler Blvd, *will function better than it currently does under the proposal.*" (Emphasis added.)

Decision are resolved and may not be reasserted here. Those arguments did not prevail then and have no merit now.

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

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

This is not to say that the 2007 Decision resolved all issues. Indeed, the 2007 Decision recognized that on-site circulation, for example, remained an issue for subsequent determination at the time a development proposal is submitted. *See*, 2007 Decision, p. 38. Also, the 2007 Decision does not discuss the adequacy of the development proposal with respect to ingress and egress for the subject property, which could not be analyzed until a detailed development plan was submitted. Thus, the May 2018 traffic study conducted by the Applicants, while broader in scope than required by the SRC for site plan review, analyzed these issues, including a sensitivity check that the proposed traffic volumes remained within those analyzed by the 2006 TIA, as requested by City staff.¹²

However, as the 2007 Decision explained, "[T]he traffic impact of a 'worst-case' commercial development on the adjacent street *network* has been analyzed in the TIA." 2007 Decision p. 38. The 2007 Decision was based upon a TIA that looked at the street

¹² Some contend there is no evidence in the record to support Applicants' stated reasons why the City transportation staff identified the limited scope for the transportation analysis. This is mistaken. The March 27, 2020 Transportation Staff Memorandum states:

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

network and concluded the Applicants met all relevant standards. 2007 Decision p. 14, 23-31, 47. The 2007 Decision's mitigation measures for that "worst-case" scenario have already been exacted from the Applicants. The City Council finds that the Applicants have made many and will soon make other offsite improvements required by the 2007 Decision and they have a vested right to complete the development proposed in the current Application, which is wholly consistent with that development approved in 2007 subject only to those exactions and no more.

The City Council finds that the Applicants' vested right means that they cannot be required to pay for or install further improvements to the City's transportation system. The only transportation issue relevant to this Application is the immediate access in and out of the development under SRC 200.05(f)(3)(B) requiring that the site design facilitate the "safe, orderly, and efficient circulation of traffic into and out of the proposed development." City staff requested that the Applicants exchange the previously approved traffic signal at the main site access on 27th Avenue SE for a roundabout to improve the flow of traffic into and out of the proposed development. The Applicants have agreed to do so. That is in part how the Applicants meet SRC 220.005(f)(3)(B). However, the City Council finds that under the 2007 Decision and its conditions of approval the City Council determined that "negative impacts to the transportation system are mitigated adequately," for a larger shopping center than is proposed. Therefore, because the Applicants have a vested right to the development approved in the 2007 Decision, they have met the part of SRC 200.05(f)(3)(B) looking to whether the "negative impacts" to the transportation system have been mitigated, by complying with the 2007 Decision's conditions.

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

The City Council finds that the 2007 Decision carefully identified a number of reviews that any proposed development for the site would have to undergo before development. This is significant because as noted elsewhere, at that time the City did not have a site plan review process for development. The City Council finds that during the intervening recession, Applicants continued to move forward to implement the 2007 Decision by proceeding with development land use actions that facilitated rezoning and development of the medical clinic and medical office building and laying the groundwork for the future shopping center development.

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

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

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

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

Just as significant is what the findings expressly state will not be addressed at the time of development of the shopping center. First, the impact of the shopping center on adjacent neighborhoods is not a relevant standard to the Application for Site Plan Review here, even under today's site plan review standards. That issue was

expressly considered, and appropriate conditions were imposed, in the 2007 Decision.¹³ Second, the traffic impacts from the proposed development would not be revisited – as the 2007 Decision explains, that issue was analyzed as part of the TIA for the CPC/ZC application the City approved.

Elsewhere in the 2007 Decision, the findings list a number of other design considerations for which the development plans will be evaluated. These include standards under land use regulations that govern screening, landscaping, setback, and building height and mass. 2007 Decision, p. 37. Other cited considerations pertain to the screening of outdoor storage areas and exterior lighting. 2007 Decision, p. 36-37. And the decision expressly refers to the then in effect Salem Code Section 132's buffer yard setback, screening and landscaping requirements. 2007 Decision, p. 44; p. 3, Condition of Approval (11).

Each of the above review standards cited by the City Council in 2007 is a straight-forward review for which the City has adopted specific siting standards. The City Council in 2007 was aware that there would likely be at least one large tenant, and the 2007 Decision does not prohibit or restrict large-format retailers, except with the possible exception of a WalMart, and a site plan that showed the bulk of the retail development to occur on the southern boundary of the property (where the eight significant trees are situated) and smaller retail development on the northern edge of the property (*see*, LUBA Record-2450). The 2007 City Council was fully aware of the general size and layout of the development, the only question was whether the eventual site plan would meet the City's published standards for things such as setbacks, building heights, number of parking spaces and landscaping, as well as the requirements imposed by the conditions of approval. The Applicants have a vested right to have their development proposal reviewed under those standards and only those standards that are not inconsistent with them and the rights conferred in the 2007 Decision.

The 2007 Decision held that the approved development's impacts on the City's transportation facilities have been fully mitigated through the conditions of approval, which the Applicants have already invested millions of dollars towards satisfying. Because the Applicants have commenced implementation of those mitigation measures to the significant extent that is shown in the record, Applicants have a vested right to

¹³ "The impact of the redesignation of the site on adjacent neighborhoods is discussed in these findings, and the traffic impact of a 'worst-case' commercial development on the adjacent street network has been analyzed in the TIA." 2007 Decision, p 38.

not have to again prove up on the adequacy of those measures or to do a new comprehensive TIA. That work has been done and the mitigation measures substantially implemented.

The 2007 Decision also concluded there were no significant natural resources on the site. The determination that a vested right to an approved development exists, means that the holder of that right is protected from changes to the interpretation and application of code sections as well as changes to conclusions about applicable criteria under ORS 227.178(3).¹⁴ As noted throughout these findings, the City Council interprets its tree ordinance provisions to mean that the Applicants' proposal to transplant the trees does not "remove" them and also that the Applicants' supplemental evidence establishes that the Applicants have met the City Council's rigorous interpretation of the "necessary" standard. It is only in the alternative to both of those, that the City Council also finds that the City could not apply the tree ordinance to deny the Applicants' proposed shopping center because they have a vested right to develop the shopping center that they propose and in fact one much larger than they propose.

Opponents' counsel argues that Applicants' rights became vested in 2012-13 (when the medical clinic was approved and built) at the earliest, or in 2015 when the Applicants agreed to provide \$3 million in transportation improvement funds before they were required to implement the improvements. Anuta Letter, August 12, 2020, p. 3. Opponents' counsel appears to assume that the standards that are in effect at the time a right becomes vested (*i.e.* the expenditures are made) are the standards that apply. The City Council finds that is not the law. As *Holmes* and the other cases cited above establish, what is vested is the right to complete the development as it was approved in 2007, not the development that would have been approved at the time the right vests. The City Council finds that later adopted standards (including those in effect when the 2007 Decision rights vested) cannot be applied to deny the application, where City Council finds that the application is consistent with what was approved in the 2007 Decision.

¹⁴ ORS 227.178(3) provides, in relevant part:

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

c. *Vested Rights Conclusion*

Based upon the evidence in the record and the findings above, the Applicants have a vested right to the proposed shopping center development reflected in their Site Plan Review Application, which is consistent with the rights derived from implementing the development approved by the City Council in the 2007 Decision and by the findings, conclusions, and conditions of approval of that decision. The City Council finds that the tree preservation basis for the City Council's previous denial violates Applicants' vested rights and, regardless, the Applicants' transplant proposal does not trigger the City's tree removal provisions in any event and that the Applicants have supplemented the record to successfully demonstrate that it is "necessary" to remove the trees for their vested development proposal to proceed. The City Council further finds that each of the opponents' arguments is inconsistent with one or more of Applicants' vested rights. For these reasons, the City Council concludes that the Applicants have a vested right to approval of their Application.

b. Traffic Impact.

Greenlight Engineering, on behalf of opponents to the Application, submitted its own traffic analysis to contrast with the Applicants' analysis. Opponents cite the Greenlight analysis and argue that the proposed development does not meet various traffic related requirements.

Response: The City Council has reviewed the evidence in the record and concludes that the analyses and conclusions provided in the Applicants' traffic analyses are more credible and persuasive than those in the Greenlight analyses. The evidence and argument presented in the Greenlight reports are therefore rejected.

The City Council begins its analysis of the issues presented by opponents regarding traffic by affirming the City Council's interpretation of the City's own code reflected earlier in this decision that, in light of the Applicants' vested right, the only applicable traffic standard is reflected in SRC 220.005(f)(3)(B) requiring:

"The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development ***."

The City Council reaffirms here its conclusion earlier in this decision that the latter part of that standard is inapplicable, which requires:

"and negative impacts to the transportation system are mitigated adequately"

This latter part of SRC 220.005(f)(3)(B) is inapplicable to this Site Plan Review because it reflects an issue that was analyzed in, and compliance established by, the 2007 Decision. This is why the Director properly concluded that the Applicants were not required to submit a SRC 803 TIA, discussed above.

Further, the City Council notes that LUBA did not require that the City address transportation concerns. LUBA only required the City to evaluate the Applicants' vested right. Accordingly, the City Council finds that the Applicants' vested right includes the development of a unified shopping center of up to 299,000 sq. ft. and the traffic impacts that go with it. That unified shopping center has already been fully analyzed and its mitigation established by the 2007 Decision. The proposed Site Plan Review is consistent with and smaller than the unified shopping center to which it has a vested right and the Applicants' proposed development cannot be denied or further conditioned on traffic impacts. As noted, the only relevant traffic impact involves the access in and out of the proposed development at the site driveways.

It is only in the alternative that the City Council addresses opponents' traffic impact issues, and by doing so the City Council does not modify its conclusion that the Applicants' vested right makes these issues irrelevant.

The detailed responses below establish certain basic principles: many of the assertions made by Greenlight Engineering are inaccurate with respect to trip generation, trip distribution, saturation flow rates and seasonal adjustments. The City will always use the most accurate and appropriate information with respect to a traffic analysis. In this case, the Costco site-specific data regarding trip generation and trip distribution is far more accurate than that provided by ITE Trip Generation Manual and Mid-Willamette Valley Council of Governments (MWVCOG) cited by Greenlight. The saturation flow rate used by the Applicants was verified by actual field collected data. This is also more accurate than using "default" values in the analysis software. The seasonal adjustments discussed on Oregon Department of Transportation (ODOT) facilities, cited by Greenlight, are appropriate to use on State Highways that are recreational routes. The freeway ramps at Kuebler Boulevard are not recreational routes, they are commuter routes, and traffic is highest when school is in session, not during the summer travel months.

The City's specific responses on these issues follow.

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

In the alternative to the City Council's finding above that the Director properly granted the Applicants an exemption from having to provide a TIA per SRC 803, the City Council also finds that a TIA consistent with the elements established in the Public Works Administrative Rules, is unnecessary because it does not inform the limited requirements of SRC 220.005(f)(3)(B).

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

"1.15 – Traffic Impact Analysis

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

This provision reinforces that TIAs are only required, if required, in the land use process. As noted, in the land use process here, no TIA is required.

Further, SAR 17-2 provides:

"Relationship with Land Use Actions and Development Review

"In accordance with requirements contained in the State Transportation Planning Rule and the *Salem Revised Code*, the adopted goals, objectives, policies, projects and maps of the *Salem Transportation System Plan* must be considered and applied towards the review and approval of specified land use actions and development applications. This means that applications submitted for such actions as Comprehensive Plan Map amendments, zone changes, conditional use permits, subdivision review, and land partitions need to include findings that show how the application is in conformance with the tenants of the *Salem Transportation System Plan*. City staff need to review these findings for conformity."¹⁵ (Italics in original; underline added).

¹⁵ TSP at 17-5, Policy 3-1 purports to apply the TSP to all land use matters. However, as noted above and below, state law prohibits plan policies from applying to limited land use decisions unless the policies are explicitly incorporated into the relevant code provision. TSP **Policy 3.1 Land use and Development Review** is not "incorporated and so cannot be applied. It states:

The list of applications that must demonstrate compliance with the requirements reflected in the Public Works Administrative Standards does not include site plan review. The City Council finds that is because of the limited nature of site plan review. The SRC 220.005(f)(3) approval criteria for a Class 3 site plan review is limited to two provisions that relate to transportation. The relevant portions of SRC 220.005(f)(3) provide:

- “(B) The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately; and
- (C) Parking areas and driveways are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians[.]”.

No comprehensive plan policies are invoked, even by reference, in the above provisions. In this regard, LUBA determined that the Application for Site Plan Review sought a limited land use decision. The City Council agrees with the Applicants that such means that unincorporated comprehensive plan provisions may not be applied to site plan review. The City Council finds that there are no incorporated comprehensive plan provisions that apply to site plan review. Therefore, the City Council finds that there are no applicable plan policies to the Applicants’ Site Plan Review Application.

With respect to the site plan review standards, SRC 220.005(f)(3)(B) expressly identifies the flow of traffic into and out of the development as an issue for site plan review. It is not disputed that the Applicants must demonstrate that the design of the proposed development facilitates the safe movement of traffic into and out of the subject property. While the 2007 Decision did impose requirements that determined where several of the ingress-egress points must be located on the subject property and the proposed design must be consistent with those conditions of approval, the details of the design for traffic flow into and out of the proposed development were not before the City Council in 2007, and thus are properly before the City Council now. Site plan review is a mechanism to evaluate such ingress and egress.

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

SRC 220.005(f)(3)(B) also requires that a site plan demonstrate that “negative impacts to the transportation system are mitigated adequately.” As the City Council explains earlier in this decision, this provision does not apply because the analysis it seeks has been provided and impacts mitigated by the 2007 Decision.

In the alternative, the City Council finds that language is directed specifically to the transportation facilities that are impacted by the flow of traffic into and out of the proposed development – in other words, the driveways and the immediately adjacent street system that feeds them. The City Council notes that the Oregon Supreme Court has reviewed plan and code language similar to how the City of Salem’s plan and code are structured and concluded that there are distinct differences between the transportation analysis required for comprehensive plan and zone changes and for site plan review. In *Siporen v. City of Medford*, 349 Or 47, 263-65, 243 P3d 776 (2010), the Supreme Court explained that a transportation study for a plan and zone change examines whether the street system is adequate to serve the permitted uses as a part of a determination about whether a type of use can be allowed at all. The Supreme Court further noted that site plan review process in the City of Medford has a different focus than that broad review and, instead, looks to the traffic flow on the development site, at the points of ingress and egress to the site, and the immediately adjacent streets to accommodate that flow. The City Council concludes that its site plan review standards have similar effect and would apply in the same way but for the fact that the Applicants here have already gone through a City proceeding which analyzed and mitigated negative transportation system impacts not only for the immediately abutting streets, but also for the larger city street network. In other words, the City’s site plan review standards do not require an analysis of the greater transportation system. Rather, the City Council finds that the City site plan review standard at SRC 220.005(f)(3)(B) requires evaluation of access in and out of the proposed development and the adequacy of the immediately adjacent streets to serve the proposal.

The 2018 Kittelson traffic study demonstrates that traffic volumes from the proposed development are less than those permitted and mitigated by the 2007 Decision. That traffic study also demonstrated all surrounding intersections would operate within the required levels of service (LOS) even with the addition of the traffic from the proposed development. As a result of the mitigation measures imposed by the 2007 Decision, the present proposal’s consistency with the traffic volume limitations imposed by that decision, and the evidence in the record regarding the transportation impacts generated from the proposed development, the City Council concludes that the “negative impacts to the transportation system are mitigated adequately.”

Turning to the other site plan review standard with some effect on transportation, the focus of SRC 220.005(f)(3)(C) is entirely within the subject property. The City Council finds that there is nothing in that standard that pertains to the larger transportation system to which a comprehensive TIA is intended to evaluate. Nothing in the site plan review standards require a comprehensive TIA whenever a site plan review application is submitted. The traffic study that was requested by City staff and that the Applicants prepared as part of their Application, was sufficient to demonstrate compliance with the site plan review standards at SRC 220.005(f)(3) including to determine whether the proposal has “negative impacts” on the immediately adjacent streets and if so whether impacts are adequately mitigated.

