

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

BEAVERTON BUSINESS OWNERS, LLC,  
*Petitioner,*

vs.

CITY OF BEAVERTON,  
*Respondent,*

and

LTF REAL ESTATE COMPANY, INC.  
and J PETERKORT & COMPANY,  
*Intervenors-Respondents.*

LUBA No. 2020-069

FINAL OPINION  
AND ORDER

Appeal from City of Beaverton.

E. Michael Connors filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

Timothy V. Ramis, Dana L. Krawczuk, and Peter Livingston filed the joint response brief. Also on the brief were Jordan Ramis PC and Stoel Rives, LLP. Dana L. Krawczuk and Hayley Siltanen argued on behalf of intervenor-respondent LTF Real Estate Company, Inc.

RYAN, Board Member; RUDD, Board Chair, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED

01/21/2021

1           You are entitled to judicial review of this Order. Judicial review is  
2   governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision concluding that a planned unit development that the city approved in 2013 did not expire.

**FACTS**

In 2013, the city approved the Sunset Station and Barnes Road Planned Unit Development (2013 PUD). The 2013 PUD includes land zoned Station Community-Sunset (SC-S) and land zoned Commercial Corridor (CC). The purpose of the 2013 PUD was to authorize a general development plan and “demonstrate \* \* \* the feasibility of providing the necessary and appropriate [traffic] mitigation measures on a holistic basis [*i.e.*, for the entire PUD area] rather than on a parcel by parcel basis.” Record 422. The 2013 PUD did not approve any specific uses. Record 515-31.

Condition 42 of the 2013 PUD implemented *former* Beaverton Development Code (BDC) 50.90(3)(B)(2) (2013), *renumbered as* BDC 50.90(4)(B)(2) (2020), and, accordingly, the 2013 PUD approval would have expired two years from the effective date of the decision unless,

“prior to that time, a construction permit has been issued and substantial construction pursuant thereto has taken place, or an application for extension has been filed, pursuant to Section 50.93 of the Development Code, or authorized development has been otherwise commenced in accordance with Section 50.90.3.B of the Development Code.” Record 530.

1 The 2013 PUD approval was extended twice pursuant to BDC 50.93 and it  
2 therefore would have expired on November 5, 2019, unless *former* BDC  
3 50.90(3)(B)(2) (2013) was met.

4 In March 2019, the city's planning commission approved conditional use  
5 and design review applications from intervenor-respondent J Peterkort &  
6 Company (Peterkort) to develop a 460-space surface parking lot and a 200-  
7 square-foot parking guard station on property within the PUD (Parking Project).  
8 In October 2019, the city issued a building permit for construction of the  
9 foundation of the parking guard station, and the foundation was constructed prior  
10 to October 23, 2019, the date on which the city inspected the foundation.

11 In June 2019, the city approved an application from intervenor-respondent  
12 LTF Real Estate Company, Inc. (LTF), for development of a fitness center on  
13 property located within the PUD (Fitness Center Project). That decision was  
14 appealed to LUBA, and we affirmed the city's decision. *Beaverton Business*  
15 *Owners, LLC v. City of Beaverton*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2019-079, Mar  
16 9, 2020), *aff'd*, 305 Or App 855, 469 P3d 298 (2020).

17 In November 2019, LTF applied for a director's interpretation of whether  
18 the standards in *former* BDC 50.90(3)(B)(2) (2013) were met by the construction  
19 of the parking guard station and, therefore, whether the 2013 PUD had expired.  
20 The city's planning director issued an interpretation which concluded that  
21 construction of the foundation of the parking guard station satisfied the  
22 requirement in *former* BDC 50.90(3)(B)(2) (2013) that "a construction permit

1 has been issued and substantial construction pursuant thereto has taken place.”  
2 Petitioner appealed the planning director’s interpretation to the city council,  
3 which held a hearing on the appeal. At the conclusion of the hearing, the city  
4 council voted to deny the appeal and affirm the planning director’s interpretation.  
5 At a subsequent meeting, the city council adopted a written decision that affirmed  
6 the planning director’s interpretation and adopted supplemental findings. This  
7 appeal followed.

