

September 28, 2017

Dana L. Krawczuk  
DKrawczuk@perkinscoie.com  
D. +1.503.727.2036  
F. +1.503.346.2036

**VIA EMAIL**

Cassie Ballew  
City of Portland  
Bureau of Development Services  
1900 SW 4th Avenue, Suite 5000  
Portland, OR 97201

**Re: Land Use Review LU 17-144195 DZ - 6025 SE Powel Boulevard Storage Facility**

Dear Cassie:

We represent Leon Capital Group, the applicant in the above referenced case. Please include this letter in the record.

We appreciate the City's collaboration over the past five months on this project. The changes Leon has made to the project based upon City and neighborhood feedback have improved the appearance of the project, but have also significantly increased the cost and/or reduced functionality. For example,

1. Extended glazing on 62<sup>nd</sup> street side.
2. Added brick to the entire street facing facades.
3. Changed building material from split faced cmu to ground faced cmu (which is more expensive).
4. Added vertical masonry elements to the front and back of the building.
5. At an early meeting with the neighborhood association, they requested that the look of Leon's building be consistent with the industrial feel of their neighborhood. One of the ways Leon achieved this was by providing the simulated divided lites on the storefront glazing.
6. At the same meeting the neighbor to the immediate north requested that Leon install a wood fence along the property line.

7. The same neighbor felt that building as was too close to the property line. Leon reduced the square footage of the building and cut back the building edge from the property line on the north side of the project. This was a significant reduction in building area.
8. At the request of the City, Leon internalized the parking so that it was not visible from 62<sup>nd</sup> street. This was a significant additional cost to the project.

Despite these design changes, the City has further recommended conditions of approval requiring second floor glazing and a prescribed amount of active space. As detailed below, the City's requests are not authorized by the code, are unnecessary and are an unconstitutional exaction, so we request that the City approve the self storage project without the following conditions:

1. *Additional Glazing.* An additional bay of windows shall be added to the second story of the SE Powell Boulevard façade, directly above the proposed ground floor windows within the three center bays. The new second story window addition shall match the color, type and size of the storefront system at the ground floor and at the corner.
2. *Office/Community Space.* The area behind the proposed ground floor glazing as indicated on Exhibits XX-XX shall have a minimum depth of 20'-0" and shall not include back-of-house functions such as storage, mechanical, and shelving, and the glazing immediately adjacent to these areas shall remain clear and transparent.

### **1. Additional Glazing**

The project is subject to objective ground floor window standards, which the SE Powell Boulevard façade exceeds. 61% of the length and area of the ground floor façade is glazed, although the code only requires 50% and 25%, respectively. Additional glazing is provided at the corner on the second story so that the predominate corner is emphasized.

The project is not subject to criteria that require windows above the ground floor, such as PCC 33.510.221. Nevertheless, the proposed condition requests glazing in excess of the ground floor window standard, and requests glazing on the second story over the central three bays, which are glazed on the ground level. The stated basis is the additional glazing is needed to meet guidelines A and C, which relate to minimizing long monotonous facades, as well as creating a varied and interesting façade along the street.

PCC 33.284.050.A and C provide:

**A. Building and roof design.** The building and roof are designed to be compatible with surrounding development, especially nearby residential uses. Considerations include design elements that break up long, monotonous building or roof lines and elements that are compatible with the desired character of the zone.

\* \* \*

**C. Street facades.** The design and layout of the street side of the site provides a varied and interesting facade. Considerations include the use of setbacks, building placement, roof design, variations in building walls, fencing, other structural elements, and landscaping.

While these criteria are discretionary, they do articulate what may be considered, and neither criterion suggests glazing as a means to meet the design objective. Instead, glazing is addressed in the ground floor window standard, which has been exceeded.

#### **A. Criterion A – Building and roof design**

Criterion A requires the building and roof to design to be “compatible with surrounding development, especially nearby residential uses.” This criterion is not aspirational. Meaning, the standard requires a comparison of the proposal with existing surrounding development; design changes based upon a vague sense of a desired vision for an area are not authorized by the criterion. While design elements that may be considered include elements that are compatible with the desired character of the zone, compatibility with the desired character of the zone is not what the criterion requires. Further, “compatible” does not mean identical or mimicking in style. Instead, a comparative analysis of whether the proposal and existing development are harmonious is required.<sup>1</sup>

For the reasons explained below, the proposed design is compatible with surrounding development. Additional glazing is not needed, and is not consistent with the design elements considered by Criterion A. When requesting the additional glazing, the City has not identified the “surrounding development,” compared the proposed façade to surrounding development, or

---

<sup>1</sup> Compatible is not defined in the code. Therefore, the word has its ordinary dictionary meaning. PCC 33.910.010. The definition of “compatible” includes:

1. capable of existing together in harmony; compatible theories; compatible people.

