

**BEFORE THE PLANNING COMMISSION FOR
THE CITY OF BEAVERTON, OREGON**

After recording return to:
City of Beaverton, City Recorder:
P.O. Box 4755
Beaverton, OR 97076

IN THE MATTER OF A REQUEST FOR APPROVAL OF AN APPEAL)	ORDER NO. 2449
OF A TIME EXTENSION FOR A PREVIOUSLY APPROVED LAND)	APP2015-0003 ORDER DENYING
USE APPLICATION (APPEAL OF SUNSET STATION & BARNES)	APPEAL OF SUNSET STATION & BARNES ROAD PUD FIRST
ROAD PUD FIRST TIME EXTENSION). J. PETERKORT &)	TIME EXTENSION
COMPANY, APPLICANTS. JAKE MINTZ, APPELLANT.)	

The matter came before the Planning Commission on January 27, 2016, on an Appeal of a Director’s Decision to approve a Time Extension (EXT2015-0004) request for Sunset Station & Barnes Road PUD (CU2013-0003) to extend the expiration date of the prior approval to November 5, 2017. The subject site is generally North and South of Barnes Road from West of Cedar Hills Boulevard to Highway 217. Washington County Tax Assessors Map 1S103AB Tax Lot 200, Map 1S103A0 Tax Lots, 1700 and 2200, Map 1S102B0 Tax Lot 500, Map 1S102CB Tax Lot 100, Map 1S102CA Tax Lots 500 & 600, and Map 1S103AD Tax Lot 600.

Pursuant to Ordinance 2050 (Development Code), Section 50.45 the Planning Commission conducted a public hearing and considered testimony and exhibits on the subject proposal.

The Planning Commission unanimously issued an Order Denying Appeal of Sunset Station & Barnes Road PUD First Time Extension on February 4, 2016 (the “Order”).

Appellants Jake Mintz and Neighbors for Smart Growth timely appealed the Order to the State of Oregon Land Use Board of Appeals (LUBA) as provided in ORS 197.805 through ORS 197.860 and as articulated in Land Use Order No. 2449.

On March 22, 2016 (Agenda Bill No. 16063), the Beaverton City Council withdrew the city's decision in this matter, as permitted by ORS 197.830(13) and OAR 661-010-0021.

The Commission, after holding the public hearing and considering all oral and written testimony, makes the following **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, as applicable to the approval criteria contained in Section 50.93 of the Development Code:

FINDINGS OF FACT

1. The property owner and applicant, J. Peterkort & Company, L.P., filed an application on October 30, 2015, seeking a first time extension pursuant to Section 50.93 of the Beaverton Development Code for a previously approved Conditional Use – PUD application (case file no. CU2013-0003) that authorized a 79.4-acre PUD, known as the Sunset Station & Barnes Road PUD.
2. Numerous issues were raised in public comments on CU2013-0003, including but not limited to alleged impacts to regional trails, transportation, bicycle and pedestrian impacts, and impacts on trails and transit. Comments were received from the Appellant herein, Jake Mintz, as well as Washington County, Oregon Department of Transportation, and TriMet, among others.
3. The Sunset Station & Barnes Road PUD was approved by the Planning Commission on October 30, 2013, and the Land Use Order was issued on November 5, 2013.

The approval includes 44 conditions of approval. The conditions of approval are intended to mitigate, among other things, transportation, bicycle and pedestrian impacts, and impacts on trails and transit identified by commenting agencies and interested persons and supported by evidence in the record, including the Facilities Review Committee Technical Review and Recommendations and the Traffic Impact Analysis (TIA) prepared in October 2013 by The Transpo Group and Transportation Consulting Group.

