



520 SW Yamhill St.  
Suite 235  
Portland, OR 97204

**Christopher P. Koback**  
503-205-8400 main  
503-205-8404 direct

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

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**VIA EMAIL**

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

Re: Composite Zoning Proposal-Mixed Use Zone Project  
Robert Foglio, Owner of 2626 NE Dekum

Dear Commissioners:

This firm represents Robert Foglio, owner of the property located at 2626 NE Dekum Street in Portland. Mr. Foglio acquired the property on June 26, 2015. The Property was, and still is, zoned Neighborhood Commercial 2 ("CN2"). That zone is intended for small sites in or near less dense or developing residential neighborhoods. The permitted uses include household living, retail (with limitations), schools, colleges, medical centers and religious institutions. PCC Chapter 130, Table 130-1. Density is determined by FAR and the maximum is .75 to 1 FAR, but that does not apply to residential uses. That lack of an FAR, combined with a 65% maximum building coverage and limited setbacks (10 feet for transit street or pedestrian district) allows for a viable residential development on a small site.

As part of the recently comprehensive plan amendment process, the City initially slated Mr. Foglio's property to be designated Campus Institutional. Mr. Foglio and our firm testified on that matter and that designation was not placed upon his property. Rather, his property was designated CM1 and is currently proposed to be rezoned to CM1 as part of the Mixed Use Project. Mr. Foglio submitted written comments specific to the Mixed Use Project hearings. Mr. Foglio also wants his position set forth in the Composite Zoning Proposal.

Mr. Foglio is concerned over the significant economic impact that rezoning his property to CM1 will have. He believes that retaining the CN2 zoning is the most appropriate zoning for small parcels such as his. While the impact of the proposed rezoning is linked to development standards in the new proposed zone, Mr. Foglio feels it is appropriate for him to address the issue in this forum for a couple of reasons. First, because the new FAR standards for residential uses in the CM1 zone have already been published in draft form, the proposed new zoning is the direct cause of the negative impacts to Mr. Foglio's property. Second, Mr. Foglio is not certain whether there

will be a process in connection with implementing the new development standard in which he will be able to make his points.

**A. The proposed CM1 Zoning will defeat the reasonable economic expectations Mr. Foglio had when he purchased his property.**

Mr. Foglio, and other owners, acquired properties in the CN2 zone because it permits multi-family housing and does not have an FAR. Small lots within a commercial zone are not conducive to commercial redevelopment. But, the lack of FAR allows owners to develop residential uses that are economically feasible. Thus, the highest and best use of these small CN2 parcels is residential redevelopment. The purchase price is based upon that highest and best use and in Mr. Foglio's case, was higher than if he acquired the property that was limited to commercial development or had to meet an FAR requirement for residential uses. In this case, if the CM1 zoning is applied to Mr. Foglio's property, he will have to redevelop his property with an FAR of 1.5 to 1 for all uses including residential living. As a result, he will lose two residential units that he counted on when he acquired the property under the CN2 zoning. That loss in units equates to an annual loss between \$30,000.00 and \$36,000.00. Mr. Foglio strongly believes that the proposal for his property is a taking. If his property was appropriate for a residential development with no FAR prior to the current plan, he does not see how it can now be inappropriate for the same development.

It appears to Mr. Foglio that the City recognizes the significant negative impact the proposal will have on his property, but the suggested response to the proposed rezoning is not adequate. The only options mentioned are to quickly file applications for development before the zone change, or apply for a density bonus, which could permit an FAR of 2.5 to 1. Not many owners can immediately apply for development permits. For example, as in Mr. Foglio's case, he acquired the property subject to an existing lease. That is not unique to Mr. Foglio. It is not uncommon for commercial properties to transfer with existing leases. Redevelopment may be some time down the road. Even if an owner applied and received permits, they would lapse before he could take actions to vest his or her development rights. The only alternative in some cases would be to force an owner to pay a lease termination fee, or violate the lease and be exposed to damages.

As far as Mr. Foglio can determine, the specific density bonus that will be available are not yet published. Based upon his conversations with staff, he understands that the primary focus will be on a bonus for affordable housing. He does not feel that he should be forced to develop and own affordable housing to obtain the development rights upon which he based his acquisition. There is nothing wrong with having incentives to develop affordable housing, but Mr. Foglio feels that the proposed bonuses really try to coerce such development by denying owners the rights they expected when they acquired property unless they develop affordable housing.

**B. There are alternatives that are consistent with the general purposes the City seeks to advance.**

The most effective means to avoid the dramatic economic impact on owners such as Mr. Foglio is for the City to retain the CN2 zoning on small CN2 properties. Mr. Foglio feels that the City should more carefully examine how proposed zoning will impact small commercial parcels that are not appropriate for commercial development and thus, rely upon the lack of FAR to support

feasible redevelopment. He believes that a careful review of the impacts of the CM1 zone on a fairly small population of lots, will lead to a conclusion that those small lots are more appropriate with the CN2 zone. On this point, it does not appear that the general purposes of the CN2 and CM1 zones are substantially different. Both zones are intended to promote small scale development in or near residential areas. While the CM1 zone may be more directed at pedestrian oriented development, that type of development is not inconsistent with the CN2 zone. In fact, the current CN2 zone contains development standards specific to development in pedestrian districts. Pedestrian oriented development is compatible with the CN2 zone.

Another alternative, that would allow the City to accomplish the underlying goals of the Mixed Use Project and not negatively impact the small CN2 parcels, would be to rezone CN2 properties to CM1, but recognize that many current owners purchased CN2 property in reliance upon the CN2 standards and delay the effective date for the application of the new FAR standards. There are a number of options for how the City could do this. One way is to grandfather all CN2 properties under a certain size so they can be developed as residential uses without an FAR requirement. It appears that in other contexts, such as uses that would become nonconforming, the City has considered grandfather provisions to avoid the negative impacts on owners of those properties.

A second way to approach the situation would be to provide owners with a reasonable period of time under the CM1 zoning before the FAR standards apply to former CN2 zoned properties. Recognizing that a number of those properties have long term leases that prevent immediate development, the code could be written to allow owners to proceed with residential development under the current FAR standard for CN2 properties if they do so within a specified period.

#### **Conclusion.**

The City should not take away the reasonable economic expectation of owners who acquired small CN2 properties based, in part, at least on the absence of an FAR requirement. The basic purpose behind the proposed CM1 zone can still be achieved if small CN2 properties remain under that zone. Moreover, even if the CM1 zone is applied, there are steps the City can take to avoid taking a significant amount of the value of the CN2 properties from the owners.

Thank you in advance for your consideration of this request.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP



Christopher P. Koback

CPK/pl

cc: Barry Manning, Senior Planner  
Robert Foglio