*Merriam-Webster.com*. Merriam-Webster, n.d. Sun. 22 Sep. 2017 ([https://www.merriam-webster.com/dictionary/compatible?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/compatible?utm_campaign=sd&utm_medium=serp&utm_source=jsonld)), provides,

explained why second story glazing on the SE Powell in excess of the ground floor window standards is the only means for achieving compatibility.

Before compatibility can be evaluated, the “surrounding development” must be identified. How far the “surrounding development” extends from the proposal is not defined in the City’s code, and the purpose statements in PCC chapter 284 do not require a particular surrounding development. Here, what should be considered as the surrounding development is influenced by purposes statements in the Self-Service Storage chapter of the zoning code (Chapter 284), zoning designations, and the dictionary definition of “surrounding.”<sup>2</sup>

The purpose statements in PCC 33.284.010, 33.284.030.A, and 33.284.040.A, are all focused on C and EX zones. The SE Powell Boulevard corridor east and west of the site is a patchwork of zoning that includes CG, R1 and R5 zoned properties. The ½ block wide, ½ mile long corridor, from to SE 56<sup>th</sup> Avenue to SE 67<sup>th</sup> Avenue, is an approximate ¼ mile extension west and east of the site, and captures several CG zoned properties. See Attachment 1. Because this area encloses the proposed development on all sides and includes the identified zoning, it should be the area of “surrounding development” that is analyzed as part of Criterion A.<sup>3</sup>

The existing surrounding development in this area is a mix of residential and commercial buildings consisting of a variety of architectural styles and materials. Attachment 2 includes photographs of exemplary surrounding development. The south side of SE Powell is predominately single family development, which is typically separated from SE Powell Boulevard by frontage roads and/or a continuous cement block wall that may or may not be covered in vines. For example, a long single color cement block wall extends from SE 62<sup>nd</sup> Avenue to SE 64<sup>th</sup> Avenue and again from SE 65<sup>th</sup> Avenue to SE 66<sup>th</sup> Avenue on the south side of SE Powell Boulevard, and appears it may be intended to mitigate sound from Powell. Single family homes are of primarily wood construction, and multifamily buildings are primarily comprised of wood and/or stucco material, and are either oriented toward SE Powell Boulevard

---

<sup>2</sup> The definition of “surround” includes:

- a. to enclose on all sides (the crowd *surrounded* her); to enclose so as to cut off communication or retreat
- b. to form or be a member of the entourage of (flatterers who *surround* the king)
- c. to constitute part of the environment of (*surrounded by poverty*)
- d. to extend around the margin or edge of (a wall *surrounds* the old city)

*Merriam-Webster.com*. Merriam-Webster, n.d. 22 Sep. 2017. <https://www.merriam-webster.com/dictionary/surround>

<sup>33</sup> An even more narrowly defined “surrounding area” for design review compatibility that included only two immediately adjoining buildings and two buildings across the street from the proposal has been affirmed by LUBA. *Leathers Oil Co. v. City of Newberg*, 63 Or LUBA 176 (2011).

or a side street. The surrounding commercial development is a mix of ages, construction type and materials. Buildings include two story stucco buildings (some with brick) near SE 57<sup>th</sup> and SE 65<sup>th</sup>/SE 66<sup>th</sup>, and single story buildings with a variety of materials, including wood, some brick elements, brick façades, some stone accents and concrete block.

The project is compatible with the surrounding development without the second story glazing. The building plane is broken up by several design elements, including ground floor glazing and storefront system, two story glazing at the corner, a generous canopy, fine-grained texture created by the brick veneer, vertical pilaster and the effective use of a darker color as an accent against the building's light body (e.g., dark second story brick veneer, flat metal panel, roof and vertical element caps, lighting and storefront system).