4. The decision to approve the Sunset Station & Barnes Road PUD was not appealed.
5. Conditional Use approvals in the City of Beaverton are valid for a two-year period unless vested pursuant to the Development Code, or an extension is requested under the provisions of Section 50.93 of the Development Code.
6. The application for time extension was timely filed prior to the Conditional Use-PUD approval expiring on November 5, 2015. The extension application is for the same property for which approval of CU2013-0003 was issued. The case file for the extension request is EXT 2015-0004.
7. The City processed the extension application under its Type 2 review procedure set forth in Section 50.65 of the Development Code.
8. The City mailed public notice of the extension application to the applicant/property owner, Central Beaverton NAC Chair, all property owners within a three-hundred foot radius and all parties of record for CU2013-0003.
9. The location of the subject property for which approval of CU2013-0003 was issued is Generally North and South of Barnes Road from West of Cedar Hills Boulevard to Highway 217, and includes Washington County Tax Assessors Map

1S103AB Tax Lot 200, Map 1S103A0 Tax Lots, 1700 and 2200, Map 1S102B0 Tax Lot 500, Map 1S102CB Tax Lot 100, Map 1S102CA Tax Lots 500 & 600, and Map 1S103AD Tax Lot 600. The boundaries of the PUD are shown in Exhibit 1.1 and Exhibit 1.2 to the October 23, 2013 Staff Report. These circumstances have not changed from the date of approval of CU2013-0003 to approval of the time extension application.

10. Zoning of the subject property is Urban High Density (R1), Corridor Commercial (CC), and Station Community-Sunset (SC-S). The NAC designation is Central Beaverton. The property is currently vacant. These circumstances have not changed from the date of approval of CU2013-0003 to approval of the time extension application.

11. To the north of the subject property are natural resource uses zoned Urban High Density (R1) & Washington County TO:R-40-80 & TO:R80-120. To the south of the subject property is Highway 26. To the west of the subject property are vacant and commercial uses zoned Station Community-High Density Residential (SC-HDR) & Washington County TO:RC & TO:BUS. To the east of the subject property are detached housing and commercial office uses zoned Washington County R-5 & City of Beaverton SC-MU. The commercial offices to the east of the subject property were annexed to the City and provided with City of Beaverton SC-MU zoning after the approval of CU2013-0003. No development or physical modifications to the site or uses were proposed or approved as part of the annexation and subsequent application of City of Beaverton zoning. The zoning of

- the remaining properties has not changed from the date of approval of CU2013-0003 to approval of the time extension application.
12. Since approval of CU2013-0003, the applicant has proposed no changes in the approved development plans, and there is no contrary evidence in the record.
 13. Since approval of CU2013-0003, no new regulations or Statutes applicable to the PUD have been adopted that are likely to necessitate modification of the decision or conditions of approval, as set forth in more detail in Findings 22-25 herein. No regulations have been adopted by the City's partner agencies such as Clean Water Services which would necessitate a new review of the previously approved PUD.
 14. Since approval of CU2013-0003, there has been no change in circumstances that necessitates modification of the decision or conditions of approval, as set forth in more detail in Findings 15, 18, 19, 20, 21, 22, 26 and 27 herein.
 15. The Peterkort Centre and St. Vincent Hospital are private properties, which are not within the boundaries of the PUD approved in CU2013-0003. The owner of the Peterkort Centre property is Peterkort Centre III, LLC. This is a different entity than the applicant and different from the owner of the subject property in APP2015-0003. The applicant has no ownership or control over the Peterkort Centre property, and there is no title, corporate registration, or other documentary evidence in the record to the contrary. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.
 16. The applicant has been unable to commence development within the two-year time period allowed for CU2013-0003 for the following reasons: (1) establishing a

development plan must take into account impacts on traffic and significant offsite improvements as required by the conditions of approval; (2) they have been working on development planning for sites targeted as initial development sites and having discussions with potential development partners; and (3) given the extent of the work necessary for a project of this size, it has been impracticable to commence development within the original approval period.

