



Hathaway Koback  
Connors LLP

520 SW Yamhill St.  
Suite 235  
Portland, OR 97204

**E. Michael Connors**  
503-205-8400 main  
503-205-8401 direct

[mikeconnors@hkcllp.com](mailto:mikeconnors@hkcllp.com)

May 10, 2016

## VIA EMAIL & HAND DELIVERY

Planning & Sustainability Commission  
Bureau of Planning & Sustainability  
City of Portland  
1900 SW 4<sup>th</sup> Avenue, Suite 7100  
Portland, OR 97201

Re: Mixed Use Zones Project  
Pliska Investments LLC & Space Age Fuel, Inc.

Dear Commissioners:

This firm represents Pliska Investments LLC and Space Age Fuel, Inc. ("Space Age Fuel"). Pliska Investments LLC owns several properties in which Space Age Fuel operates gas stations/convenience stores/service garages throughout the City. The Mixed Use Zones Project proposes to rezone the following Space Age Fuel properties as follows: (1) 16431 SE Foster Rd. from CG to CE; (2) 8410 SE Foster Rd. from EX to CM3; (3) 12920 SE Stark St. from CG to CM2; and (4) 11214 SE Powell Blvd. from CN2 to CM1. All of these properties have gas stations and convenience stores, and the 8410 SE Foster Rd. and 12920 SE Stark St. properties have vehicle repair shops as well. On behalf of Space Age Fuel, we are submitting the following comments and concerns regarding the draft Mixed Use Zones Project.

Space Age Fuel has serious concerns about the draft Mixed Use Zones Project because the proposed rezoning will render the gas stations and vehicle repair shops on at least three of these properties nonconforming uses and will make it virtually impossible to modernize or upgrade these sites. A gas station or "Quick Vehicle Servicing" use is prohibited in the CM1, CM2 and CM3 zones.<sup>1</sup> The only mixed use zone that would allow a gas station is the CE zone. With the exception of the 16431 SE Foster Rd. property, none of the remaining Space Age Fuel properties are proposed to be zoned CE. As a result of this proposed zoning, the gas stations and vehicle repair shops on three of Space Age Fuel's properties will be nonconforming uses and will be prohibited from being remodeled, modernized or redeveloped with another gas station. Not only will the proposed mixed use zones impact the existing uses, but they will substantially reduce the value of

---

<sup>1</sup> Gas stations qualify as "Quick Vehicle Servicing" uses under the PCC. PCC 33.920.220(A).

these properties since it is extremely difficult to redevelop a site that was previously occupied by a gas station.

Although the draft Mixed Use Zones Project proposes certain nonconforming use accommodations for Drive-Through Facilities in PCC 33.130.260 and gas stations are included in the definition of Drive-Through Facilities under PCC 33.910, we were recently advised by the City staff that these nonconforming use accommodations do not apply to gas stations. As a result, Space Age Fuel and similar gas stations with proposed mixed use zones other than CE will not be able to take advantage of these nonconforming use accommodations designed specifically to soften the impact of the new mixed use zones on automobile accommodating uses. Moreover, the nonconforming use accommodations set forth in PCC 33.130.260 are not adequate and would significantly restrict the ability to remodel, update or redevelop a gas station even if these standards applied.

One of the stated goals of the draft Mixed Use Zones Project has been to retain and match the use allowances of the zones being replaced and not cause existing uses to become nonconforming. The draft Mixed Use Zones Project is not adhering to this principle with respect to gas stations. In fact, gas stations appear to be one of the few use categories that will be converted to nonconforming uses on a broad scale under the draft Mixed Use Zones Project and not provided any nonconforming use accommodations. While we understand that the mixed use zones are intended to be more pedestrian friendly, there is still a substantial public need for accessible gas stations throughout the City since automobiles are the primary mode of transportation for the vast majority of Portland residents and will continue to be so for decades to come. Additionally, the draft Mixed Use Zones Project does not similarly impact other automobile-intensive uses, including some uses that generate far more traffic than a gas station (i.e. big box retail, grocery store, etc.).