As compared to the existing surrounding development, the proposal has higher quality and more durable materials, and a more cohesive architectural style. Although the project is superior to surrounding development, it is compatible because it incorporates some of the better design elements, such as brick materials, a predominate corner, and use of natural colors. Second story windows are not required in order for the proposal to be compatible with surrounding development. Moreover, second story glazing would interfere with the operational needs of the self-storage use, which is an allowed use.

### **B. Criterion C – Street façade**

Criterion C requires the street side of the site to have a varied and interesting façade, through design and layout. Like criterion A, criterion C lists elements that can be considered when determining compliance, and glazing is not included. Instead, glazing is addressed in the ground floor window standard, which has been exceeded.

The project's building design features are detailed above (brick, canopies, use of color etc.) and depicted on elevations. Additional second story glazing is not required in order to create a varied and interesting façade along SE Powell Boulevard.

### **2. Office/Community Space**

By way of background, at an early meeting with the neighborhood association, representatives requested that Leon provide them with a community space on the project's ground level that they could use to hold public meetings. In an effort to be a good neighbor, Leon was open to providing a community space within the project. During subsequent meetings with the City, Leon was told that the neighbors would rather see that space be "incubator" office space.

While Leon was agreeable to voluntarily providing a community space on this project, the City has no authority to require ground level office and/or community space as a part of the proposal.

The request to fundamentally change the nature of the proposed business has financial consequences to the developer, including operational costs and a diminished ability to finance and ultimately sell the project. The request to convert a portion of the building to a particular use has no nexus to the proposal and the financial impact is not proportional to the project's impact, so the request is prohibited as an unconstitutional exaction.

The proposed self-storage use is allowed outright, and the fact that it is a "low activity level use" that "does not add to the vitality of a commercial area" is expressly recognized in the code. PCC 33.284.010. As noted in the purpose statement of the development standards in PCC 33.284.030.A the impact of this "extremely low activity level" use and the related detraction "from the vitality and desired interaction among commercial uses in the area" is addressed by the objective development standards in PCC 33.284.030, all of which are met by the proposed development.

Design review of self-storage buildings, and the related design guidelines, in PCC 22.384.040 and .050 relate exclusively to the exterior design of the building. None of the criteria in PCC 33.284 authorize the City to demand a particular use on the ground level of a self-storage facility. By comparison, other locations in the City do have mandatory ground floor active use standards, as articulated in PCC 33.510.225, but those standards do not apply to this use or site. Nevertheless, the City has proposed regulating the interior of the proposal, by specifying that for a minimum depth of 20'-0" behind the ground floor glazed area cannot be used for storage functions, despite the fact that the proposed uses is self-storage. Leon Capital estimates that sacrificing this area of otherwise net rentable space will result in lost revenue of approximately \$31,595 annually. Moreover, self-storage facilities of the class proposed in this application typically obtain institutional financing, and her frequently purchased and held by institutional REITs. Both have strict operational and management standards, and introducing a mix of uses into an asset type that is typically single purpose storage, reduces the value of the project to investors and buyers.

Because of the economic impact to the owner caused by the City's proposed condition to convert a portion of the ground floor to a different use, it is a monetary exaction that is subject to the "essential nexus" and "rough proportionality" requirements. *Koontz v. St. Johns River Water Management District*, 570 US 2588, 133 SCt 2586, 186 LEd2d 697 (2013), *Nollan v. California Coastal Commission*, 483 US 825, 107 SCt 3141, 97 LEd2d 677 (1987); *Dolan v. City of Tigard*, 512 US 374, 114 SCt 2309, 129 LEd2d 304 (1994). Specifically, in order to impose a condition requiring a monetary exaction, the City must demonstrate through adopted individualized findings that: (1) there was an essential nexus between the mitigation measures and the government's interest; and (2) the scope of the mitigation measures was roughly proportional to the projected impact of the development. *Id.* and *McClure v. City of Springfield*, 175 Or App 425, 433-34, 28 P2d 1222 (2001).

Cassie Ballew  
September 28, 2017  
Page 7

There is no essential nexus between the condition requiring active use on the ground floor and the proposed self-storage building because self-storage is allowed outright, and the code acknowledges that it is a low activity use. That potential impact is mitigated by the development standards in PC 33.284.040, all of which the proposal satisfies, so there is no unmitigated impact which justifies a condition requiring active use. Moreover, the City has provided no analysis of the proportionality of the cost of converting a portion of the project to a different use, which the owner estimates to be \$31,595 annually, plus further diminished value to investors and potential purchasers. Without a demonstration of an essential nexus and rough proportionality, any condition to convert a portion of the proposed self-storage building to a different use is unconstitutional.