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

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

“SRC Chapter 803 identifies the threshold for requiring a TIA.”

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

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

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

As discussed above, the conditions of approval for the 2007 Decision imposed development constraints on the subject property and exactions to mitigate for the transportation system impacts of traffic volumes associated with a unified shopping center composed of 299,000 square feet of GLA. Furthermore, City staff, including its engineering professionals, required the Applicants to conduct a sensitivity check to ensure that the volume of traffic that will result from the proposed development will fall

within the permissible traffic volumes and consequent traffic impacts approved by the 2007 Decision. It cannot be questioned that the 2007 Decision's conditions more than mitigate the traffic impacts from the proposed development. City staff requested that the Applicants exchange the previously approved traffic signal at the main site access on 27th Avenue SE for a roundabout to improve the flow of traffic into and out of the proposed development. The Applicants have agreed to this request. That does not mean the mitigation approved by the 2007 Decision was or is inadequate.

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

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

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

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

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

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

As explained above, the relevant inquiry is whether the two modest site plan review standards regarding traffic are met.¹⁶ The City Council further finds that the City's SARs were adopted in 2014, and so may not be applied to deny the Applicants' vested right, in any event. Regardless, most of the SARs do not inform the answer to the questions posed by these site plan review standards. As noted above, the SARs ask about the much larger transportation system rather than ingress and egress into the proposed development. This is one of the good reasons that the Public Works Director correctly concluded that a TIA of the type contemplated by the SARs was not required, and granted the exemption discussed above. Regardless, even if some of the SARs were applied, they are met.

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

As explained in detail in this Decision, the City Council's primary positions are that (1) the Applicants' Site Plan Review was properly exempted from the requirement to provide an SRC 803 TIA that conformed to the City SARs and (2) the Applicants have a vested right to the traffic impacts and required mitigation expressed by the City Council in the 2007 Decision and the City cannot require additional traffic analysis or mitigation except to the extent required by SRC 220.005(f)(3)(B) regarding the adequacy of the driveway access in and out of the site and internal circulation per SRC 220.05(f)(3)(C). Further the City Council has explained and reiterates that it finds the traffic analysis provided in this process has demonstrated that both SRC 220.05(f)(3)(B) and (C) are met. The below is in the alternative only and without waiving these fundamental positions.

SAR 6.33(a) requires a Level of Service (LOS) operational standard for all intersections to be LOS E or better and signalized intersections have a v/c ratio of 0.90 or below. The City Council finds credible and persuasive Kittelson's July 21, 2020 submittal and accompanying data to demonstrate SAR 6.33(a) is met even with a 2021 horizon year, and even evaluating the ten study intersections and site access points. The City Council agrees with Kittelson's analysis that demonstrates that the 10

¹⁶ SRC 220.005(f)(3)(B) provides: "The transportation system provides for the safe, orderly, and efficient circulation of traffic *into and out of the proposed development*, and negative impacts to the transportation system are mitigated adequately." (Emphasis supplied.) SRC 220.005(f)(3)(C) provides: "*Parking areas and driveways* are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians." (Emphasis supplied.)

intersections are forecast to operate at LOS of D or better, or at a v/c of 0.90 or better, meeting City's operational standards.

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

The City Council finds that Kittelson directly addressed Greenlight's use of data collected on February 27, 2020 and on March 3, 2020. The City Council agrees with Kittelson's analysis that Greenlight's data is unreliable and is not considered to be valid. The City Council finds that in early March, ODOT issued an APM Update Appendix 3E that explained:

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

Evidence in the record demonstrates that the disruptive events associated with the COVID-19 pandemic began as early as February 24, 2020 and continues to this day. The City Council finds that the opponents' traffic counts taken on February 27, 2020 and March 3, 2020 are unreliable because of the unusual disruptive conditions concerning the pandemic then occurring. The City Council finds that the Governor's state of emergency announcement issued a few weeks later reflected that disruptive conditions that existed already, created an emergency. The Governor's announcement does not mean that there were no disruptive conditions before the State of Emergency caused by such conditions was declared.

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

Also, Greenlight's February 27, 2020 traffic counts taken at the Kuebler Blvd/Battle Creek Rd intersection are actually lower than the May 2018 Kittelson traffic study assumed. Greenlight's assertions that the traffic volumes are greater at the I-5 southbound/ Kuebler Blvd intersection than stated in the May 2018 Kittelson traffic study, results from Greenlight's utilization of the counts it conducted later – on March 3, 2020 – during fairly extreme and documented "disruptive conditions".¹⁷ Lower vehicle traffic existed at the Kuebler Blvd/Battle Creek Blvd. intersection on February 27, 2020 despite the fact that foot traffic at Costco was up 6.2% over the previous year and food sales were up 13.1% over the previous sales on that date. *See*, Applicants' August 12, 2020 Rebuttal submittal, Attachment 1, p. 64. This supports the observation in the ODOT manual that traffic behavior during disruptive events is unusual and should not be used. The record establishes and the City Council finds persuasive and credible that February 27, 2020 was a period in the beginning of the COVID disruptive event, when Costco started running out of key items, like toilet paper. People were not behaving as they usually do either on February 27, 2020 or March 3, 2020, and many of them rushed to Costco and other stores to buy essential items perceived to be in short supply.

Greenlight's traffic counts are rejected as unreliable. They also do not show that traffic volumes are universally greater than the Kittelson data. Greenlight's evidence supports the City Council's finding that traffic counts taken during disruptive conditions are variable, unpredictable, and unrepresentative of normal traffic behavior and that ODOT is correct to say that they should not be used for trip generation or transportation system improvement decision-making. *See*, Applicants' Rebuttal, Attachment 1, p. 2 (Kittelson explanation), and 57 (ODOT Bulletin).

Last, Kittelson's August 12, 2020 rebuttal lists a number of other invalid data and assumptions used by Greenlight. The City Council finds Kittelson's analyses to be more credible and persuasive than Greenlight's. The City Council agrees that Greenlight improperly used a significant seasonal adjustment factor, which are used for locations such as those which see heavy winter seasonal traffic to Mount Hood, for example, but are inappropriate for Salem. The City Council finds that Salem does not and should not use a seasonal adjustment. In this regard, the City Council finds that the ODOT Analysis Procedures Manual (APM) Version 2, Chapter 5 states:

¹⁷ Evidence demonstrating that March 3, 2020 was in the heart of "disruptive conditions" associated with COVID-19, is at the Applicants August 12, 2020 Rebuttal submittal, Attachment 1, p 10-64.

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

In other words, the City does not need to use and does not use a seasonal adjustment to get accurate traffic data. Accordingly, the City Council finds that Greenlight's estimates improperly inflate traffic volumes.

Also, Greenlight uses a 2022 buildout year analysis, despite arguing in a previous submittal that Kittelson should be using a 2021 build out year analysis. At the time the May 2018 Kittelson traffic study was performed, the 2019 year of build out was reasonable. No City or other standard requires the Applicants to continually update the year of opening due to delays caused by the land use process. The SARs require a TIA evaluate traffic in the "year of opening." The City Council finds that this means that a single traffic study is required for a single year of opening and the year of opening does not change or advance based upon delays caused by the land use process. Thus, the City Council finds that even if the SARs applied, they did not require successive updates when the year of opening was delayed because of land use appeals. Moreover, also as noted elsewhere, as a precaution, the Applicants have supplemented their analysis to presume a year of opening of 2021. That too is reasonable and achievable, although the City Council finds unnecessary. Importantly, the City Council finds that there is nothing about relying on either a 2019 year of opening or a 2021 year of opening, that is error.¹⁸

Next, Greenlight argues that a 1.8 percent growth rate should have been used, citing the Mid-Willamette Valley City Council of Governments (MWVCOG), as the basis for that value. The City Council finds more credible and persuasive the evidence in the record that there is no 1.8% growth rate in MWVCOG's traffic model data for this area.¹⁹ The City Council finds that the 1% growth rate that Kittelson used in its analyses is more appropriate. In addition, the City Council finds that the MWVCOG model factors into its methodology that the subject property exists as built out with the

¹⁸ Kittelson July 21, 2020 – Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments.

¹⁹ Kittelson Response to July 2, 2020 Greenlight Comments, p 5.

2007 Decision approved shopping center, as well as presumes the build-out of all other properties based on the existing zoning.²⁰ Consequently, the City Council finds that Greenlight's explanation for why it used a 1.8% growth factor **double counts vehicle trips**. Likewise, opponents' arguments that Kittelson's analysis does not consider the build-out of the Amazon Facility or the retirement community, they are simply wrong. The City Council agrees and finds credible that the analysis model assumes build-out of all properties either expressly planned, or consistent with their zoning. Applicants' Rebuttal, Attachment 1, p. 5. The City Council notes that these mistakes found in Greenlight's analysis resulted in its analysis improperly inflating traffic numbers.

The City Council further finds that Kittelson correctly explains that Greenlight appears to use only data from a single segment of the area's roadway system to reach the 1.8% growth rate to represent background regional traffic growth, without recognizing that the future volumes utilized in that calculation already account for site-generated traffic associated with a much larger development on the subject property (the traffic associated with the CR zoning approved by the 2007 Decision) and other properties in the "Traffic Analysis Zone" or TAZ.²¹ The City Council finds that Greenlight's approach builds in double-counting of trips.²² When the double-counting issue is resolved and the data from even a single other segment is considered along with the one segment relied upon by Greenlight, the City Council finds that an appropriately calculated annual growth rate is 1.06 %, which is consistent with the 1% growth rate used in the May 2018 Kittelson traffic study. Applicants' Rebuttal, Attachment 1, p. 5.

Next, the City Council finds that Greenlight uses a software default saturation flow rate of 1,800 vehicles per hour per lane (vphpl) value in their analysis of intersections along Kuebler Boulevard. However, the City Council agrees with the Applicants because there was actual data available, it preferable to use the actual available data they used versus the software default values that Greenlight utilized. Applicants' Rebuttal, Attachment 1, p. 8. The City Council finds that Kittelson's saturation flow study at several high-volume lane movement locations obtained a proper and representative sample of saturation flow characteristics at various high-volume intersections and lane group movements in the study area. Applicants' Rebuttal, Attachment 5, p. 21. The City Council finds that study was done consistently with the City SARs as well as the guidelines of the 2010 Highway Capacity Manual (Chapter 31) and the ODOT Analysis Procedures Manual (APM) (pages 3-38). *Id.* That

²⁰ Kittelson Response to July 2, 2020 Greenlight Comments, p 5.

²¹ Kittelson Response to July 2, 2020 Greenlight Comments, p 5.

²² Kittelson Response to July 2, 2020 Greenlight Comments, p 5.

study met all conditions for all lanes and the methodology and results were confirmed to be appropriate by City staff, including the City Traffic Engineer. *Id.* That analysis showed that a saturation flow rate of 1,900 vphpl is appropriate. Kittelson also points out that the standard Greenlight refers to for using a saturation flow rate of 1,800 expressly states “unless a separate flow rate analysis has been performed.” Applicants’ Rebuttal, Attachment 5, p. 21. The City Council finds that a separate saturation flow rate analysis has been performed and so using the 1900 vphpl value is appropriate. The City Council rejects as less credible and persuasive Greenlight’s contrary evaluation.

The City Council finds that Greenlight similarly used a lower, default right-turn on red (RTOR) percentage for I-5 Southbound/Kuebler Boulevard intersection instead of the site-specific data taken by Kittelson for the intersection. The City Council finds that it is better and more reliable to use the actual data the Kittelson analysis used given it was available as opposed to software default values used by Greenlight. The City Council rejects as less credible and persuasive Greenlight’s contrary evaluation.

The City Council finds that each of the above errors is cumulative and increasingly exacerbates the inaccuracies of opponents’ analyses resulting in the overstatement of the proposed development’s transportation system impacts. It is only these cumulative errors that result in Greenlight’s conclusions that appear to show transportation facilities performing below City or ODOT intersection operating standards. The City Council concludes that Kittelson’s data and analysis demonstrate that the proposed development complies with the Level of Service and volume-to-capacity operational standards provided under SAR 6.33(a) and rejects as less credible and persuasive opponents contrary evidence and conclusions.

SAR 6.33(b) “Analysis” requires that the TIA analysis be conducted using the most current version of the Transportation Research Board, Highway Capacity Manual methodologies. The City Council finds that the 2006 TIA and subsequent analysis utilized the appropriate methodologies in their transportation studies. The City Council further finds that methodology, among other things, recognizes the value and increased accuracy of site-specific field data over assumed software values in evaluating transportation issues. Thus, opponent’s objections against the Applicants’ use of data collected from actual Costco stores, or from the existing transportation facilities around the subject property are less credible than the Kittelson analyses.

The City Council finds that the 2006 TIA and subsequent analyses are consistent with SAR 6.33(b).²³ SAR 6.33(c) Extent of Study Area requires the TIA study area to include a number of locations, some of which are triggered by traffic volumes or when identified by City staff. Here, City transportation staff established the scope of work for the traffic study at issue here in pre-application communications with Kittelson. The scope of the sensitivity check mirrored those intersections that were evaluated in the 2007 Decision with the exception of Commercial Street SE and Kuebler Boulevard. Staff excepted that intersection because the City had completed a Capital Improvement Project that rebuilt the intersection and added right-turn lanes and double left-turn lanes on all approaches, so staff (and City Council) were aware that no additional mitigation was required at this particular intersection. Staff Memo, March 27, 2020, p. 2-3. The scope of the study area also included a detailed examination of the ingress/egress points for the proposed development as well as the immediately surrounding street system as required by the site plan review standards. The Staff Memo ultimately described the purpose of the study, which "was to verify that the traffic generated by the proposed development did not exceed volumes that were approved in the 2007 CPC/ZC and to analyze the driveway access to 27th Street SE." *Id* at p. 3.

SAR 6.33(c). The City Council interprets SAR 6.33(c) and SRC 220.005(f)(3) together to mean that a larger analysis area under SAR 6.33(c), is not required for a site plan review application because the analysis SAR 6.33(c) requires is irrelevant to these site plan review standards. The only relevant traffic analysis area to the site plan review standards are the access in and out of the site under SRC 220.005(f)(3)(B). The City Council finds that for site plan review that SRC only requires a TIA that evaluates (1) internal circulation, (2) ingress and egress at the driveways to the property, and (3) the adequacy of the immediately adjacent streets, which flow into those driveways. Moreover, the only site plan review standard that is applicable here, as explained above, is the first two and that the adequacy of the immediately adjacent streets and associated mitigation was resolved in the 2007 Decision.

²³ The SARs, including SAR 6.33 were not adopted until 2014, but the 2006 TIA was comprehensive, providing a similar analysis to that contemplated by the SARs. The fact that the SARs were not in effect when the shopping center was approved in 2007 is another reason the SARs cannot and should not be applied in a way that results in denial or limitations upon the Applicants' shopping center to which they have a vested right based upon the 2007 approval which comprehensively dealt with traffic issues, including to the larger system.

Regardless, no purpose is served by demanding an analysis area to meet SRC 220.005(f)(3)(B) that is irrelevant to the standard. The scope of the analysis area to be evaluated under SAR 6.33(c) greatly exceeds the site driveways or even the immediately adjacent streets. The City Council interprets its SRC and SAR standards by harmonizing them that SAR 6.33(c) does not require a transportation analysis for site plan review that extends beyond the immediately adjacent streets and driveways in and out of the site. The City Council finds that properly interpreted, the 2018 Kittelson traffic study is consistent with SAR 6.33(c).

SAR 6.33(d) requires consideration of potential transportation impacts on other jurisdictions:

“If a proposed development impacts any other jurisdictions, the preparer shall coordinate the specific jurisdiction and may be required to meet their TIA standards.”

No party has contended that there will be impacts on any other local jurisdiction and the City Council finds that the proposal does not impact any other local jurisdiction. Regarding transportation facilities under ODOT jurisdiction (I-5 ramps), the City Council finds that first they are not a part of the immediately abutting street system and so are irrelevant regardless. Second, the City Council finds that Kittelson coordinated with ODOT by exchanging documents and reasonably accommodating ODOT’s concerns. SAR 6.33(d) requires nothing more. The City Council expressly finds that this provision does not require an affirmative statement from ODOT that its standards are met.