To avoid converting these existing gas stations into nonconforming uses and significantly reducing the value of these properties, Space Age Fuel requests that the Planning and Sustainability Commission make one or more of the following changes to the draft Mixed Use Zones Project: (1) zone all of Space Age Fuel's properties CE; (2) allow gas stations and vehicle repair shops in the other mixed use zones; and/or (3) broaden the nonconforming use accommodations set forth in proposed PCC 33.130.260 and expressly provide that these provisions apply to gas stations. Based on our recent conversations with Barry Manning and Chris Scarzello with the City, the City staff is open to considering these changes and is particularly supportive of Space Age Fuel's proposals to zone its properties CE so the gas stations remain an allowed use in the new mixed use zone.

**A. All of Space Age Fuel's properties should be zoned CE.**

The easiest and most effective way to ensure that Space Age Fuel is not adversely impacted by the Mixed Use Zones Project is to zone all four of its properties CE. When selecting the appropriate mixed use zone for a particular property, the existing use should weigh heavily in that consideration and the City should avoid imposing a new mixed use zone that will cause the existing use to become nonconforming. Since the CE zone is the only new mixed use zone that allows gas stations, the City should select the CE zone for all of Space Age Fuel's properties that have existing gas stations and/or vehicle repair shops. Not only would zoning these properties CE avoid converting the existing gas stations into nonconforming uses, but there are compelling reasons for changing the zoning to CE.

For the 11214 SE Powell Blvd. property, the CE zone is more appropriate than the proposed CM1 zone given the existing uses and the characteristics of the surrounding area. The proposed CM1 zoning applies to a small area around the intersection of SE Powell Blvd. and SE 112<sup>th</sup> Ave. that has predominately auto-oriented uses. This small area includes Space Age Fuel's gas station and convenience store, a quick service automobile battery and repair shop across the street at 11207 SE Powell Blvd. (Battery Specialist) and another gas station on the same block at 11421 SE Powell Blvd. (Leather's Oil), as well as restaurants. Given the predominant auto-oriented uses in this area, the proposed CM1 zone is inappropriate since it is intended to accommodate small scale "pedestrian oriented" development. The City should not impose a new pedestrian-oriented zone on an area that is predominately auto-oriented. In contrast, the CE zone is "intended for sites along corridors in areas between designated centers, especially along Civic Corridors that are also major truck streets." This area is not within a town center, SE Powell Blvd. is a Civic Corridor and this section of SE Powell Blvd. is between designated centers, and therefore the CE is appropriate in this area. Ms. Scarzello with the City advised us that she is supportive of a CE zone for this site.

For the 12920 SE Stark St. property, the CE zone is more appropriate than the proposed CM2 zone. This particular CM2 zoned area is relatively small and is just outside the town center located along SE 122<sup>nd</sup> Ave. The CM2 zone is intended for "smaller mixed use areas that are well served by frequent transit," but this section of SE Stark St. is not well served by frequent transit. Additionally, this CM2 zoned area is practically adjacent to a CE zoned area that extends west along the south side of SE Stark St. The City could simply extend the CE zoned area to the east. Ms. Scarzello with the City advised us that she is supportive of a CE zone for this site.

For the 8410 SE Foster Rd. property, the CE zone is more appropriate than the proposed CM3 zone. The immediate surrounding area includes a number of automobile oriented uses, such as Space Age Fuel's gas station, convenience store and vehicle repair shop, an automobile tire service center at 8530 SE Foster Rd. (Premium Tire Service), an automobile service center at 8324 SE Foster Rd. (Automotive Outfitters), and a gas station at the corner of SE Foster Rd. and 82<sup>nd</sup> Ave. (Shell). Given the predominant auto-oriented uses in this area, the proposed CM3 zone is inappropriate since "development is intended to be pedestrian oriented." The City should not impose a new pedestrian-oriented zone on an area that is predominately auto-oriented. In contrast, the CE zone is "intended for sites along corridors in areas between designated centers, especially along Civic Corridors that are also major truck streets." SE Foster Rd. is a Civic Corridor and this section of SE Foster Rd. is between designated centers, and therefore the CE is appropriate in this area.