17. Five public comments were received on the application for time extension. Staff summarized the comments into five major themes in the Director's Decision approving the extension application on December 11, 2015: (1) Highway 26 eastbound off-ramp at Cedar Hills; (2) Sidewalk connections in the area; (3) 95th Avenue trail connection; (4) Traffic in the area; and (5) Parking Capacity at the Sunset Transit Center Parking Garage.

18. Highway 26 Eastbound Off-Ramp at Cedar Hills: Condition of Approval 2 of CU2013-0003 requires improvements to the intersection of Cedar Hills Boulevard and Eastbound Highway 26 off-ramp to mitigate traffic impacts identified in the TIA. The applicant does not propose any changes to the PUD or conditions of approval. These intersection improvements will be constructed, and the condition of approval satisfied, when development of specific parcels within the boundary of the PUD is approved. Construction of the intersection improvements has not yet been warranted by any physical development within the PUD area. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

19. Construction of improvements to the intersection of Cedar Hills Boulevard and Eastbound Highway 26 is not solely the responsibility of the applicant. If another party proposing to development property separately from the approved PUD is determined to create an impact to the specified intersection, that potential development will be required to mitigate the impact. If no development proposal takes place, a public agency such as Washington County and/or the Oregon Department of Transportation may construct the identified improvements to the specific intersection. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

20. Sidewalk Connections: The following conditions of approval for CU2013-0003 require sidewalk improvements to mitigate impacts identified in the TIA: 17-19, 22-24 and 28. The applicant does not propose any changes to the PUD or conditions of approval. These sidewalk improvements will be constructed, and the conditions of approval satisfied, when development of specific parcels within the boundary of the PUD is approved. Construction of the sidewalk improvements has not yet been warranted by any physical development within the PUD area. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

21. 95th Avenue Trail: If constructed, the proposed 95th Avenue Trail will be located on a parcel that is not within the boundaries of the PUD. It will be approximately 800 feet northeast of the subject property at its closest point, as shown on Exhibit 4.1 to the Staff Report prepared on the extension application, and there is no evidence in the record to the contrary. Being 800 feet away, the proposed future

95th Avenue Trail will not be “immediately adjacent” to the subject property. The trail has not been established and does not exist except as a plan for a possible future trail. There are no changes in circumstances that necessitate modification of the subject PUD decision or conditions of approval.

22. The Pedestrian System Map in the Washington County Transportation System Plan (TSP) identifies general locations for trails. Specific location of trails will be identified at the time of development. A 2014 TSP Update was adopted after approval of CU2013-0003 which, among other things, indicates a future regional trail location on the border of the Peterkort Centre and St. Vincent Hospital (the 95th Avenue Trail) and those properties are not within the subject PUD area. There is no evidence in the record to the contrary. If Peterkort Centre and/or St. Vincent Hospital propose new development or redevelopment in the future, the identified future trail connection in the Washington County TSP would be considered at that time. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

23. Washington County A-Engrossed Ordinance No. 783 was adopted in 2014, after approval of CU2013-0003. This ordinance updates the Washington County TSP. It does not include any provisions that establish new trails within the boundaries of the PUD area, and there is no contrary evidence in the record. Therefore it does not constitute a new regulation or statute applicable to the PUD that is likely to necessitate modification of the decision or conditions of approval.

24. Washington County A-Engrossed Ordinance No. 799 was adopted in 2015, after approval of CU2013-0003. Paragraph 501-7.1.B states that regional trails

identified on the TSP pedestrian system map are “essential services.” There are no mapped existing or proposed regional trails within the boundaries of the PUD area, and there is no contrary evidence in the record. Therefore it does not constitute a new regulation or statute applicable to the PUD that is likely to necessitate modification of the decision or conditions of approval.

25. An inter-governmental agreement between the City of Beaverton and Washington County requires that the City acknowledge and implement regional trail designations. The inter-governmental agreement is not a new regulation or statute, and there is no contrary evidence in the record. In addition, there are no mapped existing or proposed regional trails within the boundaries of the PUD area, and therefore the agreement does not constitute a new regulation or statute applicable to the PUD that is likely to necessitate modification of the decision or conditions of approval.