SAR 6.33(e) concerns the horizon year for TIA analysis, and provides:

“The horizon year of a TIA is defined as the most distant future year that shall be considered.”

For a non-multi-phased development SAR 6.33(e) requires the TIA evaluate traffic conditions at the year of opening.

The City Council finds that this standard expressly fixes the horizon year based upon when the TIA is first prepared. Opponents argue that the horizon year must be adjusted to consider the remand of the initial approval and that the remand now makes development of the project in 2019 an impossibility. Consequently, opponents argue that the horizon year should be 2021 and some argue 2022. The City Council rejects this view of SAR 6.33(e). The relevant time period is the year of opening at the time that the TIA is first prepared – here, from the standpoint of the 2018 traffic study. The City Council finds that at the time of the 2018 Kittelson traffic study that the year 2019

was a reasonable and appropriate target for the “year of opening.” The City Council rejects as less credible and persuasive evidence to the contrary.

In the alternative, the City Council also finds that the Kittelson supplement that analyzed traffic impacts at the date of opening presumed to be 2021 are also valid. Kittelson ran the numbers for a 2021 opening date and compared them to the numbers in the 2018 Kittelson traffic study. Applicants’ First Open Record Exhibit 3, p. 1, 3. The City Council finds that the analysis shows that the transportation facilities continue to operate within all City and ODOT operational standards. The City Council rejects evidence to the contrary.

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

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

Table 6-33. Horizon Year for Various Proposed Developments

Opponents contend that the Site Plan Review Application is for a multi-phase shopping center project and so the horizon year for each phase must be observed. They are incorrect. First, the City Council finds that the Site Plan Review proposal is for a use “allowed under existing zoning” under the above chart and as a result, there is no requirement to observe a horizon year for “year of opening each phase” even if there were later phases contemplated. The City Council interprets the above chart to mean that where a use allowed under existing zoning is proposed in phases, that the relevant analysis is the horizon year in the year of opening of the first phase.

This simply reflects the truism that the City’s plans and codes contemplate that land will deliver uses that the zoning district allows as permitted uses, as is the case here. The overall traffic from particular permitted development is unlikely to have impacts not contemplated on the transportation system that would not be identified in the traffic analysis for the entire development. Furthermore, requiring that uses allowed under existing zoning provide a TIA that evaluates all trips rather than individual parts, results in a **proper** traffic count **for the entire development**. Finally, the City Council’s interpretation of the above chart is also correct in the situation presented here, because the 2006 TIA and 2007 Decision as well as the Kittelson traffic studies produced for this Site Plan Review, all address the traffic impacts of the entire

development – regardless of whether in phases or all at once. All trips are accounted for and mitigated.

The City Council finds that there is no “phasing” for the retail shopping center at issue in the Site Plan Review, in any event. Rather, the proposal is a single shopping center development.

The City Council finds that the shopping center at issue here is the last remaining part of the unified shopping center approved in the 2007 Decision. Accordingly, regardless of whether the project is in the last phase of that shopping center or a unified shopping center with no “phases”, the horizon year for the TIA is the year of opening estimated at the time the TIA was prepared – 2019. That is the horizon year used in the May 2018 Kittelson traffic study supporting the Site Plan Review before the City Council and the City Council finds it to be appropriate.

Furthermore, when opponents argued that 2019 was not a reasonable build-out year and that calculations should be based on a build-out year of 2021, Kittelson ran the numbers to 2021 and found that all potentially relevant transportation standards – including for the adequacy of the site driveways are still met. The City Council finds that negative impacts to the transportation system that may flow from the proposed development are mitigated adequately both under the City Council’s primary position that traffic impacts and adequate mitigation were established in the 2007 Decision and its conditions, but is also demonstrated in the Site Plan Review traffic analyses provided by Kittelson. The City Council finds that either way, not only are the traffic analyses consistent with SAR 6.33(h) but also, they demonstrate that SRC 220.005(f)(3)(B) is met.

SAR 6.33(f) provides that the City Traffic Engineer will determine which peak hours are required for traffic study. Here, Kittelson prepared their peak traffic hour analysis based upon the determination of the City Traffic Engineer. The City Council finds that this SAR is met. The City Council rejects opponent claims that the City Traffic Engineer should have included different peak hours. The peak hours identified by the City Traffic Engineer are appropriate and consistent with the 2006 TIA as well as the 2007 Decision. The City Council finds that opponents’ claims to the contrary are not credible and rejects them.

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

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

Furthermore, as discussed above under SAR 6.33(a), the City Council concludes that a growth rate of 1% was appropriate here.

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

Regarding trip distribution, the City Council finds that Kittelson adequately explained that the Salem Costco sales data for FY 2014 through 2016 was analyzed by zip code and estimated directional routing to each zip code was then determined to approximate percentage of travel from each direction to and from the proposed new Costco site. The City Council concludes that the Applicants’ transportation analysis is consistent with SAR 6.33(g) and rejects contrary evidence and arguments.

SAR 6.33(h) site generated traffic, provides:

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

The City Council finds that Kittelson explains in their June 6, 2020 response to Greenlight’s December 2018 comments that the estimated site generated traffic volumes are based on data and guidance from the most current version of the ITE Trip Generation Manual and complies with this standard. Applicants’ Request for Remand Proceeding, Exhibit C, p. 8.

The ITE Manual provides:

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

The City Council finds that the size of data points in the ITE manual are smaller than the proposed elements. The data ranges are as follows:

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

Therefore, the City Council finds that under ITE it is appropriate to use Costco-specific data.

The City Council further finds that there are no data points in ITE at all for a Costco Store as proposed and that when Costco specific data is available, it should be used. The City Council finds that doing so complied with ITE within the meaning of SAR 6.33(h).

The City Council also agrees that the proposal’s compliance with ITE Trip Generation Manual requirements is also established in Applicants’ Rebuttal, Attachment 5, p. 8-9. As noted above, the ITE Trip Generation Manual prefers site specific information where it is available. The City Council agrees that the use of Salem Costco specific trip generation data as well as other specific Costco trip generation profiles is consistent with the ITE manual and meets this SAR.

Second, opponents were critical of the fact that Kittelson’s analysis was based on data drawn from the existing Salem Costco store, arguing that the change in size of the store and increased number of fueling positions would result in significantly higher traffic volumes than extrapolated by Kittelson. Kittelson responded with other data compiled from other Costco stores in Oregon and other states, some larger than the proposed store, some smaller. The City Council finds that there was an insignificant change in the trip generation rate when the data collected from additional Costco sites was added to the data gathered from the existing Salem Costco site. The additional data in some cases showed that the average trip rate used by Kittelson was higher than what would be used if the data from other similar Costco stores were used. Applicants’ Rebuttal, Attachment 5, p. 3-7, and Kittelson document Attachments B-D.

The City Council finds that the Kittelson trip analyses using these additional stores is consistent with the ITE Trip Generation Manual and meets this SAR.

Third, opponents argued that Kittelson should not use Costco-specific trip generation data and should instead use ITE specified trip generation rates. Kittelson

first pointed out where in the ITE Trip Generation Handbook it stated that using the Costco-specific traffic data was consistent with the ITE Manual referenced in this SAR, but then in deference to expressed concerns, conducted the alternative analysis requested by opponents using ITE rates ascribed to different types of discount stores, some of which ITE acknowledged included trips associated with fueling positions, but regardless Kittelson *added* to those ITE rates, rates for a stand-alone gas station. The City Council finds that the Kittelson ITE analysis performed to answer the opponents' objections, is even more conservative than sought by Greenlight. *See, Applicants' First Open Record Exhibit 3, July 21, 2020.*²⁴ Even so, the City Council finds that Kittelson's 60-page, July 21, 2020 response is thorough and provides both analysis and supporting data from 10 intersections at or near the subject property and demonstrates that the Costco-specific data assumes more trips than ITE would assume using those default store categories.

Kittelson's responses in this regard include a comparison of Costco data with fuel positions that includes data from multiple stores, the ITE data for free-standing Discount Superstores, free-standing Discount Stores, and Discount Club with the traffic from a separate fueling station added in.

In all instances, the uses with an existing ITE Land Use Code had lower trip generation rates than those identified specifically from Costco. The City Council finds that Kittelson's analysis has withstood significant scrutiny and the opponents' claims against the Kittelson trip generation estimates are rejected as less credible and the City Council determines that the Kittelson analysis' are valid, credible and reliable.

Opponents also claimed that the Applicants' methodology using trips derived from either ITE or Costco specific data assumes that a small percentage of Costco trips also use the fueling station. The City Council finds that this is mistaken. As presented in the May 2018 Traffic Study and supplemental documents prepared by Kittelson, the estimated trip generation for Costco accounts for all trips associated with the store and fuel station. Put another way, the City Council finds that the trip generation estimate for the fueling station is accounted for (i.e. calculated) in the overall trip generation of

²⁴ Kittelson's response considered the following ITE categories of uses: a Free-Standing Discount Superstore, a Free-Standing Discount Store; and a Discount Club. The City Council finds that for the supplemental analysis, Kittelson also included the trip generation from a Gasoline/Service Station in conjunction with the Discount Club data, in an effort to be conservative. In that same response, the City Council finds that Kittelson evaluated the traffic data for several other Costco stores, which demonstrated that the data derived from the existing Salem Costco and used by Kittelson were accurate.

the Costco (store and fuel station). Kittelson explained this in great detail in its August 12, 2020 *Response to July 28, 2020 Remand Response Comments*, pages 3-7, and the City Council adopts that explanation as its own.

The City Council further finds that Kittelson's evidence and conclusions are based upon transparent data that is directly responsive to comments and evidence submitted by others. Kittelson responded to each of the multitude of arguments presented by opponents.

Furthermore, the City Council finds that the Applicants' pass-by trip data is quantified and provided as Appendix A to Applicants' Request for Remand, Exhibit C, and is discussed throughout the analysis provided in Exhibit C and meet this SAR provision as well. *See, e.g., Applicants' Request for Remand, Exhibit C, p. 8-13, 16, 25.* The City Council rejects claims and evidence to the contrary. The City Council finds that the 2018 Kittelson traffic study and supplemental documents are consistent with SAR 6.33(h).

SAR 6.33(i) provides:

"Mitigation. The TIA shall identify and propose transportation system improvements that will restore the operations to a level of service not exceeding pre-development conditions, for each applicable horizon year from the proposed development. The proposed improvements shall:

- "(1). Be described and/or designed in sufficient detail for the City to determine if they meet the Design Standards.
- "(2). Identify required ROW acquisition or dedication.
- "(3). Be accompanied by an estimate of construction costs and ROW acquisition if applicable."

The City Council finds that the mitigation requirements of SAR 6.33(i) do not apply to this Application for Site Plan Review because the Application has been exempted from being required to provide a SRC 803 TIA and thus comply with the SARs at all. Moreover, the City Council further finds that all necessary traffic mitigation for a shopping center even larger than the proposed shopping center, were adequately mitigated by the 2007 Decision. Regardless, in the alternative only, the City Council finds that the 2007 Decision's required traffic mitigation and the analyses in the 2018 Kittelson traffic study and supplemental documents demonstrate that mitigation is provided and so the traffic analyses provided are consistent with SAR 6.33(i).

The City Council reiterates that the only SAR standards that could be applied to site plan review are those that can reasonably inform its terms – standards which look at the adequacy of the driveways serving the proposed development and the immediately adjacent streets.

The City Council finds this SAR requires only a TIA that shows the proposed development will not change the “level of service” of relevant transportation system intersections. The City Council finds that the terms “restore the operations to a level of service not exceeding pre-development conditions” refers to predevelopment LOS at intersections. In other words, the pre-and post-development intersection LOS must not change. The City Council finds that this SAR does not refer to v/c. The required intersection level of service is reflected on the chart at SAR 6.33(a) (at 006-51), which requires a level of service for signalized and unsignalized intersections of “LOS E”. The City Council finds that SAR 6.33(i) is met so long as affected street intersections do not fall below LOS E, under a proposal. The City Council finds that the evidence demonstrates for the immediately adjacent intersections²⁵ – the only potentially relevant ones – all remain at or above LOS E. This SAR is met. The City Council finds that contrary evidence and argument is less credible and is rejected. The City Council expressly chooses to rely upon the Kittelson analysis and adopts it as its own.

Further, the City Council finds that there is no need to provide an “estimate of construction costs and ROW acquisition” and that doing so is not “applicable.” The City Council finds that SAR 6.33(i)(3) is only “applicable” when ROW and construction costs will fall to the City. This is not the case here. Where the transportation mitigation is provided only by private parties, there is no need to provide construction and ROW costs and so the requirement is not “applicable” here.

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

The City Council concludes that the 2018 Kittelson traffic study is not required to satisfy, but nevertheless does satisfy, the City’s TIA requirements that could apply to site plan review.

²⁵ The City Council finds that these immediately adjacent streets are Battlecreek and Kuebler; Kuebler and 27th and Battlecreek and Boone.

Particular to the site plan review standards, the City Council finds that the Applicants' 2018 Kittelson traffic study demonstrates that the transportation system will provide for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, as required by SRC 220.005(f)(3)(B). The City Council also finds that the Applicants have already demonstrated that "negative impacts to the transportation system are mitigated adequately" by complying with the 2007 Decision. In the alternative, the City Council demonstrates above and below that "negative impacts to the transportation system are mitigated adequately" with the combination of the 2007 Decision and this decision.

The City Council finds that the credible and persuasive evidence in the record demonstrates that the roundabout at the 27th Avenue SE site access, which was specifically requested by the City Traffic Engineer, will safely and efficiently move traffic not only into and out of the proposed development, but will also move residential traffic more efficiently into and out of the affected neighborhoods. While irrelevant to the site plan review approval criteria, the traffic calming measures, which are required by the 2007 Decision will mitigate for potential speeding impacts that some opponents have expressed concern about.²⁶ The required \$5,000 will be paid to the City to use in appropriate mitigation. The other improvements required by the 2007 Decision, such as the right-turn-in only access from Kuebler Boulevard, which has already been implemented as part of the Kuebler Boulevard improvements, also helps satisfy this requirement.

The evidence in the record also demonstrates that the on-site circulation will be safe and efficient as required by SRC 220.005(f)(3)(C). The only issue raised by opponents relevant to this standard is that the fuel station has insufficient queueing space and that Kittelson's analysis and conclusions were inadequate because Kittelson failed to show the data and calculations used in reaching its conclusion. In response, Kittelson provided in great detail the basis for its conclusions, which the City Council finds demonstrated that opponents' concerns were mistaken and that the fueling station will operate safely and not create any on-site or off-site safety issues (including

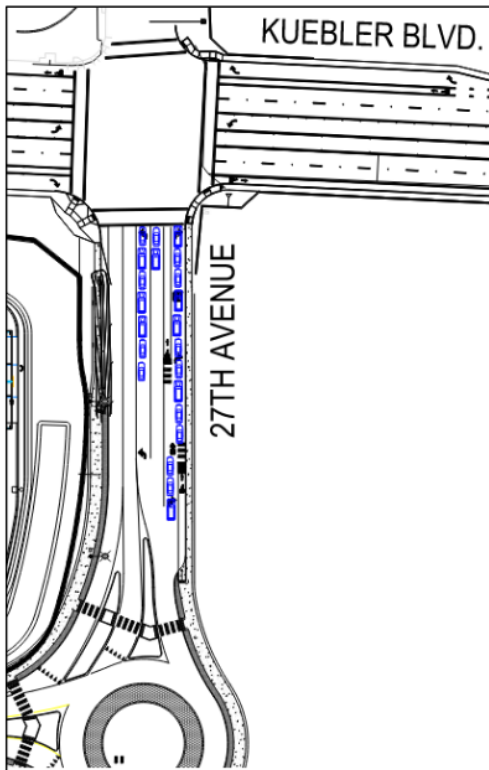
²⁶ The 2007 Decision includes the following condition of approval:

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

queueing) and will operate efficiently. See, Applicants' Rebuttal Argument, Attachment 5, p. 14-16.