To the extent the City does not want to make larger changes to the proposed mixed use zoning in these areas, the City can and should change the proposed zoning for just Space Age Fuel's properties given the existing uses on those properties. The Mixed Use Zones Project is proposing single CE zoned properties that are surrounded by other mixed use zones in order to accommodate

existing uses in other instances.<sup>2</sup> The City should provide similar accommodations to Space Age Fuel's properties. Ms. Scarzello at the City advised us that she is supportive of a CE zone for the 11214 SE Powell Blvd. and 12920 SE Stark St. properties, and is open to considering a CE zone for the 8410 SE Foster Rd. property.

Finally, it is important to note that the Mixed Use Zones Project includes proposals to change some residentially zoned properties with established commercial use to a mixed use commercial zone so the existing uses can become legally conforming. If the City is rezoning residential properties to mixed use commercial in order to conform existing nonconforming uses, it should be willing to change the type of mixed use commercial zone for a particular property in order to avoid converting the existing commercial use into a nonconforming use.

**B. Gas stations and vehicle repair shops should be allowed uses in all of the mixed use zones.**

Although we recognize that the City wants the new mixed use zones to be more pedestrian friendly, there is still a substantial public need for gas service stations throughout the City. Automobiles are currently the primary mode of transportation for the vast majority of Portland residents and will continue to be so for decades. Space Age Fuel's four gas stations noted in this letter average between 450 to 900 customers per day, and provide its customers a low cost fuel source. Residents need easy access to gas service stations or they will be forced to drive further distances to find this service. The City should ensure that gas stations are reasonably accessible to the public and should not adopt new mixed use zones that will prohibit these types of uses or discourage their redevelopment and modernization.

Currently, gas stations are only allowed in industrial and commercial zones. Commercial zones are the most appropriate zones for these uses since they need to be accessible to surrounding businesses and residents that travel to these commercial areas. If the draft Mixed Use Zones Project is adopted, gas stations will be limited to the CE zone and some industrial zones. Given the limited areas that are proposed to include CE zoning, there are simply not enough properties zoned to accommodate the gas stations necessary to serve the growing population.

Rendering existing gas station properties nonconforming uses in the majority of the mixed use zones will not lead to redevelopment of these properties with pedestrian-oriented uses. It is extremely challenging and cost prohibitive to redevelop a former gas station use into another type of use due to environmental issues. It is even more challenging to redevelop small sites like Space Age Fuel's properties because the return on the development is not large enough to redevelop an environmentally challenging site. The only viable economic use for such a site is to retain the existing gas stations no matter how old or outdated. Preventing Space Age Fuel from modernizing

---

<sup>2</sup> The following are examples of the City proposing a single CE zoned properties surrounded by other mixed use zones in order to accommodate an existing use. The Mixed Use Zones Project proposes a CE zone for the gas station and vehicle repair shop located at 9808 SE Division St. notwithstanding the fact that it is surrounded by CM1 and CM2 zoned properties. The Mixed Use Zones Project proposes a CE zone for the Fabric Depot property located at 700 SE 122<sup>nd</sup> Ave. notwithstanding the fact that it is surrounded by CM2 and CM3 zoned properties.

or upgrading its gas stations on a site that cannot be redeveloped in a cost effective manner will substantially reduce the value of these properties.

To avoid this problem, the City should allow gas stations in some or all of the other mixed use zones, at least those areas outside the Central City area. There is no reason why a gas station should be prohibited in the medium-scale CM2 commercial zone and large-scale CM3 commercial zone when it is allowed in the medium-scale CE commercial zone. Gas stations should be allowed in all medium and large-scale commercial zones. Gas stations should not be prohibited in the CM1 zone since they are currently allowed in one of the corresponding small scale commercial zones, the CN2 zone.