## 8 **STANDARD OF REVIEW**

9 In the challenged decision, the city council interpreted provisions of the  
10 BDC. We review those interpretations under the deferential standard of review  
11 in ORS 197.829(1), as explained in *Siporen v. City of Medford*, 349 Or 247, 259,  
12 243 P3d 776 (2010).

13 The city council’s decision also includes interpretations of the planning  
14 commission’s March 2019 decisions to approve the Parking Project. With respect  
15 to these interpretations, our task is to determine whether the city council  
16 “improperly construed the applicable law.” *M & T Partners, Inc. v. City of Salem*,  
17 \_\_\_ Or LUBA \_\_\_ (LUBA No 2018-143, Aug 14, 2019), *aff’d*, 302 Or App 159,  
18 460 P3d 117 (2020).

## 19 **FIRST ASSIGNMENT OF ERROR**

20 As noted, *former* BDC 50.90(3)(B)(2) (2013) provided that a decision  
21 approving a planned unit development would expire unless “a construction  
22 permit has been issued and substantial construction pursuant thereto has taken

1 place.” BDC chapter 90 defines “substantial construction” to mean, “[p]roviding  
2 there are buildings on the site, the completion of construction of footings for the  
3 building where the principal use will take place.”

4 Petitioner’s first assignment of error includes several arguments  
5 challenging the city council’s conclusion that construction of the foundation of  
6 the parking guard station satisfied *former* BDC 50.90(3)(B)(2) (2013) and that,  
7 accordingly, the 2013 PUD has not expired.

8 **A. A Construction Permit Has Issued**

9 The city council concluded that (1) the foundation permit issued in October  
10 2019 was a “construction permit” within the meaning of *former* BDC  
11 50.90(3)(B)(2) (2013) and (2) “substantial construction” had taken place with the  
12 construction of the foundation as the footing of the parking guard station. Record  
13 3-4, 332. Petitioner first argues that the city council’s conclusion that the permit  
14 issued in October 2019 was a “construction permit” within the meaning of *former*  
15 BDC 50.90(3)(B)(2) (2013) is not supported by substantial evidence in the record  
16 because, according to petitioner, the October 2019 permit was a “foundation  
17 permit” and a foundation permit is not a “construction permit.” Petition for  
18 Review 16. Petitioner also argues that the city’s findings are inadequate to  
19 explain why the October 2019 permit was a “construction permit” within the  
20 meaning of *former* BDC 50.90(3)(B)(2) (2013). *Id.*

21 Peterkort, LTF, and the city (together, respondents) respond, initially, that  
22 petitioner failed to raise the issue of whether the foundation permit is a

1 construction permit prior to the close of the evidentiary hearing and, accordingly,  
2 the issue is waived. ORS 197.763(1); ORS 197.835(3). In the reply brief,  
3 petitioner cites Record 227-28, 248, 250-51, and 502 and argues that petitioner's  
4 general assertion that construction of the parking guard station foundation did not  
5 satisfy *former* BDC 50.90(3)(B)(2) (2013) was sufficient to put the city on notice  
6 that it was raising the issue of whether the October 2019 foundation permit was  
7 a "construction permit" within the meaning of *former* BDC 50.90(3)(B)(2)  
8 (2013).

9 We have reviewed the cited record pages, and nothing in them raises the  
10 issue of whether the foundation permit issued in October 2019 is a "construction  
11 permit" for purposes of *former* BDC 50.90(3)(B)(2) (2013) with enough  
12 specificity to afford the decision maker an opportunity to respond. *Boldt v.*  
13 *Clackamas County*, 107 Or App 619, 622-23, 813 P2d 1078 (1991); ORS  
14 197.763(1). We agree with respondents that the issue is waived.