Opponents also argued that northbound left turn movements at the Kuebler Boulevard and 27th Ave. intersection "could very well be stuck behind this 342' queue." However, the City Council finds that this concern is based upon incorrect math. In the July 28, 2020 Greenlight comment to this effect, Greenlight mistakenly adds the northbound left turn, through lane and right turn lane queue lengths together to claim error regarding the northbound left-turning and through vehicles. This is mistaken. In Kittelson's *Response to July 28, 2020 Remand Response Comments memo* (dated August 12, 2020), Exhibit 4 (reproduced below), shows how the northbound queues **can** be accommodated for the 2019 PM peak hour scenario. If one more vehicle were to be added to the right-turn lane (as to represent the 2021 PM peak hour scenario 95th percentile queue estimate), then the right-turn queue would still not block the other lanes nor extend into the 27th Ave. roundabout.

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



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

The City Council concludes that the evidence in the record demonstrates that the proposed development is consistent with the site plan review transportation requirements set forth under SRC 220.005(f)(3). The City Council finds the Kittelson

analyses more credible and persuasive than the opponents' including Greenlight. The City Council adopts the Kittelson analyses as its own.

V. Specific Responses to Other Traffic Issues

This section responds to various arguments presented by opponents.

- a. *The City Council Finds that the Applicants Have Not "Implicitly Admitted" That a TIA Appropriate For a Plan And Zone Change, is Required For Site Plan Review.*

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

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

The Applicants are on record stating that no new comprehensive TIA – of the type that was performed for the comprehensive plan amendment and zone change in 2006 – is required for site plan review. That is an accurate statement, as is confirmed in the Public Works Director's memorandum and this Decision. But that does not mean that an analysis of traffic to establish the adequacy of internal circulation and of access into and out of the shopping center, is inappropriate. The Applicants' 2018 Kittelson traffic study demonstrates the adequacy of internal circulation and traffic into and out of the shopping center. It also performs a sensitivity check on the continued validity of the 2006 TIA in the particulars requested by City staff. As a technical matter, the City Council finds that no standard required the Applicants to perform the sensitivity check

requested. But consistent with the manner in which the Applicants have always gone about developing this property, they were willing to accede to City staff's request.

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

b. The Transportation System Mitigation Exactions From the 2007 Decision Are Scaled For a Project of 314,000 Square Feet Of GLA and Those Improvements Offset the Transportation Impacts From the Proposed Development.

The proposed development is for a retail shopping center of 189,550 square feet of GLA, that will be used in conjunction with the medical clinic and medical office uses currently on the site for a unified shopping center of 228,062 square feet of GLA. Yet, with respect to transportation, the Applicants have or will implement mitigation measures for traffic impacts that would result from a similar development of 314,000 square feet of GLA. The City Council rejects opponents' evidence and argument that the Applicants will not mitigate for the impacts to the transportation system that generate from the significantly smaller proposed shopping center.

There is no legal theory that allows the City, after it has imposed exactions that more than compensate for the impacts to the transportation system caused by the approved unified shopping center, to impose further exactions for those very same

impacts. Doing so would violate the principles of Constitutional takings law set forth in *Nollan* and *Dolan*.²⁷

Many opponents either repeat arguments against the 2006 traffic analysis for the 2007 Decision that were raised in, or raise arguments that could have been raised in, *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008). However, this is improper. The City Council in the 2007 Decision expressly held:

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

The City Council finds that opponents cannot now argue that the 2006 TIA was incomplete, inadequate, and unreliable to argue that the mitigation measures that relied on that evidence are incomplete or inadequate. Doing so is an impermissible collateral attack on the prior decision and the evidence behind the decision. *Just v. Linn County*, 59 Or at 236; *see also, Olson v. City of Springfield*, 56 Or LUBA 229, 233 (2008) (cannot challenge the underlying data behind a prior land use decision in a later application that relies on the prior decision); *Graser-Lindsey v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2016-044, November 22, 2016) (cannot challenge data behind prior adopted TSP in subsequent appeal of application that relies on TSP).

The City Council adopts the explanation in the Kittelson August 12, 2020 rebuttal to opponents’ July 28, 2020 submittal (Applicants’ Rebuttal Attachment 5):

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

²⁷ *Nollan v. California Coastal Com.*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987) (establishing “essential nexus” test); *Dolan v. City of Tigard*, 512 Us 374, 114 S Ct 2309, 129 L Ed2d 304 (1994) (establishing “rough proportionality” test).

requirements otherwise expressed in the City's regulations." Applicants' Rebuttal Attachment 5, Page 2.

The City Council also agrees that the consequence of the City Council imposing the significant and comprehensive mitigation measures in the 2007 Decision is appropriately explained in the Kittelson rebuttal:

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

The City Council rejects evidence and argument to the contrary as less credible and persuasive.

c. Greenlight's Objections to Signal Timing Adjustments Lack Merit

The Applicants' traffic supplement dated July 21, 2020, explains that a modest signal timing adjustment at the Battle Creek Rd. and Kuebler Boulevard intersection will maintain operational compliance with all relevant mobility standards.²⁸ The City Council finds that signal timing and phase adjustments will have to be made to accommodate the planned off-site traffic signal improvements that are required conditions of approval from the 2007 Decision.²⁹ The City Council further approves the proposed signal timing adjustment. The City Council finds that adjusting signal timing as the Applicants' propose is a standard transportation procedure that occurs whenever adjustments (addition of signals, turn lanes, etc.) on a transportation system occur regardless of the property type. As such, the fact that retiming of traffic signals will occur, provides no basis for denial of site plan review. The City Council rejects evidence and argument to the contrary.

d. Traffic Information Relied Upon by the City Council.

²⁸ Kittelson Memoranda dated July 21, 2020 – Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments, p 4.

²⁹ Kittelson explained in its July 21, 2020 Supplement, at p 4: "It is important to note that signal timing and phasing adjustments will be made at the signalized intersections along Kuebler Boulevard to accommodate the planned off-site traffic signal improvements, which are required conditions of approval from the 2007 year zone change decision for the site, regardless of the final development uses or horizon year."

The transportation materials that the City Council relies upon are the 2006 TIA and 2007 Decision and the following Kittelson reports:

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

The City Council finds the above Kittelson materials to be more credible than those of Greenlight and other opponents. The City Council finds that the Kittelson evidence and conclusions are accurate and reliable and credible. Kittelson's traffic analysis have been tested and validated in response to criticisms.

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

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

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

“*** on March 3rd, 2020 member foot traffic ran 28% up over last year. This was reflected in long lines in the building and long lines back to the freeway entrance trying to enter the parking lot. ***

“Because of the increase in out of stocks, limits were imposed on select items prior to opening on March 3rd, at the direction of our corporate office. These items included water, bath tissue, rice, beans, sugar, flour and dog food.

“The above-mentioned spikes in sales created an environment where members would run through the store to get to those items first, forcing us to manage the flow into the building. Due to the member foot traffic and increased parking lot traffic, we hired an additional 40 employees to help manage the sudden increase in traffic into the building.”³⁰

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

³⁰ Kittelson August 12, 2020 Response Memo, Attachment 1, p 1.

“*** on February 27th, 2020 Foods sales ran up 13.1% over last year. Key staple items *** saw significant increases in volume. This was when we began to show panic buying in key paper goods and sundry items.

“The jump in foot traffic and sales resulted in out of stock situations in key items such as bath tissue, paper towels, disinfecting wipes etc.”³¹

Kittelsohn points out that it is improper to rely upon traffic counts taken during such disruptive conditions as those the City experienced on Feb 27, 2020 and March 3, 2020. Kittelsohn cites and attaches an ODOT memorandum to that effect, entitled “Traffic Volume Development During Disruptive Events”.³² That memo expressly states: “Caution should be exercised in taking new traffic counts during disruptive events. New traffic counts should only be taken during disruptive events when it is determined that the data already available is not sufficient for decision making.” The data already available – the counts relied upon in the May 2018 Kittelsohn traffic study supporting the Site Plan Review Application – is sufficient for decision making. There is no credible evidence otherwise. The Applicants’ traffic counts are appropriate and reliable.

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

The Applicants’ traffic supplement dated July 21, 2020, explains that a modest signal timing adjustment at the Battle Creek Rd. and Kuebler Boulevard intersection will maintain operations compliance with all relevant mobility standards.³³ We do not disagree that additional signalized intersections along Kuebler Boulevard may need to be studied more in depth before implementing signal timing changes. In fact, the Applicants stated in their July 21, 2020 Supplemental Analysis memo, that they are willing to pay for a signal retiming study, which would be coordinated with the City and ODOT. There can be no dispute that signal timing and phase adjustments will have to be made to accommodate the planned off-site traffic signal improvements that are required conditions of approval from the 2007 Decision.³⁴

³¹ Kittelsohn August 12, 2020 Response to Comments Attachment 1, p 64.

³² Kittelsohn August 12, 2020 Response to Comments, Attachment 1, p 57.

³³ Kittelsohn Memoranda dated July 21, 2020 – Supplemental Traffic Analyses in Response to Greenlight Engineering December 2018 Comments, p 4.

³⁴ Kittelsohn explained in its July 21, 2020 Supplement, at p 4: “It is important to note that signal timing and phasing adjustments will be made at the signalized intersections along Kuebler Boulevard to accommodate the planned off-site traffic signal improvements,

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

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

The evidence establishes that the highest peak hour for traffic volumes on Kuebler Boulevard is the weekday PM peak hour.³⁵ This is the analysis used by Kittelson and is correct. Greenlight asserts the analysis peak hour should have been the Saturday mid-day peak. Greenlight is wrong.

The quest for the traffic peak hour is a quest for the period when traffic volumes – for both the shopping center and background traffic together – are their highest. While Costco may have greater trip generation at the Saturday mid-day hour, that is not the critical peak hour period that must be used to determine traffic impacts. This is because the overall background volume of traffic on Saturday during the mid-day is much lower than during the week, so the overall volume of traffic entering the intersection, at the respective peaks, is highest during the weekday afternoon, peak hour. It is basis that the highest total traffic volume per hour, that matters.

The Kittelson May 2018 transportation analysis establishes the weekday PM peak hour results in a total entering vehicle count at Battle Creek and Kuebler – 4,705 vehicles entering per hour. This is to be contrasted with the Saturday mid-day peak, which is lower – 4,320 vehicles entering per hour.³⁶ The total weekday PM peak hour entering vehicle count at the I-5 southbound ramp/Kuebler Boulevard is similarly higher at 3,682 vehicles per hour than the Saturday mid-day peak hour which has 3,400 vehicles per hour.

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

which are required conditions of approval from the 2007 year zone change decision for the site, regardless of the final development uses or horizon year.”

³⁵ Kittelson May 2018 Traffic Analysis, p. 6-7.

³⁶ See Kittelson May 2018 Traffic Analysis, Figure 11, bubble 1 and Figure 12, bubble 2.

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

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

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

With regard to Greenlight's demand for an AM peak hour analysis, this repeats a previous comment that was fully addressed in Kittelson's November 29, 2018, Memo pages 3-4. The answer is the same – the AM peak traffic volumes are lower than those attributed to the PM peak hour. As such, it is not appropriate to use the AM peak hour.³⁷

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

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

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

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

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

³⁷ Kittelson June 6, 2020 – Response to Greenlight Engineering comments (page 22).

“the existing right-in only access driveway from Kuebler Boulevard was a Condition of Approval from CPC/ZC06-6 and was constructed as part of a City capital improvements project, years ago. This ***existing*** access is not subject to reevaluation in this proceeding.” Applicants’ Rebuttal Attachment 5, p. 21 (emphasis in original).

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

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

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

The City Council rejects opponents’ arguments regarding the Kuebler Boulevard entrance.

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

In a brief challenge that presented a range of different arguments, Greenlight contends that the Application fails to provide evidence that the 27th Avenue SE Driveway Access Permit requirements are met. The City Council rejects opponents’ claims that the driveway access permit requirements are not met. The City Council finds that the 27th Avenue SE Driveway Access Standards are all met and finds Kittelson’s analysis in this regard to be more credible and persuasive, and adopts them as the City Council’s own.

Opponents make two arguments that warrant specific response. The first argument contends, “the queuing at the Kuebler Boulevard/27th Avenue intersection will likely spillback into the roundabout at the 27th Avenue/Site Access intersection.” The City Council rejects this speculation. As Kittelson’s response to the statement explains, “Greenlight Engineering takes an overly simplistic and *** incorrect approach by adding

different northbound approach lane PM peak hour 95th percentile queue lengths together to state that there would be 525 feet of queues.” Applicants’ Rebuttal Attachment 5, p. 17. Kittelson’s analysis includes 95th percentile queues for the intersection and a diagram of what the northbound approach vehicle queues would look like. Kittelson explains:

“[T]he estimated northbound 95th percentile queues during the PM and Saturday midday peak hours can be accommodated by the planned 27th Avenue design. Northbound approach vehicle queues will not back-up from Kuebler Blvd to the 27th Avenue roundabout, nor will cars be trapped in the 27th Avenue roundabout.” Applicants’ Rebuttal Attachment 5, p. 17.

The City Council accepts Kittelson’s analysis as the more credible and persuasive and rejects opponents’ evidence and argument to the contrary.

Opponents’ second argument contends “the TIA fails to provide substantial evidence that queues from the fueling depot will not spillback onto 27th Avenue.” Kittelson also directly responded to this argument and further supplemented the fuel station queuing data based on data from other Costco stores. That analysis explains that larger fuel stations with 24 to 30 fueling positions process peak demand efficiently and thus reduce waiting times, vehicle queuing and vehicle idling. The City Council finds that the proposed development has a capacity to handle 82 vehicles at any given time, with 30 vehicles at the fueling positions and 52 vehicles in queue. The City Council finds that the data shows the estimated maximum peak hour queue ranges from between 8 and 13 vehicles, which can be accommodated by the proposal without spilling onto 27th Avenue SE as opponents contend. Applicants’ Rebuttal Attachment 5, p. 14-16.

The City Council concludes that the evidence in the record demonstrates that the driveway approach approval criteria for the 27th Avenue SE and Boone Road SE have been met and approve the Driveway Approach Permit. The City Council rejects evidence and argument that City Driveway Approach Permit criteria are not met.

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

An opponent presented evidence of four distinct crashes at the Battle Creek Road/Kuebler Boulevard intersection over a 6-month timeframe, presumably to show crashes happen. The City Council finds that this comment presents nothing that undermines any of the Applicants’ traffic analyses or reports. Rather, the City Council

finds that it supports Kittelson's data, which shows the historical crash data showed an average of 7 – 8 crashes occurring each year. Therefore, the resulting crash rate at that intersection reported in this comment is entirely consistent with the historical rate documented in the May 2018 Kittelson traffic study and below the required ODOT 90th percentile rate.³⁸

The comment also presented four crashes at the Battle Creek Road/Boone Road intersection. The City Council finds persuasive Kittelson's response in its November 29, 2018 Response to Comments, that the Battle Creek Road/Boone Road intersection is a stop-controlled intersection that was identified in the May 2018 Kittelson traffic study for having a crash rate that exceeds the ODOT 90th percentile rate. As Kittelson also explained, signalization of that Battle Creek Road/Boone Road intersection is Condition 1 to the 2007 Decision that will improve that intersection's safety performance. The City Council finds that the traffic signal at the Battle Creek Road/Boone Road intersection is part of the proposed development, that will be installed when the City approves the Application. The City Council finds that there is nothing about this comment that can result in denial of the Application. Rather, it corroborates Kittelson's analysis and emphasizes one of the many transportation benefits of approving the Applicant so that the final 2007 conditions of approval like the aforementioned signal, can be constructed and installed.

I. The Proposed Development is Not "Too Close" to Residential Neighborhoods.

Several opponents argued that the proposed development are "too close" to residential neighborhoods and that such larger retail shopping centers are typically built in other areas, farther away from residential uses. The City Council rejects these claims for several reasons.