26. Traffic Concerns: The following conditions of approval for CU2013-0003 require street improvements to address vehicular capacity and pedestrian safety in the vicinity of the PUD, as evidenced by the TIA: 2-38 and 43. The applicant does not propose any changes to the PUD or conditions of approval. These improvements will be constructed, and the conditions of approval satisfied, when development of specific parcels within the boundary of the PUD is approved. Construction of the improvements has not yet been warranted by any physical development within the PUD area. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

27. Sunset Transit Center Parking Capacity and Safety: The Sunset Transit Center is a Tri-Met facility and is not located within the boundary of the approved PUD, and its capacity and safety are not relevant to the approval criteria for the PUD extension. The garage is not owned or operated by the applicant. There are no changes in circumstances that necessitate modification of the decision or conditions of approval.

28. On December 11, 2015, a Director's Decision approving time extension request EXT2015-0004 was issued. Staff concurred with the applicant that the complexity of the planning for projects of the scale approved in CU2013-0003 makes it difficult to develop and receive land use entitlements for the master plan area within the two years provided by the PUD approval and make it not practicable to commence development within the time allowed by the approval of CU2013-0003, meeting the criterion set forth in Section 50.93.6.A. The Decision found that no changes to the originally approved designs, uses or conditions of approval were proposed with the application, meeting the criterion set forth in Section 50.93.6.C. It stated that all conditions of approval remain in force and must be complied with before building permits, site development permits, or building occupancy permits, as applicable, can be obtained. The Decision stated all critical facilities required for the development were evaluated during the review of the original applications. Staff determined no new regulations or Statutes applicable to the PUD have been adopted that are likely to necessitate modification of the decision or conditions of approval, meeting the criteria set forth in Section 50.93.6.B. The Decision states that no changes to the previously approved plans are permitted. Any changes to

the approved plans will require new land use approval. It approved the time extension request extends the expiration date of the prior approvals for a two-year period, to November 5, 2017.

29. On December 23, 2015, Jake Mintz, as representative of Neighbors for Smart Growth, a party of record to the decision, filed a timely appeal of the Director's Decision, pursuant to Section 50.40.11.E of the Development Code. Appellant challenged the approval of the time extension as violating Section 50.93.6.B, regarding change in circumstance and applicable regulations, focusing on alleged impacts to 95th Avenue Trail. Appellant argued that: (1) the Washington County 2014 TSP Update, which identifies a pedestrian connection from 95th Avenue to Barnes Road, is a change in an applicable regulation; (2) Washington County Ordinance 799, paragraph 501-7.1.B states that regional trails are essential services; (3) the owner of the Peterkort Centre has blocked access to a path across its property, which constitutes blocking the 95th Avenue Trail connection and a change in circumstances; and (4) residents northeast of the subject property desire to use the 95th Avenue Trail for pedestrian access to the Sunset Transit Center, which is a change in circumstances.

30. Appellant requests that the PUD approval be modified to add a condition of approval requiring the re-opening of trail access at Peterkort Centre. He requests that the applicant be required to remove fencing and other obstacles from the 95th Avenue trail to allow free passage by pedestrians.

31. Appellant argues that the Traffic Impact Analysis that was conducted along collectors, arterials and state highways should be updated to cover essential

public access and that the conditions of approval must be modified to reflect the essential nature of the 95th Avenue regional trail and ensure full access to it and other pedestrian services. He requests that the originally approved development plan maps be amended to show the 95th Avenue trail and that the applicant be required to construct the trail in the future Sunset Station PUD development application(s).