15 **B. The Challenged Decision Did Not Modify the 2013 PUD**  
16 **Conditions**

17 Before the city council, petitioner argued that, when the planning  
18 commission approved the Parking Project in March 2019, it did not intend for  
19 construction of the foundation of the parking guard station to satisfy Condition  
20 42 of the 2013 PUD and *former* BDC 50.90(3)(B)(2) (2013) and result in vesting  
21 of the 2013 PUD. In response to that argument, the city council adopted findings  
22 concluding that, in approving the Parking Project in March 2019, the planning

1 commission understood that construction of the foundation of the parking guard  
2 station would satisfy Condition 42 of the 2013 PUD. Record 15. In reaching that  
3 conclusion, the city council relied on Condition 30 of the Parking Project design  
4 review approval, which specifically allowed issuance of a foundation permit for  
5 the parking guard station prior to issuance of a site development permit.<sup>1</sup>

6 We agree with respondents that petitioner challenges findings that the city  
7 did not make. Petitioner argues that the city council found that the Parking Project  
8 approvals modified Condition 42 of the 2013 PUD without applying for such a  
9 modification under BDC 50.95. However, when those findings are read in the  
10 context of their intended function to respond to petitioner's arguments below, it  
11 is clear that the city council did not find that the planning commission's approvals  
12 of the Parking Project modified Condition 42 of the 2013 PUD. Moreover, and  
13 more importantly, we agree with respondents that petitioner's arguments are  
14 really directed at the Parking Project approvals themselves, decisions that are

---

<sup>1</sup> Condition 30 of the Parking Project design review approval requires Peterkort, prior to building permit issuance, to

“[s]ubmit a complete site development permit application and obtain the issuance of site development permit from the Site Development Division. A foundation only permit for the guard structure may be issued prior to full Site Development Permit issuance if the City's review is complete and subject only to outside agency permit issuance required for full Site Development Permit issuance. No additional building permits may be issued prior to full Site Development Permit issuance.” Record 352.



1 final and that may not be challenged in this appeal. *See Just v. Linn County*, 59  
2 Or LUBA 233, 236 (2009) (providing that a challenge to the correctness or  
3 validity of a previous permit decision that was not appealed amounts to an  
4 impermissible collateral attack on a final land use decision).

5 **C. Substantial Construction Has Taken Place**

6 **1. Parking is a Principal Use of the Site**

7 In its March 2019 decision approving the Parking Project as a conditional  
8 use, the planning commission imposed Condition 1, which limits the duration of  
9 the approval. Generally, Condition 1 provides that the Parking Project  
10 conditional use approval will expire (1) if the 2013 PUD expires, (2) if, five years  
11 after issuance of a certificate of occupancy, there is not an active land use  
12 entitlement to build a certain square footage of non-residential floor area or 200  
13 dwelling units, or (3) 10 years after the certificate of occupancy for the parking  
14 lot is issued. Record 342.

15 As noted, BDC chapter 90 defines “substantial construction” to mean,  
16 “[p]roviding there are buildings on the site, the completion of construction of  
17 footings for the building where *the principal use* will take place.” (Emphasis  
18 added.) BDC chapter 90 defines “Use, Principal” to mean “[t]he main or primary  
19 purpose of which land or a structure is designed, arranged or intended or for  
20 which it is occupied or maintained.” Petitioner argues that the temporary approval  
21 of the parking lot use resulting from Condition 1 means that the parking lot is not  
22 a “permanent principal use” of the site and that, as a consequence, the city

1 council's conclusion that construction of the foundation of the parking guard  
2 station means that "substantial construction has taken place" improperly  
3 construes the defined term "substantial construction." In support of its argument,  
4 petitioner focuses on the March 2019 conditional use approval's description of  
5 the parking lot as "not a permanent principal use of the site." Record 342.

6 The findings state:

7 "[T]he Council interprets its code, including the definition of 'Use,  
8 Principal' to reach the conclusion that parking is the principal use of  
9 the \* \* \* Parking project for the same reasons as the Planning  
10 Commission. The Council also notes that parking is the only use  
11 proposed for the \* \* \* Parking project. Therefore, parking is the only  
12 use for which the site is 'designed, arranged or intended,' and once  
13 complete, the only use for which it will be 'occupied or maintained,'  
14 in compliance with the definition of 'Use, principal.'" Record 7.