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

Moreover, one of the primary reasons why the City Council in 2007 decided to change the comprehensive plan designation and zoning for the subject property was that there were inadequate commercial opportunities for commercial development to

³⁸ Kittelson November 2018 Traffic Analysis, p. 3-4.

serve the growing residential development in the south part of the City.³⁹ The City Council wanted this development to be near residential uses. Second, the City Council understood in 2007 that the unified shopping center it was approving would be significant in size – up to 299,000 square feet of GLA – and had been presented with a range of potential commercial users for the property that had individual building sizes even larger than the proposed Costco.

Opponents may not relitigate the issue of whether a Costco is a suitable retail store for the shopping center approved in 2007. The City Council finds that LUBA held that it was, and this determination was affirmed by the court of appeals. Opponents cannot now argue, again, that the proposed Costco store is not a use authorized by the 2007 Decision.

Additionally, the evidence in the record demonstrates that retail stores of the size of the proposed Costco store are typically located adjacent to residential neighborhoods as the proposal is here. The City Council finds persuasive the diagram submitted by Jeff Olson as an exhibit to his July 28, 2020 letter which demonstrates, the WinCo Foods, Fred Meyer, and Walmart stores, all located along Commercial Street SE, are adjacent to or surrounded by residential uses. The City Council finds that to the extent it is relevant, that the proposed shopping center is not “too close” to residential neighborhoods.

m. Issues that the Request for Approval of up to 30 Fueling Positions Cannot be not Allowed

Some opponents contended that the proposed fueling station will be for commercial truck fueling. The City Council finds this is incorrect. The City Council finds that the proposed fuel station is designated only for Costco customers and not commercial fueling. Another opponent claimed that the proposed fueling station is an “industrial fueling station.” The City Council finds that this too is incorrect. The City Council finds that both LUBA’s decision and the decision of the court of appeals characterized the fueling station as a “retail fueling station.” In its briefing to LUBA and the court of appeals, the Applicants characterized the fueling station as retail

³⁹ For example, the 2007 Decision, p. 34, explains: “The location of the property is central to the surrounding residential neighborhoods that are otherwise a block of residential uses lacking in bikeable or walkable commercial shopping and service opportunities. The proposal includes a number of bike and pedestrian improvements that will further facilitate alternative modes of transportation for a meeting with friends, eating, shopping or medical services opportunities.”

facilities. The City Council finds that the evidence in the record establishes that the proposal is for a 30-position fueling station that is solely for the convenience of Costco's customers. *See also* Kittelson November 29, 2018 traffic memorandum, p. 21. The City Council rejects claims to the contrary. The City Council also finds that this issue is settled by the characterizations of the appellate review authorities who have characterized the proposed fueling station as retail facilities.

n. Issues that the City Council Chooses not to Revisit.

Whether because they are well-outside of the scope of remand, or because the principles of raise-it-or waive it or issue preclusion apply, or because the matter was resolved by LUBA or the Court of Appeals, the City Council will not revisit a range of issues and arguments raised by opponents in this proceeding. These include, but are not limited to, the following issues: sewer, stormwater, fire and other emergency services, light pollution, noise and air pollution, crime, property values, the suitability of other locations, tribal lands, the impact on downtown shopping, and whether Costco is a regional store not authorized by the 2007 Decision. The City Council expressly rejects these issues as irrelevant to this proceeding.

3. Remaining Site Plan Review Approval Criteria.

As noted above, the City Council agrees with the Applicants' and Mr. Condit's legal opinion (that substantially agrees with the Applicants') that the Applicants have a vested right to develop the shopping center they propose, which is entirely consistent with the shopping center the City Council approved in 2007 Decision. The City Council agrees with Mr. Condit's determination that the City cannot impose additional traffic mitigation requirements on the Applicants, and that the Applicants are entitled to develop their property with the uses and square footage expressly approved in the 2007 Decision as they have laid it out. As the City Council has explained throughout this Decision that affects how the City's site plan review standards are applied. They may not be applied to deny the proposal. And the City Council finds that some standards are inapplicable. Specifically, SRC 220.005(f)(3)(B) regarding demonstrating that negative impacts to the traffic system are mitigated, has already been resolved by the 2007 Decision and its conditions. However, as explained above, in the alternative, the City Council finds that standard means the Applicants need only show the immediately abutting streets are adequate, which can be satisfied with reference to the 2007 Decision and Conditions. The City Council explores this in greater detail below.

Against this backdrop, the City Council finds the following.

Pursuant to SRC 220.005(f)(3), an application for Class 3 site plan review shall be granted if:

Criterion 1:

SRC 220.005(f)(3)(A): The Application meets all applicable standards of the SRC.

The Applicants request permission to develop a new retail shopping center, including four retail shop buildings which collectively equal 21,000 square feet, a 168,550 square foot building for Costco, and a Costco fueling station with up to 30 pump positions.

The following sections of this Decision outline the applicable standards of the SRC. The City Council notes that the conditions of approval from the 2007 Decision are deemed development standards under the SRC. The City Council finds that the proposed development meets all relevant standards to this Site Plan Review Application and approves it as submitted subject to the conditions contained in this Decision.

The City Council further notes that it has already in this decision established the proposed development's compliance with the SRC 808 tree standards, SRC 803 traffic standards and SRC SARs in 6.33. The City Council reaffirms those findings here.

SRC 220.005(f)(3)(B).

"The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately;"

The City Council explains throughout this Decision that this standard may not be applied to deny the Applicants' vested right to develop the shopping center it proposes. This standard contains two parts. The City Council interprets the first part of this standard to require adequate access into and out of the site: "provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development." The City Council expressly finds that this part of the standard does not require an analysis of or evidence regarding anything else. While the Applicants' proposed development is required to comply with this standard, the City Council finds that they have established compliance. As explained in detail above, the proposed site plan establishes that access into and out of the site all function adequately and are safe, orderly, and efficient and all arguments and evidence to the contrary is rejected.

The City Council finds that there are four driveways into the site and three driveways out of the site, as follows:

- Existing **right-in only** entrance driveway (no control) on Kuebler Boulevard located approximately 1,200 feet to the west of 27th Avenue,
- Existing full-access driveway (stop control) on Boone Road SE (currently serves the Salem Clinic) located approximately 500 feet to the east of Battle Creek Road,

- Proposed full-access driveway (stop control) on Boone Road located approximately 375 feet to west of 27th Avenue and aligned with Bow Court; and,
- Proposed full-access driveway (single lane roundabout) on 27th Avenue SE located approximately 450 feet to the south of Kuebler Boulevard.

The City Council finds that the preliminary roundabout design for the site driveway and 27th Avenue SE intersection is a single lane circulating, three leg approach roundabout with an inscribed circle diameter (ICD) of 140 feet. The City Council finds that the southbound approach includes a right-turn bypass lane, while the northbound and westbound are single lane approaches. The single lane roundabout is required to be in place and operational as of the date of the Costco store opening for business to the public.

The City Council expressly finds more credible and persuasive the Kittelson analyses that establish that the roundabout at the driveway on 27th Avenue SE will function in a safe, orderly, and efficient manner and will not result in adverse impacts including queuing that interferes with Kuebler Boulevard or the functioning of the roundabout. The City Council rejects claims and evidence to the contrary as less credible and persuasive than the Kittelson reports that support the adequacy of the roundabout and associated driveway.

The City Council finds that the Kuebler Boulevard right in only access was approved in the 2007 Decision and is not subject to reevaluation in this proceeding. Furthermore, the City Council finds that the specific construction of this access was performed by the City as a part of the Kuebler Blvd improvements and is not subject to challenge in this proceeding. The City Council finds that any deviations from particular street or landscape design standards in the City's construction occurred as a consequence of City decisions for the City's reconstruction of Kuebler Boulevard and have no bearing on this Application, are not the responsibility of the Applicants, and the City Council rejects claims and evidence to the contrary. The City Council finds that this right-in only access is safe, orderly, and efficient.

The City Council finds that the existing full-access driveway (stop control) on Boone Road SE (that currently serves the Salem Clinic and the medical office building), that is located approximately 500 feet to the east of Battle Creek Road SE, is safe, orderly, and efficient. The City Council rejects claims and evidence to the contrary.

The City Council finds that the proposed full-access driveway (stop control) on Boone Road SE located approximately 375 feet to west of 27th Avenue SE and aligned with Bow Court is safe, orderly and efficient. The City Council rejects claims and evidence to the contrary.

Regarding the second part of this standard: "negative impacts to the transportation system are mitigated adequately", the City Council has three responses.

First, the City Council finds that this standard cannot be applied at all to the Applicants' proposal because they have a vested right to the development approved under the 2007 Decision and its conditions which fully analyzed and mitigated for a unified shopping center larger than proposed here and that is fully consistent with the shopping center that the Applicants have proposed here.

Second, in the alternative only, applying this standard only requires an evaluation of the adequacy of the immediately abutting streets and no others – which streets are Kuebler/Battlecreek; Battlecreek/Boone and 27th and Kuebler Boulevard. The City Council finds based upon the analysis provided earlier in this Decision, that these streets immediately abutting the property function adequately with the approval of the proposed development for two reasons. First, because these intersections and streets have already been evaluated under the 2007 Decision and the Applicants' vested right allows them to continue to rely upon those determinations. Second, the Kittelson analyses in the record establish that negative impacts to these immediately adjacent streets and their intersections are adequately mitigated. In this regard, the City Council finds that the terms "adequate mitigation" means that these immediately adjoining streets' intersections will not fall below their LOS (but not v/c) established in the City SARs, with the approval of the subject site plan. The City Council finds that these streets intersections will not fall below a LOS E, which is the standard the City finds applies from the City's SARs. The City Council finds that this standard is met. The City Council expressly rejects evidence and argument to the contrary as less credible and persuasive than the Kittelson reports that the City Council relies upon.

SRC 220.005(f)(3)(C) requires that the Applicant establish that "Parking areas and driveways are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians." The City Council finds that this standard is met.

The City Council finds that as shown on the site plan drawing C2.0 Overall Plan, the parking areas and driveways are designed to provide for convenient and proximate access to all buildings in the proposed shopping center development. All required parking is provided on the property, and no off-site parking is required. All driveway entrances serving the property will include sidewalks to provide for pedestrian access from the street to the shopping center, as required by CPC/ZC06-6 Condition (13). The driveways will be at the locations specified by the City to meet spacing standards from existing street intersections and driveways in the area. The internal driveways provide circulation throughout the shopping center for motor vehicles and bicycles to the entries of the buildings. Parking spaces are located adjacent to each building; and then in rows that extend perpendicular to the buildings to provide for safe, convenient, and efficient pedestrian access to the shopping center buildings. Parking is provided within the limits of allowed Code ratios for shopping centers of 1 space per 250 sq. ft. of gross

floor area, SRC Table 801-1. The parking spaces, aisles, and driveways are designed to meet or exceed Code requirements for length and width. Full size parking spaces will be 9'x19' and compact spaces will be 8'x15'. Ten bicycle parking spaces are provided, as required by the formula for shopping center in Table 806-8. Because parking will be proximate to each building, the number of parking spaces will meet the SRC requirement, the internal driveways will provide access to all of the access drives and throughout the property for motor vehicles and bicycles, and pedestrian access is provided on the access driveways, and the design of the parking areas and driveways facilitate the safe and efficient movement of vehicles, bicycles and pedestrians. The City Council finds that this standard is met and finds that the Applicants' evidence is more persuasive and credible than other evidence in the record.

SRC 220.005(f)(3)(D) requires that "The proposed development will be adequately served with City water, sewer, storm drainage, and other utilities appropriate to the nature of the development."

The City Council finds that this standard is met and rejects evidence and argument to the contrary. As shown on the Utility Plans C5.0 and C500, all required City services and utilities are available at adequate levels to serve the proposed development. The property is within a fully urbanized part of the City and all necessary services are available and of sufficient size to serve the proposed development. The Applicants will be required to comply with the City storm and other public facilities standards that were in effect at the time the Application was submitted. The Applicants will install the required utilities on the property.

Comprehensive Plan Change/Zone Change Case No. 06-06, Conditions of Approval:

Condition 1: The intersection of Battle Creek and Boone Roads SE shall be improved to include a traffic signal with dedicated westbound left-turn lane, westbound right-turn lane and an eastbound left-turn lane. The southbound left-turn lane shall be lengthened to provide a minimum of 300 feet of storage.

Finding: This condition remains to be completed. The intersection of Battle Creek Road SE and Boone Road SE shall be improved to include a traffic signal with an eastbound left-turn lane. The southbound left-turn lane shall be lengthened to provide a minimum of 300 feet of storage.

Condition 2: The intersection of Battle Creek Road SE and Kuebler Boulevard shall be improved to provide exclusive right-turn lane and a northbound left-turn lane with a minimum of 300 feet of storage. To provide the necessary northbound left-turn storage at this intersection with the southbound left-turn lane storage at Battle Creek and Boone Roads, side-by-side left turn lanes shall be constructed as approved by the Public Works Director.

Finding: The condition states, "side-by-side left-turn lanes shall be constructed as approved by the Public Works Director." The Applicants have proposed a design which includes dual northbound left-turn lanes which provide a minimum of 300 feet of storage. The design also provides the required side-by-side left-turn lane configuration. The City Traffic Engineer has reviewed the proposed design and concurs that it will provide the necessary storage for the left-turn lanes at the intersection of Battle Creek Road SE and Kuebler Boulevard, and the intersection of Battle Creek Road SE and Boone Road SE, and is consistent with the intent of the original condition.

Condition 3: The south side of Kuebler Boulevard shall be widened to meet City of Salem Standards with curb, sidewalk and bike lanes. The widening shall extend from 1500 feet west of Battle Creek Road SE to the Interstate 5 ramps to provide an additional lane for a total of two eastbound lanes.

Finding: Capital Improvement Plan project number 713513, which included the widening of Kuebler Boulevard extended from 1500 feet west of Battle Creek Road SE to the Interstate 5 ramps, was accepted as complete on March 5, 2018. The required improvement has been completed.

Condition 4: Dual left turn lanes shall be constructed on eastbound and westbound Kuebler Boulevard at 27th Avenue SE. Only one eastbound left-turn lane will be striped as there is only one receiving lane. For the westbound left turn lanes, an additional receiving lane shall be constructed which will drop immediately south of the subject property's driveway on 27th Avenue SE. The intersection of Kuebler Boulevard at 27th Avenue SE shall also be improved to provide an exclusive eastbound right-turn lane.

Finding: The condition is partially complete. Remaining improvements include installation of striping for dual left-turn lanes on westbound Kuebler Boulevard at 27th Avenue SE. For the westbound left-turn lanes, an additional receiving lane shall be constructed, which will drop immediately south of the subject property's driveway on 27th Avenue SE.

Condition 5: In addition to boundary street improvements required by Salem Revised Code (SRC) 77.150, the developer shall coordinate with the City and use best practices for design and location of site access and shall construct left-turn lanes and pedestrian refuge islands where appropriate.

Finding: Capital Improvement Plan project number 713513, which included the widening of Kuebler Boulevard extended from 1500 feet west of Battle Creek Road SE to the Interstate 5 ramps, was accepted as complete on March 5, 2018. The required improvement has been completed.

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

Finding: This condition remains to be complete. If no need for traffic calming measures is identified, the developer may provide a bond or security deposit in the amount of \$5,000 to be dedicated to mitigation for future impacts that may not anticipated at this time.

Condition 7: The developer shall provide right-in access from Kuebler Boulevard with a design that minimizes impact to through vehicles and provides a safe driveway crossing for bicycle and pedestrian traffic the final design of which to be approved by the Salem Public Works Director. In addition, the developer shall complete the widening of the eastbound lanes of Kuebler Boulevard west to Commercial Street. This additional widening of approximately 1300 feet of Kuebler Boulevard is considered as payment for a grant of access on Kuebler Boulevard to allow a right-in driveway on the Subject Property.

Finding: Capital Improvement Plan project number 713513, which included the construction of the right-in access from Kuebler Boulevard to the subject property, was accepted as complete on March 5, 2018. The required improvement has been completed.

Condition 8: The developer shall offset their access driveway along Boone Road SE from Cultus Avenue at a location approved by the Salem Public Works Director.

Finding: The shopping center has an existing driveway along Boone Road SE that is offset from Cultus Avenue SE, the proposed site plan shows one additional driveway on Boone Road SE that is directly across from Bow Court SE, in compliance with this condition of approval.