32. Appellant argues that without the 95th Avenue trail, the walking distance from Westhaven's Transit Oriented designated Pedestrian District to Sunset Transit Station would increase significantly and reduce the Transit Oriented community's ability to access Sunset Transit Station, negatively impact the station's functionality and undermine the previous Traffic Impact Analysis for the Barnes Road vicinity. In turn, Appellant argues this will increase auto impacts and create higher demand on Sunset Transit Station's over-burdened parking facility. Appellant argues that the conditions of approval should be modified to require the applicant to protect the 95th Avenue trail and enhance pedestrian access to transit in the Transit Oriented community.

33. Appellant argues that approximately 14 of the 44 conditions of approval for the PUD require improvements to intersections and other areas outside of the boundaries of the PUD and that the fact the 95th Avenue trail is not within the PUD is irrelevant.

34. Appellant argues that the 95th Avenue trail is a "well-established" public trail corridor that may be subject to the common law doctrine of prescription. Appellant also argues that the 95th Avenue trail is directly connected to the PUD

and protection of its services would not require any immediate investment by the City or the developer. Appellant also argues that the City can create a trail under ORS 105.668.

35. The Planning Commission reviewed the record, including materials submitted by Appellant, and finds that the facts do not support Appellant's arguments.

CONCLUSIONS OF LAW

1. Under Section 50.93.1 of the Development Code, an application to extend the expiration date of a decision made pursuant to the Beaverton Development Code may be filed only before the decision expires as provided in Section 50.90 or before the decision expires as provided in the appropriate subsection of the specific application contained in Chapter 40 (Applications). As a matter of law, the application to extend CU2013-0003 was timely filed.
2. A conditional use-planned unit development application is not listed in Section 50.93.2 as a land use decision not subject to extensions of time. As a matter of law, the application to extend CU2013-0003 is allowed by the Development Code.
3. Section 50.93.3 states that a land use decision may be extended no more than two (2) times. As a matter of law, this first request to extend the expiration date for CU2013-0003 is allowed by the Development Code.
4. Section 50.93.4 provides that an extension of a land use decision for an application not listed in Section 50.93.2 may be granted for a period of time not to exceed two (2) years, will be subject to a Type 2 review procedure, and must be found consistent with the approval criteria listed in Section 50.93.6. As a matter of law,

these requirements are met as set forth in Findings of Fact 5, 6, 7, 12, 13, 14, 16 and 28, and Conclusions of Law 8-20 herein.

5. Extension requests shall provide mailed public notice to those parties identified in Section 50.40.2. Section 50.93.5. Section 50.40.2 requires notice to all property owners within a three-hundred foot radius. As a matter of law, this requirement is met as set forth in Finding of Fact 8.
6. Public notice of extension requests shall also be mailed to the parties of record contained in the initial land use decision. Section 50.93.5. As a matter of law, this requirement is met as set forth in Finding of Fact 8.
7. Section 50.93.6.B sets forth approval criteria for an extension application. All of the following criteria must be satisfied: (A) It is not practicable to commence development within the time allowed or reasons beyond the reasonable control of the applicant (B) There has been no change in circumstances or the applicable regulations or Statutes likely to necessitate modification of the decision or conditions of approval since the effective date of the decision for which the extension is sought; and (C) The previously approved land use decision is not being modified in design, use, or conditions of approval. As a matter of law, these requirements are met as set forth in Findings of Fact 12, 13, 14, 16 and 28, and Conclusions of Law 8-20 and 22.
8. Washington County A-Engrossed Ordinance No. 783 is not a change in regulations that necessitates modification of the decision or conditions of approval, because it does not change the County TSP regarding the area within the approved PUD.