**C. The nonconforming use accommodations set forth in proposed PCC 33.130.260 should be broadened.**

To the extent the Commission is not willing to zone all of Space Age Fuel's properties CE or allow gas stations in the other mixed use zones, the Commission should broaden the nonconforming use accommodations set forth in proposed PCC 33.130.260 and expressly provide that these provisions apply to gas stations and vehicle repair shops. The Mixed Use Zones Project proposes modifications to the Drive-Through Facilities provisions set forth in PCC 33.130.260 that would allow for nonconforming drive-through facilities to redevelop in the CM2 and CM3 zones if certain standards are satisfied. The staff commentary for this section indicates that these changes are intended to soften the impact of the new mixed use zones on automobile accommodating uses and "allow for the improvement of existing development, which would otherwise be regulated as a non-conforming development, limiting the ability to rebuild or update facilities with this status." In order to provide similar rights for gas stations, the Commission should broaden this proposed provision in several respects.

The Commission should expressly provide that these provisions apply to gas stations. Although gas stations are expressly included in the definition of Drive-Through Facilities under PCC 33.910, we were recently advised by the City staff that these nonconforming use accommodations are not intended to apply to gas stations. There are two problems with the staff's position. First, if gas stations are expressly included in the definition of Drive-Through Facilities and the primary component of a gas station clearly meets the characteristics of a drive-through facility (fuel pump islands), there is no reason why these provisions should not apply to gas stations. Second, the rationale for providing these accommodations to drive-through facilities applies equally to gas stations. While the City may want to restrict new automobile-oriented uses in the mixed use zones, it should not punish existing uses by transforming them into nonconforming uses or create a disincentive to modernize or redevelop these sites. The City should support efforts to modernize or redevelop these sites with newer gas stations, not impeded such plans. It would be patently unfair for the City to provide nonconforming use accommodations to drive-through facilities in general and not provide the same accommodations to gas stations even though they qualify as drive-through facilities and are similarly situated.

The Commission should also allow for these nonconforming use accommodations in the CM1 zone. Currently, proposed PCC 33.130.260 only provides these nonconforming use accommodations in the CM2 and CM3 zones. Since gas stations are allowed in the current CN2 zone, which is one of the corresponding zones for the CM1 zone, the CM1 zone should allow these

same nonconforming use accommodations because some CN2 properties will have existing uses that will be converted to nonconforming uses if the CM1 zone is applied. Space Age Fuel's 11214 SE Powell Blvd. property is a perfect example. It is currently zoned CN2, and therefore the gas station is an allowed use. The proposed zone is CM1, which will convert the existing gas station to a nonconforming use. This is precisely the type of situation that proposed PCC 33.130.260 is intended to address.

The Commission should delete or modify the requirement in proposed PCC 33.130.260(A)(3) that rebuilt drive-through facilities in the CM3 zone must be part of a larger development on the site with a minimum FAR of 1 to 1. A gas station/convenience store is typically a stand-alone development that is not part of a larger development. Nor is it possible to redevelop a gas station with a minimum FAR of 1 to 1 because they are one-story buildings and need to provide room for the fuel islands. To accommodate existing gas stations in the CM3 zone, this provision should be deleted or modified to allow for an exception for gas stations since they are not part of a larger development nor do they have a minimum FAR of 1 to 1.

### **Conclusion**

The City should not impose new mixed use zoning standards in a way that causes a select category of existing uses to become nonconforming and effectively prohibits the redevelopment or modernization of these types of facilities. The City needs to ensure that gas stations and vehicle repair shops are reasonably accessible to the public and should not adopt new mixed use zone standards that will jeopardize these types of uses, discourage their redevelopment and modernization, and substantially reduce the value of the underlying properties. Space Age Fuel proposed three specific ways of addressing this problem and urges the Commission to adopt one or more of these approaches.

Please understand that if the City is not willing to accommodate Space Age Fuel's concerns in a reasonable manner, it will have no choice but to strenuously object to the Mixed Use Zones Project and challenge it through any legal means possible. We appreciate your consideration of our comments. We look forward to working with the City further on this matter.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP



E. Michael Connors

EMC/pl  
cc: Clients