Condition 9: The developer shall establish a landscaped setback along the street frontages of the project area to provide buffering and screening from the street frontage. Along Kuebler Boulevard, the setback shall be a minimum of five (5) feet in depth from the property line, as required in the CR Zone, Salem Revised Code (SRC) 152.080. Along Boone Road SE and 27th Avenue SE, the setback shall be a minimum of fifteen (15) feet in depth where the project area lies opposite residential uses.

Finding: The Costco building and vehicle use area setbacks provided along Boone Road SE and 27th Avenue SE, opposite of residential uses and residentially zoned

property, are greater than 15 feet in depth, in compliance with this condition of approval.

Condition 10: The developer shall provide sidewalks along all street frontages. The sidewalks may be located inside the setback area as part of a landscape plan.

Finding: This condition is partially complete. The developer shall provide sidewalks along all remaining street frontages. The sidewalk shall be located along the curb line only where needed to reduce conflicts with the previously mitigated wetland areas; all other sidewalks shall be located parallel to and one foot from the adjacent right-of-way.

Existing sidewalks are provided along the Kuebler Boulevard, a portion of Boone Road SE and Battle Creek Road SE street frontages. Sidewalks will be provided along 27th Avenue SE and the remaining portion of Boone Road SE.

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

Finding: Required setback areas adjacent to a street are proposed to be landscaped consistent with the landscaping requirements as conditioned, and as required by SRC Chapter 807 (Landscaping and Screening) which replaced SRC 132 (Landscaping) in the SRC in 2014. The landscaping standards for street frontage did not change.

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

Finding: Prior to issuance of building permit, the Applicants are required to identify which screening method will be provided along the Boone Road SE and 27th Avenue SE frontages.

Condition 1: Prior to issuance of building permit, the Applicants shall identify which screening method will be provided along the Boone Road and 27th Avenue frontages in compliance with CPC/ZC06-6 Condition 12.

Condition 13: The developer shall provide sidewalks at all driveway entrances to the development. The internal pedestrian accessway shall be distinct from the vehicular travel lanes by means such as striping, distinctive pavement, elevation, or other method that clearly distinguishes the area for pedestrian travel from vehicle travel.

Finding: The proposed site plan provides for internal pedestrian pathways leading to the main entrance for Costco, however, the internal pedestrian pathway does not connect the other buildings within the shopping center. Internal pedestrian pathways shall be provided throughout the development site connecting to each building.

Condition 2: Prior to issuance of building permit, the site plan shall be revised to provide internal pedestrian pathways which connect each of the proposed buildings within the shopping center, and which connect to public sidewalks along adjacent streets. The internal pedestrian pathways shall be distinct from the vehicular travel lanes by means such as striping, distinctive pavement, elevation, or other method that clearly distinguishes the area for pedestrian travel from vehicle travel.

Condition 14: The subject 18.4 acre property shall be developed with a retail shopping center. The maximum amount of gross leasable area (GLA) for the retail shopping center on the subject property shall be 240,000 GLA. If the subject property is developed in conjunction with the abutting 10.08 acre property (for simplicity referred to as a 10.0 acre property) currently owned by the Salem Clinic (083W12C tax lot 702 5.5 acres and 083W11D tax lot 600 4.58 acres), the total amount of retail GLA and medical/dental offices on the two properties shall not exceed 299,000 GLA). The City shall have the right to enforce this condition through the enforcement procedures in its code or through a post acknowledgement plan amendment using required City and state procedures restoring the Residential plan designation and RA zone to the property.

Finding: The combined gross floor area for retail buildings within the proposed shopping center is approximately 189,550 square feet. The total floor area for the two-existing medical/dental office buildings (Salem Clinic) are approximately 38,512 square feet in size. The combined gross leasable area for the shopping center development site is approximately 228,062 square feet, less that the maximum amount of gross leasable area allowed for the subject property.

Condition 15: All improvements shall be built as outlined as set forth in the November 21, 2006 staff report to City Council, including the widening of Kuebler Boulevard from the I-5 Interchange to Commercial Street and the right-in access from Kuebler to the property (except as modified by this Order).

Finding: Capital Improvement Plan project number 713513, was accepted as complete on March 5, 2018. The required improvement along Kuebler Boulevard has been completed, all remaining improvements from CPC/ZC06-6 will be built as discussed in the findings of this Decision.

Condition 16: Prior to issuance of a certificate of occupancy for any building on the subject property the following traffic improvements shall be completed; 1) The funded City CIP project to construct improvements on Kuebler Boulevard as identified in the Applicants' September 2006 TIA; 2) All traffic mitigation improvements required to be constructed by the Developer as conditions of approval in this decision, and; 3) In addition to the other traffic mitigation improvements required as conditions of approval, the Developer shall construct an exclusive right-turn lane at the westbound Kuebler Boulevard intersection with 27th Avenue. The traffic improvements that the Developer is responsible for, in addition to the right-turn lane at westbound Kuebler and 27th Avenue, are as specified in conditions of approval 1 through 7 of this decision.

Finding: Capital Improvement Plan project number 713513, was accepted as complete on March 5, 2018. The required improvement has been completed.

Condition 17: The Applicants, at the time of development application, shall coordinate with the Salem Area Transit District to enhance transportation and bus facilities on the site.

Finding: The Applicants have contacted Cherriots Transit regarding enhancement of transportation and bus facilities on the site. Cherriots Transit has responded with a recommendation for additional transit stops along Boone Road SE. In addition, Cherriots has requested that wider sidewalks be provided to accommodate bus stops, and that the location for the stops should be close to street lighting. If space is available, Cherriots will consider adding a shelter. Pursuant to Condition 17, the Applicants shall continue to coordinate with Cherriots to enhance transit opportunities for the proposed development.

As indicated in the findings above, some of the conditions of approval from CPC/ZC 06-6 have been complete or are partially complete. All remaining conditions shall be complete prior to final occupancy for the proposed development.

Condition 3: All remaining unsatisfied conditions of approval from CPC/ZC06-06 as specified in the November 30, 2015, "Certificate of Partial Satisfaction of Conditions of Approval and Deferral Agreement" shall be completed prior to final occupancy for the proposed development.

Development Standards – CR (Retail Commercial) Zone:

SRC 522.005(a) – Uses:

Finding: The proposed development includes four retail shop buildings, a 168,550 square foot building for Costco store, and a retail fueling station with up to 30 pump positions. Permitted, special and conditional uses for the CR zone are found in SRC Chapter 522, Table 522-1. The proposed retail sales use (Costco) and gasoline service station are listed as outright permitted uses in the CR zone per Table 522-1.

Future uses for the proposed retail shop buildings will be determined at the time of occupancy permit; Class 1 Site Plan Review will be required to determine permitted uses in the proposed retail shop buildings.

SRC 522.010(a) – Lot Standards:

There are no minimum lot area or dimension requirements in the CR zone. All uses are required to have a minimum of 16 feet of street frontage.

Finding: The subject property consists of eight tax lots with a combined size of approximately 23.96 acres in size and has approximately 108 feet of frontage along Battle Creek Road SE, 1,855 feet of frontage along Kuebler Boulevard, 750 feet of frontage along 27th Avenue SE and 1,112 feet of frontage along Boone Road SE, exceeding the minimum lot standards of the CR zone.

SRC 800.015 provides that every building or structure shall be entirely located on a lot. Where two or more lots are under single ownership to accommodate a single development, the entire combined area shall be considered as a single lot for purposes of the SRC. However, the Building Code does not allow buildings to cross over existing property lines. SRC 205.065(a) provides that the property boundary verification process may be used whereby the outside boundary of two or more contiguous units of land held under the same ownership may be established as the property line for purposes of application of the Building Code.

Condition 4: Prior to building permit issuance, where a proposed building crosses over an existing property line, either (1) pursuant to SRC 205.065, a property boundary verification shall be recorded, or (2) a property line adjustment shall be recorded to remove or relocate the property line.

SRC 522.010(b) – Setbacks:

Setbacks within the CR zone shall be provided as set forth in Tables 522-3 and 522-4.

Kuebler Gateway Shopping Center East:

Buildings include Gas Station, Costco Store, and Retail Shop Building

North: Adjacent to the north is right-of-way for Kuebler Boulevard. There is a minimum 5-foot building setback and a minimum 6-10 foot vehicle use area setback adjacent to a street.

Finding: The proposed off-street parking area is setback approximately 10 feet from the property line adjacent to Kuebler Boulevard, in compliance with the minimum standard. The proposed buildings are setback from the property line adjacent to Kuebler Boulevard as follows:

- Gas Station – Approximately 75 feet
- Costco Store – Approximately 395 feet
- Retail Shop Building – Approximately 10 feet

South: Adjacent to the south is right-of-way for Boone Road SE. There is a minimum 5-foot building setback and a minimum 6-10 foot vehicle use area setback adjacent to a street.

CPC/ZC06-6 Condition 9 requires a minimum 15-foot setback adjacent to Boone Road SE, and Condition 12 requires a minimum six-foot-tall brick or masonry wall along the interior line of the landscaped setback. The applicant/developer may provide a landscaped berm within the setback in lieu of a wall.

Finding: The proposed off-street parking area is setback approximately 42 feet from the property line adjacent to Boone Road SE, in compliance with the minimum standard. The proposed buildings are setback from the property line adjacent to Boone Road SE as follows:

- Gas Station – Approximately 650 feet
- Costco Store – Approximately 26 feet
- Retail Shop Building – Approximately 715 feet

Additional screening required by CPC/ZC06-6 shall be provided adjacent to Boone Road SE.

East: Adjacent to the east is right-of-way for 27th Avenue SE. There is a minimum 5-foot building setback and a minimum 6-10 foot vehicle use area setback adjacent to a street.

CPC/ZC06-6 Condition 9 requires a minimum 15-foot setback adjacent to Boone Road SE, and Condition 12 requires a minimum six foot tall brick or masonry wall

along the interior line of the landscaped setback. The applicant/developer may provide a landscaped berm within the setback in lieu of a wall.

Finding: The proposed off-street parking area is setback approximately 50 feet from the property line adjacent to 27th Avenue SE, in compliance with the minimum standard. The proposed buildings are setback from the property line adjacent to 27th Avenue SE as follows:

- Gas Station – Approximately 55 feet
- Costco Store – Approximately 400 feet
- Retail Shop Building – Approximately 800 feet

Additional screening required by CPC/ZC06-6 shall be provided adjacent to Boone Road SE.

West: Adjacent to the west is the western portion of the shopping center, zoned CR (Retail Commercial) and CO (Commercial Office). There is no building setback required adjacent to a commercial zoned property, vehicle use areas require a minimum five-foot setback.

Finding: A shared driveway providing access to all existing and proposed uses within the shopping center is provided along the western property line. SRC 806.040(b)(2) provides that driveways may not be located within required setbacks except where the driveway is a shared driveway located over the common lot line and providing access to two or more uses.

Kuebler Gateway Shopping Center West:

Three new retail shop buildings and integrated parking area.

North: Adjacent to the north is right-of-way for Kuebler Boulevard. There is a minimum 5-foot building setback and a minimum 6-10 foot vehicle use area setback adjacent to a street.

Finding: The proposed off-street parking and vehicle use areas are setback approximately 10 feet from the property line adjacent to Kuebler Boulevard, in compliance with the minimum standard. The proposed buildings are setback from the property line adjacent to Kuebler Boulevard as follows:

- Shop Building A – Approximately 25 feet
- Shop Building B – Approximately 22 feet
- Shop Building C – Approximately 44 feet

South: Adjacent to the south is an existing office complex within a CO (Commercial Office) zone. Per Table 522-4, there is no building setback required

adjacent to a commercial zoned property, vehicle use areas require a minimum five foot setback.

Finding: A shared driveway providing access to all existing and proposed uses within the shopping center is provided along the southern property line. SRC 806.040(b)(2) provides that driveways may not be located within required setbacks except where the driveway is a shared driveway located over the common lot line and providing access to two or more uses.

East: Adjacent to the east is the eastern portion of the shopping center, zoned CR (Retail Commercial).

Finding: The proposed off-street parking area is setback approximately 16 feet from the eastern property line.

West: Adjacent to the west is right-of-way for Battlecreek Road SE. There is minimum 5-foot building setback and a minimum 6-10 foot vehicle use area setback adjacent to a street.

Finding: The proposed off-street parking area is setback approximately 10 feet from the western property line adjacent to Battle Creek Road SE, in compliance with the minimum standard. The proposed buildings are setback from the property line adjacent to Battle Creek Road SE as follows:

- Shop Building A – Approximately 40 feet
- Shop Building B – Approximately 321 feet
- Shop Building C – Approximately 550 feet

SRC 522.010(c) – Lot Coverage, Height:

There is no maximum lot coverage standard in the CR zone, the maximum height allowance for all buildings and structures is 50 feet.

Finding: The City Council finds that the proposed buildings are 35 feet or less in height, the development complies with the lot coverage and height limitation of the CR zone.

SRC 522.010(d) – Landscaping:

- (1) **Setbacks.** Required setbacks shall be landscaped. Landscaping shall conform to the standards set forth in SRC Chapter 807.
- (2) **Vehicle Use Areas.** Vehicle use areas shall be landscaped as provided under SRC Chapter 806 and SRC Chapter 807.
- (3) **Development Site.** A minimum of 15 percent of the development site shall be landscaped. Landscaping shall meet the Type A standard set forth in SRC Chapter 807. Other required landscaping under the SRC, such as landscaping

required for setbacks or vehicle use areas, may count towards meeting this requirement.

Finding: The City Council finds that the combined area for the shopping center is approximately 23.96 acres (1,043,698 square feet) in size, net of right-of-way dedication, requiring a minimum of 156,555 square feet, net of impervious area (0.081 acres), of landscaping (1,043,698 x 0.15 = 156,554.7) . The total amount of landscaping provided for the development site is approximately 4.36 acres (189,922 square feet), approximately 18.2 percent, exceeding the minimum requirement.

Development plans for the Kuebler Gateway Shopping Center shall demonstrate that a minimum of 15 percent landscaping will be provided for the development site with the first building permit.

Condition 5: A minimum of 15 percent of the development site, approximately 156,555 square feet, shall be landscaped with the issuance of the first building permit for the Kuebler Gateway Shopping Center.

General Development Standards – SRC Chapter 800

Solid Waste Service Areas – SRC 800.055

SRC 800.055(a) – Applicability.

Solid waste service area design standards shall apply to all new solid waste, recycling, and compostable services areas, where use of a solid waste, recycling, and compostable receptacle of 1 cubic yard or larger is proposed.

Finding: The proposed shopping center will include new solid waste service areas.

The proposed development site plan shows generally where these areas are to be situated. A solid waste service area is shown on the west side of the Costco building, south of the loading docks. The area shown is designed to be large enough to meet the placement standards of SRC 800.055(b)(1) and (2) for pad area, separation, and vertical clearance. The required vertical clearance will depend on the size of the receptacles, but at the shown location there are no apparent obstacles to any of the vertical clearance requirements. The permanent drop box placement standards of (c), the screening standards of (d), and the enclosure standards of (e) will be incorporated into the construction design. The proposed development plan shows that the solid waste area will be screened from Boone Road SE, the street to the south. The service area shown on the development plan is accessed from the site driveway drive to the west of the Costco building, and the access to the solid waste area appears large enough to meet the vehicle access standards of (f).

Specific uses for the small retail building have yet to be identified, and the type of uses that occupy that building will determine the size of the solid waste service area for that building.

The proposed site plan does not and need not provide construction details for the proposed solid waste service areas, but the provisions for this feature on the site plan make it clear that all applicable standards can be met. At the time of building permit application, the Applicants shall submit construction details for the proposed solid waste service areas.

Condition 6: At the time of building permit application, the Applicants shall submit construction details for the proposed solid waste service areas.

Exterior Lighting – SRC 800.060

- (a) Exterior lighting shall not shine or reflect onto adjacent properties, or cast glare onto the public right-of-way.
- (b) Exterior light fixtures shall be located and designed so that the light source, when viewed at a height of five feet above the ground at a distance of five feet outside the boundary of the lot, shall be either:
 - (1) Completely shielded from direct view; or
 - (2) No greater than five foot-candles in illumination.