### Conclusion

Leon has made several revisions to the project in response to City and neighborhood requests. The proposed project is better overall. The requested conditions go too far, and are in excess of regulatory limits on what the City is able to request as revisions to the proposed use. Accordingly, we request that the City approve the proposed self-storage building without conditions of approval 1 and 2.

Very truly yours,



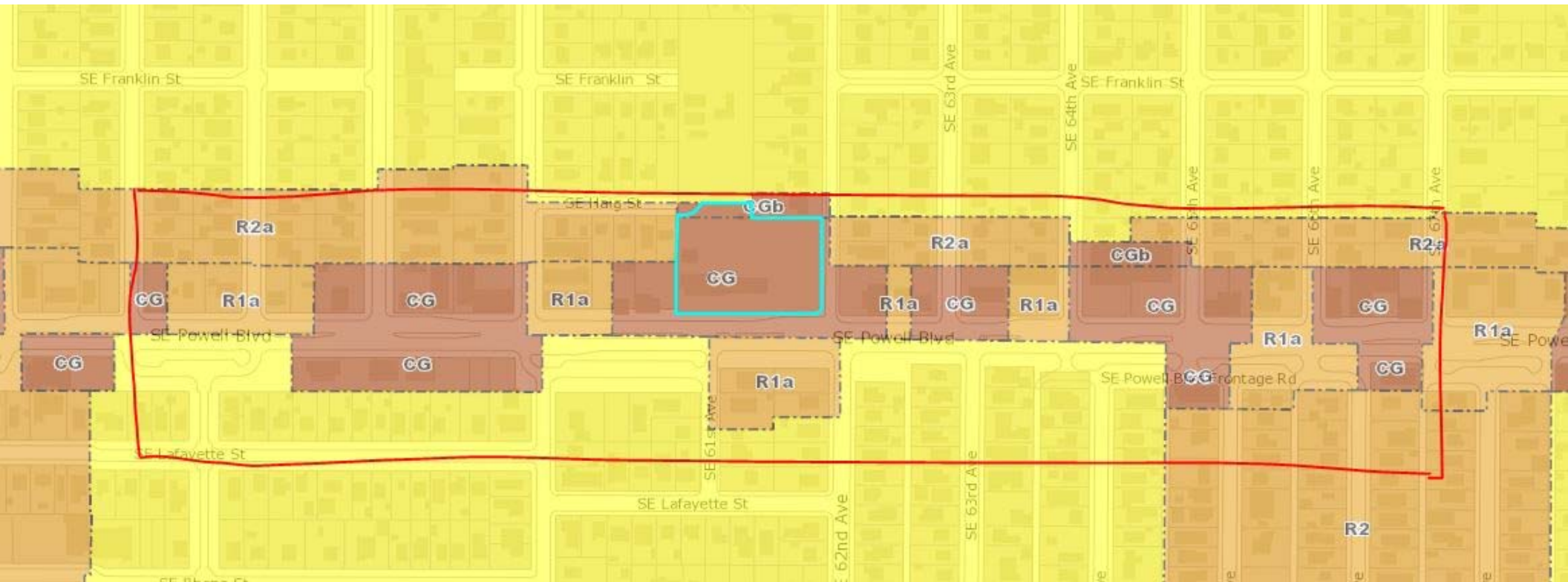
Dana L. Krawczuk

DLK:sv

Cc: Bryan Barry  
Jake Walker

Attachment 1 Surrounding Area  
Attachment 2 Photographs of Surrounding Development

Attachment 1 Surrounding Development Map





**Attachment 2 – Surrounding Development**



2 story building at SE 57th.



2 story building at SE 58th.



2 story multi-family at SE 66th.



2 story Shamrock Apts. at SE 58th.



Commercial block construction at

SE 65th.



Concrete wall on south side and 2

story residential.



Multi-family at SE 67th.



Multi-family at SE 68th.



Seafood Company at SE 65th.



SE 57th.

South side of Powell block wall at



SE 57th.

South side of Powell block wall at



at SE 56th.

South side of Powell concrete wall



South side of Powell concrete wall

at SE 67th.