15 The city council interpreted the defined term "Use, Principal" and found that  
16 "whether a use qualifies as a principal use does not depend on the duration of the  
17 use." Record 8. The city council further found:

18 "Condition of Approval No. 1 was intended to ensure that parking  
19 is not the *permanent* use of the site. The Planning Commission did  
20 not impose Condition of Approval No. 1 to ensure that parking is  
21 not the *principal* use of the site. The Planning Commission approved  
22 'Parking, as a Principal Use' as the primary use for the project, and  
23 the Council interprets [the conditional use approval] to be consistent  
24 with the code and mean that parking is the principal use of the site.

25 "The definition of 'Use Principal' does not include a temporal  
26 component. For that reason, the Council interprets that definition to  
27 mean that whether a use qualifies as a principal use does not depend  
28 on the duration of the use. A principal use can also be an interim  
29 use." *Id.* (citation omitted, emphases in original).

1 Petitioner does not challenge that interpretation or explain why the city's  
2 interpretation of the defined term "principal use" as not encompassing a temporal  
3 component is inconsistent with the express language of the term. Respondents  
4 respond, and we agree, that the parking use is the principal use of the site.  
5 Accordingly, the city council correctly concluded that substantial construction of  
6 the parking use has taken place.

7                   **2. The Parking Guard Station is not an Accessory Structure**  
8                   **or Use**

9           BDC chapter 90 defines "accessory structure or use" to mean "[a] structure  
10 or use incidental, appropriate, and subordinate to the main structure or use."  
11 Petitioner argued to the city council, and argues here, that the planning  
12 commission's March 2019 Parking Project approvals categorized the parking  
13 guard station as an "accessory structure or use." Therefore, petitioner argues, the  
14 city council's decision that construction of the foundation of the parking guard  
15 station qualifies as "substantial construction" improperly construes the defined  
16 term "substantial construction" because it is not "the completion of construction  
17 of footings *for the building where the principal use will take place.*" BDC chapter  
18 90 (emphasis added). In support of its argument, petitioner cites and relies on  
19 findings incorporated by the planning commission decisions which characterize  
20 the parking guard station as an "accessory use" and an "auxiliary structure."  
21 Record 285, 288.

22           The findings for the challenged decision state:

1 “The Council interprets ‘Accessory Structure or Use’ to mean a  
2 secondary use on a site that has a different ‘Use, Primary.’ It finds  
3 the \* \* \* Parking facility does not have a ‘Use, Primary’ that is  
4 different from the parking, and concludes that the guard structure is  
5 not an ‘accessory structure or use,’ because it is a part of [the] \* \* \*  
6 Parking facility.

7 “The Council interprets ‘Parking, as a Principal Use’ to mean a  
8 facility for daily parking that exclusively occupies an area, and does  
9 not mean a parking facility on a site with another approved ‘Use,  
10 Principal.’ ‘Facility’ is not defined in the Code. Webster’s Third  
11 New International Dictionary, 1993, which applies to undefined  
12 terms (BDC 10.20.6.B), defines ‘facility’ as ‘something (as a  
13 hospital, machinery, plumbing) that is built, constructed, installed,  
14 or established to perform some particular function or to serve or  
15 facilitate some particular end.’ Based on this definition, we interpret  
16 the term ‘facility’ in this context to include the guard structure  
17 because the function of and end served by the surface parking  
18 project is to provide vehicle parking, and the guard structure is an  
19 element of performing that function. The guard structure includes  
20 an office with windows and a restroom, and is intended to house a  
21 security guard to provide security for and to attend to any issues  
22 concerning the parking facility. Because the guard structure is part  
23 of the parking facility, which is the principal use of the site, the  
24 Council concludes the guard structure is neither ‘incidental’ nor  
25 ‘subordinate’ to the ‘Parking, as a Principal Use’ of the site.

26 “Further, the Planning Commission did not approve the guard  
27 structure as an ‘accessory use or structure.’ The criteria for review  
28 of ‘Accessory Uses and Structures’ are specified at BDC 60.50.05.  
29 The Council affirms the Planning Commission decision to not apply  
30 those criteria to the guard structure, and concludes the raising of that  
31 issue now is a collateral attack on the \* \* \* Parking approval.”  
32 Record 10-11.