Finding: The Applicants have provided an illumination plan for the proposed development, indicating that lighting on the site will not shine, reflect or cast glare onto neighboring properties or onto the public right-of-way. The illumination plan indicates that when viewed at a height of five feet above the ground at a distance of five feet outside the boundary of the lot, the maximum illumination will be three foot-candles, in compliance with this section.

Off-Street Parking, Loading, and Driveways – SRC Chapter 806

SRC 806.005 - Off-Street Parking; When Required.

Off-street parking shall be provided and maintained for each proposed new use or activity.

SRC 806.010 - Proximity of Off-Street Parking to Use or Activity Served.

Required off-street parking shall be located on the same development site as the use or activity it serves.

SRC 806.015 - Amount of Off-Street Parking.

- a) *Minimum Required Off-Street Parking.* A minimum of 1 space per 250 square feet of floor area is required for shopping centers.

- b) *Compact Parking.* Up to 75 percent of the minimum off-street parking spaces required under this Chapter may be compact parking spaces.
- c) *Carpool and Vanpool Parking.* New developments with 60 or more required off-street parking spaces, and falling within the Public Services and Industrial use classifications, and the Business and Professional Services use category, shall designate a minimum of 5 percent of their total off-street parking spaces for carpool or vanpool parking.
- d) *Maximum Off-Street Parking.* Unless otherwise provided in the SRC, off-street parking shall not exceed the amounts set forth in Table 806-2.

Finding: The proposed floor area for the shopping center is 189,550 square feet in size, requiring a minimum of 758 off-street parking spaces ($189,550 / 250 = 758.2$). A maximum of 1,327 off-street parking spaces are allowed for the shopping center ($758 \times 1.75 = 1,326.5$). No carpool/vanpool spaces are required for the proposed shopping center use.

The proposed site plan indicates that 1,053 off-street parking spaces will be provided for the shopping center, including 24 accessible parking spaces (ADA) and 6 compact spaces. The off-street parking meets the requirements of SRC Chapter 806.

SRC 806.035 - Off-Street Parking and Vehicle Use Area Development Standards.

- a) *General Applicability.* The off-street parking and vehicle use area development standards set forth in this section apply to the development of new off-street parking and vehicle use areas.
- b) *Location.* Off-street parking and vehicle use areas shall not be located within required setbacks.
- c) *Perimeter Setbacks and Landscaping.* Perimeter setbacks shall be required for off-street parking and vehicle use areas abutting streets, abutting interior front, side, and rear property lines, and adjacent to buildings and structures.

Adjacent to Buildings and Structures: Except for drive-through lanes, the off-street parking or vehicle use area shall be setback from the exterior wall of the building or structure by a minimum 5 foot wide landscape strip or by a minimum 5 foot wide paved pedestrian walkway.

Finding: The proposed vehicle use area complies with the minimum perimeter setback standards identified in the CR zone development standards and by SRC

Chapter 806, and the minimum 5-foot setback requirement adjacent to buildings and/or structures.

- d) *Interior Landscaping.* Interior landscaping shall be provided in amounts not less than those set forth in Table 806-5. For parking areas 50,000 square feet and greater in size, a minimum of 8 percent of the interior parking area shall be landscaped.

Finding: The off-street parking area for Kuebler Gateway Shopping Center East is approximately 390,600 square feet in size, requiring a minimum of 31,248 square feet of landscape area ($390,600 \times 0.08 = 31,248$). The proposed site plan indicates that 41,520 square feet of interior parking landscaping will be provided, exceeding the minimum landscape requirement.

The off-street parking area for Kuebler Gateway Shopping Center West is approximately 66,813 square feet in size, requiring a minimum of 5,345 square feet of landscape area ($66,813 \times 0.08 = 5,345.04$). The proposed site plan indicates that 5,750 square feet of interior parking landscaping will be provided, exceeding the minimum landscape requirement.

A minimum of one (1) deciduous shade tree shall be planted for every 12 parking spaces within the off-street parking area. Landscape islands and planter bays shall have a minimum planting area of 25 square feet, and shall have a minimum width of 5 feet.

- e) *Off-Street Parking Area Dimensions.* Off-street parking areas shall conform to the minimum dimensions set forth in Table 806-6.

Finding: The proposed parking spaces, driveway and drive aisle for the off-street parking area meet the minimum dimensional requirements of SRC Chapter 806.

- f) *Additional Off-Street Parking Development Standards 806.035(f)-(m).*

Finding: The proposed off-street parking area is developed consistent with the additional development standards for grade, surfacing, and drainage. Bumper guards and wheel barriers are not shown on the proposed site plan.

Condition 7: The proposed off-street parking area shall include bumper guards or wheel barriers so that no portion of a vehicle will overhang or project into required setbacks, landscape areas, or pedestrian pathways.

Bicycle Parking

SRC 806.045 - General Applicability.

Bicycle parking shall be provided and maintained for each proposed new use or activity.

SRC 806.050 – Proximity of Bicycle Parking to use or Activity Served.

Bicycle parking shall be located on the same development site as the use or activity it serves.

SRC 806.055 - Amount of Bicycle Parking.

Per SRC Chapter 806, Table 806-8, shopping centers require the greater of four bicycle parking spaces, or a minimum of one space per 10,000 square feet for the first 50,000 square feet of gross leasable floor area, plus one space per 20,000 square feet for 50,000-100,000 square feet, plus one space per 30,000 square feet for remaining square footage over 100,000 square feet.

Finding: The proposed Costco building is approximately 168,550 square feet in size, requiring a minimum of 10 bicycle parking spaces ($50,000 / 10,000 = 5$, plus, $50,000 / 20,000 = 2.5$, plus $68,550 / 30,000 = 2.28$). Each of the remaining 4 retail buildings within the shopping center will require a minimum of four bicycle parking spaces per building, for a total of 16 bicycle parking spaces. Therefore, the entire shopping center will eventually have 26-bicycle parking spaces and the City Council finds meets this standard.

Condition 8: Bicycle parking areas shall be provided for each proposed building within the shopping center meeting the applicable amount and development requirements of SRC Chapter 806 for a total of 26 bicycle parking spaces for the retail portion of the shopping center.

SRC 806.060 – Bicycle Parking Development Standards.

Bicycle parking areas shall be developed and maintained as set forth in this section.

- (a) Location. Bicycle parking areas shall be located within a convenient distance of, and shall be clearly visible from, the primary building entrance. In no event shall bicycle parking areas be located more than 50 feet from the primary building entrance.
- (b) Access. Bicycle parking areas shall have direct and accessible access to the public right-of-way and the primary building entrance.
- (c) Dimensions. Bicycle parking spaces shall be a minimum of six feet by two feet, and shall be served by a minimum four-foot-wide access aisle.

(d) Bicycle racks. Where bicycle parking is provided in racks, the racks may be floor, wall, or ceiling racks. Bicycle racks shall accommodate the bicyclist's own locking device.

Finding: The location and design of the bicycle parking areas will be reviewed at the time of building permit application for conformance with this section.

Off-Street Loading Areas

SRC 806.065 - General Applicability.

Off-street loading areas shall be provided and maintained for each proposed new use or activity.

SRC 806.075 - Amount of Off-Street Loading.

Per SRC Chapter 806, Table 806-9, uses falling under the retail sales and service category require a minimum of one off-street loading space for floor area between 5,000 square feet to 60,000 square feet in size and a minimum of two loading spaces for buildings between 60,001 to 250,000 square feet in size. Loading spaces shall have a minimum width of 12 feet, minimum length of 30 feet, and minimum unobstructed vertical clearance of 14 feet.

Finding: The proposed Costco building is approximately 168,550 square feet in size, and requires a minimum of two off-street loading spaces. The proposed site plan indicates that four loading spaces will be provided on the north side of the building, with additional loading spaces on the west side of the building, meeting the minimum requirements of SRC Chapter 806.

Two proposed retail buildings on the Kuebler Gateway Shopping Center West plan are greater than 5,000 square feet in size and will each require one off-street loading space per Table 806-9. The site plan indicates that these buildings will have a dedicated off-street loading space meeting the minimum requirements of SRC Chapter 806.

Landscaping

All required setbacks shall be landscaped with a minimum of 1 plant unit per 20 square feet of landscaped area. A minimum of 40 percent of the required number of plant units shall be a combination of mature trees, shade trees, evergreen/conifer trees, or ornamental trees. Plant materials and minimum plant unit values are defined in SRC Chapter 807, Table 807-2.

All building permit applications for development subject to landscaping requirements shall include landscape and irrigation plans meeting the requirements of SRC Chapter 807.

Finding: As conditioned, the first building permit for development of the shopping center will require a minimum of 155,945 square feet of landscape area. A minimum of one plant unit per 20 square feet, or 7,797 plant units ($155,945 / 20 = 7,797$) are required at the time of building permit. Of the required plant units, a minimum of 3,119 plant units ($7,797 \times 0.4 = 3,118.9$) shall be a combination of mature trees, shade trees, evergreen/conifer trees, or ornamental trees.

Landscape and irrigation plans will be reviewed for conformance with the requirements of SRC 807 at the time of building permit application review. Additional plant units may be required if the proposed landscape area increases.

Natural Resources

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

The existing conditions plan indicates that there are eight significant trees on the subject property; the Applicants propose to transplant and relocate each of the significant trees to another location on the same development site. As discussed in earlier sections of this decision, the proposal to transplant existing mature trees does not meet the definition of removal in SRC Chapter 808, further, the Applicants have demonstrated that the removal of the significant trees is necessary for the proposed development, therefore, pursuant to SRC 808.030(a)(2)(L), the Applicants are not required to preserve or transplant the proposed trees. The Applicants has previously accepted a condition of approval to incorporate 16 new Oregon white oaks into the landscape design for the shopping center.

Condition 9: A minimum of 16 Oregon White Oaks shall be incorporated into the landscape design for the shopping center. Replanted trees shall have a minimum two-inch caliper.

To ensure that the proposal to transplant the eight significant trees results in the greatest chance for survival with minimum impact to the trees, The City Council adopts the following condition of approval:

Condition 18: The eight (8) 'significant' white oak trees on the subject property shall be transplanted and maintained after transplant,

consistent with the recommendations of the PacTrust Remand Letter, Exhibit B, Arborist's Report. A report containing final recommendations shall be submitted to the City's Urban Forester prior to any tree transplanting activity.

SRC 809 - Wetlands: Grading and construction activities within wetlands are regulated by the Oregon Department of State Lands (DSL) and US Army Corps of Engineers. State and Federal wetland laws are also administered by the DSL and Army Corps, and potential impacts to jurisdictional wetlands are addressed through application and enforcement of appropriate mitigation measures.

Wetland remediation work was completed under Army Corp of Engineers permit number #NWP-2012-48. Wetlands remain on the property along the north side of Boone Road and the west side of 27th Avenue SE. The Applicants' site plan does not propose to negatively impact the wetland areas. Wetland notice was sent to the Oregon Department of State Lands pursuant to SRC 809.025.

SRC 810 - Landslide Hazards: A geological assessment or report is required when regulated activity is proposed in a mapped landslide hazard area. According to the City's adopted landslide hazard susceptibility maps and SRC Chapter 810 (Landslide Hazards), there are mapped 2-point and 3-point landslide hazard areas on the subject property. The proposed activity of a commercial building adds 3 activity points to the proposal, which results in a total of 5-6 points. Therefore, the proposed development is classified as a moderate landslide risk and requires a geological assessment and/or geotechnical engineering report. A Geotechnical Engineering Report, prepared by Terracon Consultants, Inc. and dated April 16, 2018, prepared for Costco Wholesale was submitted to the City of Salem. A second Report of Geotechnical Engineering Services, prepared by GeoDesign Inc. and dated June 13, 2016, prepared for Pac Trust was also submitted to the City of Salem. These reports demonstrate the subject property can be developed without increasing the potential for slope hazard on the site or adjacent properties.

Criterion 2:

The transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the proposed development, and negative impacts to the transportation system are mitigated adequately.

Finding:

As noted above, the Applicants have a vested right in development consistent with the 2007 Decision. The 2007 Decision imposed multiple conditions of approval requiring substantial traffic mitigation measures. The City cannot impose additional traffic mitigation measures at this time.

Land Use Decision CPC-ZC06-6 directed future developments to meet certain conditions of approval in order to ensure that the transportation system provides for the safe, orderly, and efficient circulation of traffic into and out of the site. Successive developments and City of Salem Capital Improvement Projects have since completed portions of the conditions of approval dictated in the original decision.

The following conditions of approval from CPC/ZC06-6 have been constructed:

1. Condition 2: The intersection of Battle Creek Road SE and Kuebler Boulevard shall be improved to provide exclusive eastbound right-turn lane.
2. Condition 3: The south side of Kuebler Boulevard shall be widened to meet City of Salem Standards with curb, sidewalk, and bike lanes. The widening shall extend from 1500 feet west of Battle Creek Road SE to the Interstate 5 ramps to provide an additional lane for a total of two eastbound lanes.
3. Condition 4: Dual left-turn lanes shall be constructed on eastbound and westbound Kuebler Boulevard at 27th Avenue SE. Only one eastbound left-turn lane will be striped as there is only one receiving lane. The intersection of Kuebler Boulevard at 27th Avenue SE shall also be improved to provide an exclusive eastbound right-turn lane.
4. Condition 5: The developer shall construct left-turn lanes and pedestrian refuge islands where appropriate.
5. Condition 7: The developer shall provide right-in access from Kuebler Boulevard with a design that minimizes impact to through vehicles and provides a safe driveway crossing for bicycle and pedestrian traffic, the final design of which to be approved by the Salem Public Works Director. In addition, the developer shall complete the widening of the eastbound lanes of Kuebler Boulevard west to Commercial Street. This additional widening of approximately 1300 feet of Kuebler Boulevard is considered as payment for a grant of access on Kuebler Boulevard to allow a right-in driveway on the Subject Property.
6. Condition 8: Offset the access driveway along Boone Road SE from Cultus Avenue SE at a location approved by the Public Works Director.
7. Condition 16: The funded City CIP project for improvements on Kuebler Boulevard as identified in the Applicant's September 2006 TIA, and an exclusive right-turn lane at the westbound Kuebler Boulevard intersection with 27th Avenue SE.

The following conditions are what remain for Public Works of the CPC/ZC06-6 conditions of approval:

1. Condition 1: The intersection of Battle Creek SE and Boone Roads SE shall be improved to include a traffic signal with an eastbound left-turn lane. The southbound left-turn lane shall be lengthened to provide a minimum of 300 feet of storage.
2. Condition 2: The intersection of Battle Creek Road SE and Kuebler Boulevard shall be improved to provide a northbound left-turn lane with a minimum of 300 feet of storage. To provide the necessary northbound left-turn storage at this intersection with the southbound left-turn lane storage at Battle Creek and Boone Roads, side-by-side left-turn lanes shall be constructed as approved by the Public Works Director.
3. Condition 4: Install striping for dual left-turn lanes on westbound Kuebler Boulevard at 27th Avenue SE. For the westbound left-turn lanes, an additional receiving lane shall be constructed which will drop immediately south of the subject property's driveway on 27th Avenue SE.
4. Condition 6: Pay \$5,000 for traffic calming devices (such as speed humps or other traffic calming measures) to be used in the residential neighborhood south of the proposed development as determined through the City's Neighborhood Traffic Management Program.
5. Condition 10: The developer shall provide sidewalks along all street frontages. The sidewalk shall be located along the curb line only where needed to reduce conflicts with the previously mitigated wetland areas; all other sidewalks shall be located parallel to and one foot from the adjacent right-of-way.

Pursuant to SRC 803.015, the Applicants were required to provide a Transportation Impact Analysis (TIA) to identify the impacts of this proposed development on the public transportation system in the area and construct any necessary mitigation measures identified in that report. The Applicants submitted a TIA, prepared by Kittelson & Associates and dated May 31, 2018. The City Traffic Engineer reviewed the TIA and determined that the report meets the requirements of SRC 803.015.