9. Washington County A-Engrossed Ordinance No. 799 is not a change in regulations that necessitates modification of the decision or conditions of approval, because it does not change the County TSP regarding the area within the approved PUD.
10. The intergovernmental agreement between the City and the County is not a new regulation or statute. It does not affect the subject property because no trail is designated within the area of the approved PUD. Therefore it does not constitute a change in circumstances that necessitates modification of the decision or conditions of approval.
11. The addition of the 95th Avenue Trail to the Washington County TSP as a regional trail located at least 800 feet northeast of the subject property does not constitute a change in applicable regulations or a change in circumstances which would require modification of the original PUD approval.
12. Changes in the area of the planned 95th Avenue Trail do not constitute a change in circumstances that necessitates modification of the decision or conditions of approval. The owner of the Peterkort Centre's choice to fence its property is a private legal matter not addressed by the criteria applicable to this application.
13. Parking capacity and safety at the Sunset Transit Center do not constitute a change in circumstances that necessitates modification of the decision or conditions of approval because the Sunset Transit Center is not owned or operated by the applicant and is outside the boundary of the approved PUD.
14. A dispute regarding the legal status of the proposed 95th Avenue Trail and an unauthorized trail outside the boundary of the approved PUD is not relevant to

extension of the approved PUD and does not constitute a change in circumstances that necessitates modification of the decision or conditions of approval.

15. The City has no legal authority to require any new conditions of approval for CU2013-0003 as a condition to approving a request for an extension. Specifically, the City lacks authority to:

- Require the applicant to take action regarding property it does not own or control.
- Require the applicant to prepare an updated TIA for CU2013-0003.
- Require the applicant to take any action with respect to the proposed 95th Avenue Trail where impacts from the PUD on the proposed trail and pedestrian circulation system have not been established and the trail is far outside the boundaries of the PUD.

16. Appellant's appeal is an improper collateral attack on the City's initial land use decision to approve CU2013-0003, because it demands that new conditions for off-site improvements be added to that approval in the absence of any change in the development plans.

17. The City lacks authority to deny the extension application based on a change in regulations that may affect other property outside the boundary of the CU2013-0003 approval.

18. The City lacks authority to take private property that is not within the area of the CU2013-0003 approval as a condition of approval for the extension of that approval when there is no change in the development proposed.

19. The Director's December 11, 2015 Decision is supported by substantial evidence in the record.
20. There is no substantial evidence in the record of a change in circumstances or any new applicable regulations or statutes likely to necessitate modification of the decision or conditions of approval since the 2013 PUD decision for which the extension was requested.
21. The Planning Commission reviewed the record, including materials and legal argument submitted by Appellant, and concludes the appeal is neither well-founded in law nor based on factually supported information.

The Commission, after holding the public hearing and considering all oral and written testimony, adopts the Director's Decision dated December 11, 2015, Staff Memoranda dated January 20, 2016 and January 26, 2016, and the findings of fact and conclusions of law identified in this land use order (Order No. 2449) as applicable to the approval criteria contained in Section 50.93 of the Development Code.

Therefore, **IT IS HEREBY ORDERED THAT APP2015-0003 is DENIED** based on the testimony, reports and exhibits and evidence presented during the public hearings on the matter and based on the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, Director's Decision dated December 11, 2015 and Staff Memoranda dated January 20, 2016 and January 26, 2016, and this Land Use Order.

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

AYES:	Wilson, Kroger, Winter, Nye, Overhage, and Sajadpour.
NAYS:	None.
ABSTAIN:	None.

ABSENT: Doukas.

Dated this _____ day of _____, 2016.

To appeal the decision of the Planning Commission, as articulated in Land Use Order No. 2449 an appeal of this decision should be made to the State of Oregon Land Use Board of Appeals (LUBA) as provided in ORS 197.805 through ORS 197.860. A notice of intent to appeal shall be filed not later than 21 calendar days after notice of decision is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Mailing of notice on _____, 2016, results in an appeal deadline of _____, 2016.

PLANNING COMMISSION
FOR BEAVERTON, OREGON

ATTEST:

APPROVED:

JANA FOX
Associate Planner

LINDA WILSON
Chair

STEVEN SPARKS, AICP
Principal Planner