33 Petitioner does not address any of the above-quoted city council interpretations  
34 or explain why they are inconsistent with the express language or the underlying

1 policy of the operative BDC provisions. Petitioner also does not explain why the  
2 city council’s interpretations of the planning commission’s decisions approving  
3 the Parking Project improperly construed the applicable law. Accordingly, absent  
4 any focused challenge to the city council’s interpretations of the operative BDC  
5 provisions or of the planning commission’s decisions, petitioner’s arguments do  
6 not provide a basis for reversal or remand.

7 Petitioner also argues that “[t]he guard shack cannot be a principal  
8 structure or building because it did not comply with numerous approval criteria.”  
9 Petition for Review 26. The city council found that petitioner’s arguments  
10 challenging whether the parking guard station complies with design review  
11 criteria are improper collateral attacks on the planning commission’s March 2019  
12 Parking Project design review approval. We conclude that petitioner’s same  
13 argument in this appeal is also a challenge to the merits of the unappealed March  
14 2019 decision, which is not the subject of this appeal. Accordingly, it does not  
15 provide a basis for reversal or remand.

16 Finally, petitioner argues that the city council’s alternative conclusion—  
17 that, even if the parking guard station is an “accessory structure or use,” the  
18 completion of its foundation qualified as “substantial construction”—is  
19 inconsistent with the BDC’s definition of “Building, Principal.”<sup>2</sup> However,

---

<sup>2</sup> BDC chapter 90 defines “Building, Principal” to mean “[a] structure within which is conducted the principal use of the lot.”

1 because we reject petitioner’s challenge to the city council’s conclusion that the  
2 parking guard station is not an accessory structure or use, we need not reach  
3 petitioner’s challenge to the city’s alternative conclusion.

4 **D. The City Council’s Decision is not Inconsistent with the**  
5 **Purposes and Policies Underlying BDC 50.90(1)(A) or *Former***  
6 **BDC 50.90(3)(B)(2) (2013)**

7 Finally, petitioner argues that the city council’s conclusion that the 2013  
8 PUD did not expire because the foundation of the parking guard station was  
9 completed prior to November 5, 2019, is inconsistent with the purposes and  
10 policies of the vesting and expiration requirements in *former* BDC 50.90(3)(B)(2)  
11 (2013) and BDC 50.90(1)(A).<sup>3</sup> Petitioner argues that “[t]he city council’s  
12 conclusion that the construction of the foundation for an accessory structure  
13 associated with a temporary surface parking lot not contemplated by the PUD can  
14 fully vest that PUD is wholly inconsistent with the purpose or underlying policy  
15 of the expiration and vesting provisions.” Petition for Review 30. However, as  
16 respondents note, petitioner does not point to any specific city council  
17 interpretation that is allegedly inconsistent with those provisions. Moreover,  
18 petitioner’s challenge to the city council’s interpretation relies on its argument  
19 that the parking lot is not a principal use and its argument that the parking guard  
20 station is an accessory structure, arguments which we reject above. Accordingly,

---

<sup>3</sup> BDC 50.90(1)(A) generally provides that approval of a planned unit development expires five years after the decision unless construction occurs, the use is established, or an extension is granted within the 5 year period.

1 petitioner has not established that any of the city council's interpretations are  
2 inconsistent with BDC 50.90(1)(A) or *former* BDC 50.90(3)(B)(2) (2013).

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 In the second assignment of error, petitioner argues that the 2013 PUD has  
6 expired for the reasons alleged in the first assignment of error and that,  
7 accordingly, the Fitness Center Project is a nonconforming use and LTF must  
8 establish that it has a vested right to complete the development. The second  
9 assignment of error is entirely dependent on our sustaining petitioner's first  
10 assignment of error, which argues that the 2013 PUD expired under BDC  
11 50.90(1)(A). We reject petitioner's first assignment of error and, accordingly, we  
12 need not reach the second assignment of error.

13 We do not reach the second assignment of error.

14 The city's decision is affirmed.