The following mitigation measures are recommended in the TIA and shall be required as conditions of approval:

- Condition 10:** The east site driveway on 27th Avenue SE shall be constructed as a single-lane roundabout, with southbound right-turn by-pass lane to the site.

Condition 11: A stop sign shall be installed at the new south site driveway (southbound) approach to Boone Road SE.

Condition 12: The westbound left-turn lane at intersection of Kuebler Boulevard and Battle Creek Road SE shall be restriped to provide 400 feet of storage.

Condition 13: All future landscaping, above-ground utilities, and site signage shall be located and maintained to ensure adequate sight-distance is provided at the site driveways.

Condition 2 of CPC/ZC06-06 requires a northbound left-turn lane with a minimum of 300 feet of storage at the intersection of Battle Creek Road SE and Kuebler Boulevard. The condition states, "side-by-side left turn lanes shall be constructed as approved by the Public Works Director." The Applicants have proposed a design which includes dual northbound left-turn lanes which provide a minimum of 300 feet of storage. The design also provides the side-by-side left-turn lane configuration. The City Traffic Engineer has reviewed the proposed design and concurs that it will provide the necessary storage for the left-turn lanes at the intersection of Battle Creek Road SE and Kuebler Boulevard, and the intersection of Battle Creek Road SE and Boone Road SE, and is consistent with the language of the original condition.

Condition 3 of CPC/ZC06-6 required that the south side of Kuebler Boulevard was widened to meet City of Salem Standards with curb, sidewalk, and bike lanes. The widening extended from 1500 feet west of Battle Creek Road SE to the Interstate 5 ramps to provide an additional lane for a total of two eastbound lanes. This condition was met by the Capital Improvement Plan project number 713513, which was accepted as complete on March 5, 2018. No additional right-of-way or street improvement is required on Kuebler Boulevard along the frontage of the proposed development. However, the Applicants shall install the appropriate striping to the westbound dual left-turn lanes to allow for traffic flow into the future dual collection lanes on 27th Avenue SE.

The existing configurations of Boone Road SE and 27th Avenue SE along the frontages of the proposed development do not meet current standards for a Collector street classification per the *Salem Transportation System Plan*. The Applicants shall construct a half-street improvement along both frontages to Collector street standards as specified in the City Street Design Standards and consistent with the provisions of SRC Chapter 803.

Condition 14: Along the frontages of Boone Road SE and 27th Avenue SE, construct a half-street improvement to Collector street standards as specified in the City Street Design Standards and consistent

with the provisions of SRC Chapter 803. The fee-in-lieu amounts previously collected may be used towards the security amount required for the public construction pursuant to SRC 110.100.

Street standards require that sidewalks shall be located parallel to and one foot from the adjacent right-of-way (SRC 803.035(l)(2)(A)); however, the mitigated wetlands were placed between the future curb line and the right-of-way line along the frontages of Boone Road SE and 27th Avenue SE. These wetland channels conflict with the location of the sidewalk as required by the street standards. In order to protect the wetland areas, the sidewalk may be located along the curb line only as needed to reduce conflicts between the existing wetland channels and proposed improvements; all other sidewalks shall be located parallel to and one foot from the adjacent right-of-way pursuant to SRC 803.035(l).

Condition 15: Sidewalks shall be located parallel to and one foot from the adjacent right-of-way, however, if topography or other physical conditions, such as the previously mitigated wetland areas, make the construction of sidewalks impossible or undesirable, then a different location may be allowed per SRC 803.035(l)(2)(B).

No special setbacks are required because the existing rights-of-way meet or exceed the standards for the boundary street classifications.

Criterion 3:

Parking areas and driveways are designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians.

Finding: The driveway access onto Boone Road SE is proposed to be located directly across from Bow Court SE and provides for safe turning movements into and out of the property. The driveway access onto 27th Avenue SE is proposing a single-lane roundabout with southbound right-turn by-pass lane to the site, as recommended by the TIA submitted. The eastbound right-turn only access from Kuebler Boulevard was approved by a previous Land Use Decision and was designed to facilitate safe and efficient movement of vehicles, bicycles, and pedestrians.

The proposed site plan provides for internal pedestrian pathways leading to the main entrance for Costco, however, the internal pedestrian pathway does not provide a connection to the other buildings within the shopping center. Internal pedestrian pathways shall be provided throughout the development site connecting to each building. As previously conditioned (Condition 2), the site plan shall be revised to provide internal pedestrian pathways which connect each proposed building within the shopping center.

Criterion 4:

The proposed development will be adequately served with City water, sewer, stormwater facilities, and other utilities appropriate to the nature of the development.

Finding: The Public Works Department has reviewed the Applicants' preliminary plan for this site. The water, sewer, and storm infrastructure are available within surrounding streets/areas and is adequate to serve the proposed development.

The portion of the subject property within Kuebler Gateway Subdivision is subject to the stormwater management plan adopted under SRC 71.180(c) that was submitted and approved with SUB14-01. New stormwater requirements in SRC Chapter 71 and PWDS became effective January 1, 2014. The proposed subdivision was submitted prior to the effective date of the new requirements. As specified in SRC 71.080(c), because the Applicant submitted a stormwater management plan as a part of the subdivision application prior to the effective date of the new ordinance, future site plan review applications shall comply with the Applicants' stormwater management plan instead of the stormwater requirements that became effective January 1, 2014. The Applicants' engineer for the portion of the subject property within the Kuebler Gateway Subdivision indicated that the future development will comply with the previously submitted stormwater management plan.

Condition 16: For the portion of the subject property within Kuebler Gateway Subdivision, the Applicant shall comply with the stormwater management plan that was adopted under SRC 71.180(c) and approved with SUB14-01.

The portion of the subject property outside the Kuebler Gateway Subdivision shall be designed and constructed to current water quality and flow control standards as found in SRC Chapter 71 and 2014 Public Works Design Standards (PWDS). The Applicants' engineer for the portion of the subject property outside the Kuebler Gateway Subdivision submitted a statement demonstrating compliance with Stormwater PWDS Appendix 004-E(4)(b) and SRC Chapter 71. The preliminary stormwater design demonstrates the use of green stormwater infrastructure to the maximum extent feasible.

Condition 17: For the portion of the subject property outside Kuebler Gateway Subdivision, the Applicant shall design and construct a storm drainage system for areas of new and replaced impervious surface in compliance with SRC Chapter 71 and the Public Work

Design Standards (PWDS) in effect at the time that the Applicants' Application was submitted.

The Applicants shall design and construct all utilities (sewer, water, and storm drainage) according to the PWDS and SRC standards in effect at the time that the Applicants' Application was submitted and to the satisfaction of the Public Works Director. The Applicants are advised that a sewer monitoring manhole may be required, and the trash area shall be designed in compliance with Public Works Standards.

3. Analysis of Class 2 Driveway Approach Permit Approval Criteria

The approval criteria for a Class 2 Driveway Approach Permit are found in SRC 804.025(d), findings for each proposed driveway are included below.

Driveway approach to 27th Avenue SE:

Criterion 1:

The proposed driveway approach meets the standards of this Chapter and the Public Works Design Standards.

Finding: The proposed driveway meets the standards for SRC 804 and Public Works Design Standards (PWDS).

Criterion 2:

No site conditions prevent placing the driveway approach in the required location.

Finding: The construction of the roundabout as recommended in the TIA provided by Kittelson and is required in order to locate the driveway along the frontage of 27th Avenue SE. There are no other site conditions prohibiting the location of the proposed driveway.

Criterion 3:

The number of driveway approaches onto an arterial are minimized.

Finding: The proposed driveway is not accessing onto an arterial street.

Criterion 4:

The proposed driveway approach, where possible:

- a) Is shared with an adjacent property; or

b) Takes access from the lowest classification of street abutting the property.

Finding: The proposed driveway is currently located with access to the lowest classification of street abutting the subject property.

Criterion 5:

The proposed driveway approach meets vision clearance standards.

Finding: The proposed driveway meets the PWDS vision clearance standards set forth in SRC Chapter 805.

Criterion 6:

The proposed driveway approach does not create traffic hazards and provides for safe turning movements and access.

Finding: The proposed driveway approach follows the recommendations found in the TIA submitted by Kittelson on May 31, 2018. No evidence has been submitted to indicate that the proposed driveway will create traffic hazards or unsafe turning movements.

Criterion 7:

The proposed driveway approach does not result in significant adverse impacts to the vicinity.

Finding: The analysis provided in the TIA of the proposed driveway and recommended roundabout indicate that the proposed driveway will not have any adverse impacts to the adjacent properties or streets.

Criterion 8:

The proposed driveway approach minimizes impact to the functionality of adjacent streets and intersections.

Finding: The property is fronted by a Parkway street (Kuebler Boulevard), a Minor Arterial street (Battle Creek Road SE) and two Collector streets (Boone Road SE and 27th Avenue SE). The Applicants are proposing the driveway approach to the lower classification of street and as recommended by the TIA provided by Kittelson & Associates. By complying with the requirements of SRC Chapter 804, constructing the required improvements found in the Conditions of Approval for CPC/ZC06-6, and following the recommendations of the TIA, the Applicants have minimized impacts to the functionality of adjacent streets and intersections.

Criterion 9:

The proposed driveway approach balances the adverse impacts to residentially zoned property and the functionality of adjacent streets.

Finding: The proposed driveway approach to 27th Avenue SE is located adjacent to a residentially zoned area. However, the direction of travel by the majority of drivers is into the commercially zoned area utilizing the single-lane roundabout. Installation of the southbound right-turn by-pass lane to the site, along with the single lane roundabout, significantly limits cut-through traffic into the residential areas, and minimizes the effect on the functionality of the adjacent streets.

Driveway approach to Boone Road SE:

Criterion 1:

The proposed driveway approach meets the standards of this Chapter and the Public Works Design Standards.

Finding: The proposed driveway meets the standards of SRC Chapter 804 and PWDS.

Criterion 2:

No site conditions prevent placing the driveway approach in the required location.

Finding: There are no site conditions prohibiting the location of the proposed driveway.

Criterion 3:

The number of driveway approaches onto an arterial are minimized.

Finding: The proposed driveway is not accessing onto an arterial street.

Criterion 4:

The proposed driveway approach, where possible:

- a) Is shared with an adjacent property; or
- b) Takes access from the lowest classification of street abutting the property.

Finding: The proposed driveway is currently located with access to the lowest classification of street abutting the subject property.

Criterion 5:

The proposed driveway approach meets vision clearance standards.

Finding: The proposed driveway meets the PWDS vision clearance standards set forth in SRC Chapter 805.

Criterion 6:

The proposed driveway approach does not create traffic hazards and provides for safe turning movements and access.

Finding: The proposed driveway approach meets the criteria set by previous land use decisions and shall follow the recommendations found in the TIA submitted by Kittelson. No evidence has been submitted to indicate that the proposed driveway will create traffic hazards or unsafe turning movements.

Criterion 7:

The proposed driveway approach does not result in significant adverse impacts to the vicinity.

Finding: The driveway approach to Boone Road SE is located directly across from Bow Court SE. The City Council finds the location of the proposed driveway will not have any adverse impacts to the adjacent properties or streets.

Criterion 8:

The proposed driveway approach minimizes impact to the functionality of adjacent streets and intersections.

Finding: The property is fronted by a Parkway street (Kuebler Boulevard), a Minor Arterial street (Battle Creek Road SE) and two Collector streets (Boone Road SE and 27th Avenue SE). The Applicants are proposing the driveway approach to the lower classification of street and as recommended by the TIA provided by Kittelson & Associates. By complying with the requirements of SRC Chapter 804, constructing the required improvements found in the conditions of approval for CPC/ZC06-6, and following the recommendations of the TIA, the City Council finds that the Applicants have minimized impacts to the functionality of adjacent streets and intersections.

Criterion 9:

The proposed driveway approach balances the adverse impacts to residentially zoned property and the functionality of adjacent streets.

Finding: The driveway approach to Boone Road SE is located directly across from a residentially zoned area. Locating the driveway directly across from Bow Court SE provides for safe turning movements into and out of the property. This additional driveway balances the adverse impacts to the residentially zoned area south of the subject property and will not have an adverse effect on the functionality of adjacent streets.

DECISION:

1. The City Council finds that the proposed Class 3 Site Plan Review satisfies the applicable approval criteria of SRC Chapter 220, and finds that the proposed Class 2 Driveway Approach Permit satisfies the applicable approval criteria of SRC Chapter 804, for Case No. SPR-DAP18-15, and the City Council APPROVES the Application subject to the following conditions of approval:

Condition 1: Prior to issuance of building permit, the Applicants shall identify which screening method will be provided along the Boone Road and 27th Avenue frontages in compliance with CPC/ZC06-06 Condition 12.

Condition 2: Prior to issuance of building permit, the site plan shall be revised to provide internal pedestrian pathways which connect each of the proposed buildings within the shopping center, and which connect to public sidewalks along adjacent streets. The internal pedestrian pathways shall be distinct from the vehicular travel lanes by means such as striping, distinctive pavement, elevation, or other method that clearly distinguishes the area for pedestrian travel from vehicle travel.

Condition 3: All remaining unsatisfied conditions of approval from CPC/ZC06-06 as specified in the November 30, 2015, "Certificate of Partial Satisfaction of Conditions of Approval and Deferral Agreement" shall be completed prior to final occupancy for the proposed development.

Condition 4: Prior to building permit issuance, where a proposed building crosses over an existing property line, either (1) pursuant to SRC 205.065, a property boundary verification shall be recorded, or (2) a property line adjustment shall be recorded to remove or relocate the property line.

- Condition 5:** A minimum of 15 percent of the development site, approximately 156,555 square feet, shall be landscaped with the issuance of the first building permit for the Kuebler Gateway Shopping Center.
- Condition 6:** At the time of building permit application, the plans for the solid waste service areas shall demonstrate compliance with all applicable development standards of SRC Chapter 800.
- Condition 7:** The proposed off-street parking area shall include bumper guards or wheel barriers so that no portion of a vehicle will overhang or project into required setbacks, landscape areas, or pedestrian pathways.
- Condition 8:** Bicycle parking areas shall be provided for each proposed building within the shopping center meeting the applicable amount and development requirements of SRC Chapter 806.
- Condition 9:** A minimum of 16 Oregon White Oaks shall be incorporated into the landscape design for the shopping center. New trees shall have a minimum two-inch caliper.
- Condition 10:** The east site driveway on 27th Avenue SE shall be constructed as a single-lane roundabout, with southbound right-turn by-pass lane to the site.
- Condition 11:** A stop sign shall be installed at the new south site driveway (southbound) approach to Boone Road SE.
- Condition 12:** The westbound left-turn lane at intersection of Kuebler Boulevard and Battle Creek Road SE shall be restriped to provide 400 feet of storage.
- Condition 13:** All future landscaping, above-ground utilities, and site signage shall be located and maintained to ensure adequate sight-distance is provided at the site driveways.
- Condition 14:** Along the frontages of Boone Road SE and 27th Avenue SE, construct a half-street improvement to Collector street standards as specified in the City Street Design Standards and consistent with the provisions of SRC Chapter 803. The fee-in-lieu amounts previously collected may be used towards the security amount required for the public construction pursuant to SRC 110.100.

- Condition 15:** Sidewalks shall be located parallel to and one foot from the adjacent right-of-way, however, if topography or other physical conditions, such as the previously mitigated wetland areas, make the construction of sidewalks impossible or undesirable, then a different location may be allowed per SRC 803.035(l)(2)(B).
- Condition 16:** For the portion of the subject property within Kuebler Gateway Subdivision, the Applicants shall comply with the stormwater management plan that was adopted under SRC 71.180(c) and approved with SUB14-01.
- Condition 17:** For the portion of the subject property outside Kuebler Gateway Subdivision, the Applicants shall design and construct a storm drainage system for areas of new and replaced impervious surface in compliance with SRC Chapter 71 and the current Public Work Design Standards (PWDS).
- Condition 18:** The eight (8) 'significant' white oak trees on the subject property shall be transplanted and maintained after transplant, consistent with the recommendations of the PacTrust Remand Letter, Exhibit B, Arborist's Report. A report containing final recommendations shall be submitted to the City's Urban Forester prior to any tree transplanting activity.