CHURCHILL LEONARD
LAWYERS

June 7, 2017

Jim Brewer, Hearings Officer
c/o Pamela Cole, Planner II
City of Salem Planning Department
555 Liberty Street SE #305
Salem, OR 97301

Re: Written Statement in Opposition to Quasi-Judicial Zone Change, Class 3 Site Plan Review, and Class 1 and Class 2 Adjustments
Case No. ZC-SPR-ADJ 17-02; Our File No. 13788

Dear Mr. Brewer,

This letter is sent on behalf of Garten Services, Inc., doing business as Garten Mail and Packaging and Assembly Services, in response to the supplemental submission of Joey Shearer, of AKS Engineering and Forestry, dated May 31, 2017. The supplemental submission was provided by Mr. Shearer following the public hearing for a Quasi-Judicial Zone Change, Class 3 Site Plan Review, three Class 2 Adjustments, and one Class 1 Adjustment held on May 24, 2017.

In terms of the requested Zone Change application, Mr. Shearer argues that the zone change from IBC to IP meets the criteria for approval because the two zones are very similar in the uses allowed and development standards. Garten disagrees with Applicants' statements. First, the reason Applicants seek a zone change to the IP zone for the Subject Property is not because the uses are similar or consistent with one another, but because the current IBC zoning will not allow development of another hotel for short-term lodging on the Subject Property. In other words, the IP zone is not sought because of its consistency of use with the IBC zone, but because it would allow Applicants to circumvent the restrictions of the current IBC zoning for this development site, which already contains a large hotel for short-term lodging.

Likewise, Applicants' statement that the development standards of the IBC, IC, and IP zones are similar, and thus supportive of the zone change and the proposed use is erroneous where Applicants are seeking multiple Adjustments to waive or reduce multiple IP development standards to fit their desired use. Specifically, Applicants want the IP zone to obtain the ability to add additional rooms for short-term lodging over and above the restricted number allowed under the IBC zone, yet Applicants also want to obtain waivers of the current IP development standards to match those of the IBC zone through the four Adjustment applications in order to fit the oversized hotel use into the Subject Property. Thus, the zone change is not sought because the standards are consistent between the IP zone and the IBC zone, but because Applicants are seeking to pick and choose between the standards they would like to follow and the restrictions they wish to avoid for their desired use.

In addition, Applicants' statements that the use of the Subject Property is logical for the Subject Property and in relation to the surrounding land uses is also incorrect. As admitted to by

Applicants, in addition to the Hampton Inn next door, there are two additional hotels providing short-term lodging in close proximity to the Subject Property. Based on this another hotel in the area is not logical where: 1) there is no need for additional short-term lodging; 2) additional short-term lodging would not be supportive of the surrounding industrial uses as promoted by the IP zone based on the existing short-term lodging; and 3) significant evidence has been provided that the size and scope of the proposed use will have negative impacts on the Garten property to the east. For these reasons, and those addressed in Garten's previous written submission, Applicants' claim that the proposed use under the IP zone is logical based on the surrounding land uses in inaccurate and Applicants' applications should be denied.

In seeking approval for their applications, Applicants attempt to hide the negative impacts of the oversized hotel they seek by promoting other uses that would/could result in higher trip counts to and from the Subject Property. These other potential uses for the Subject Property presented by Applicants include a 24-hour Fitness, Olive Garden Restaurant, and a Subway Restaurant. While we will not get into discussion about the feasibility of placing either a 24-Hour Fitness or an Olive Garden restaurant on the property based on the proximity of existing uses for both companies at nearby locations on Lancaster Drive, we would like to address these additional proposed uses and Applicants' suggestion that they could be sited on the property. First, Health Clubs and Gyms are allowed in the IP zone as a permitted use. As shown in Applicants' supplemental writing, a 24-Hour Fitness center would carry similar parking needs to that of the proposed 82-room hotel. However, Applicants' letter excludes the footprint of the proposed hotel as a means of trying to highlight trip counts over building size. Applicants need three Class 2 Adjustment in order to fit the required 82 parking spaces in support of their desired hotel use, which hotel, according to Applicants' previously submitted materials, will have a footprint of 14,459 square feet. Conversely, the proposed available use for a 24-Hour Fitness would have a footprint of 25,000 square feet; a footprint 10,514 square feet larger (73% larger) than the proposed hotel. This significant additional square footage could only be taken from the parking spaces and drive aisles as the IP zone requires specific ratios for landscaping. As such, it would be impossible for Applicants to actually site a 24-Hour Fitness center on the Subject Property, so any claim that they could apply that specific use as a means of supporting their desired use is inaccurate and should be rejected.

Alternatively, for the Olive Garden and the Subway restaurants, while Applicants provide evidence that potential trips to and from the Subject Property would be increased, they ignore the fact that a large part of Garten's objections relate not to the use of the driveway for access, but to the inevitable encroachments on that access driveway that will result from the proposed parking spaces to be located on both sides of the existing driveway access. With the proposed uses for both an Olive Garden and a Subway, there would be significantly smaller building footprints, along with a significantly lower required number of parking spaces. This would result in a development where no Adjustments to avoid setbacks or building height restrictions would be needed, and all parking spaces directly along the existing access could be eliminated. Eliminating the parking directly adjacent to the existing access driveway would resolve a good amount of the concerns and objections expressed by Garten and would promote a development size that would be more consistent with the standards of the requested IP zoning and supportive of the surrounding industrial uses. That being said, while Applicants promote the Olive Garden and Subway as

potential alternative uses, the increased trip counts to and from the property for those uses could likely result in Applicants being required to perform a TIA to show that the number of trips along the existing access, and into and out of the property from Hawthorne Ave. SE were safe. Applicants have worked to tailor their current applications to avoid having to conduct a TIA for the proposed development to avoid safety issues or potential required improvements that could affect their proposed development. Therefore, Applicants' discussion of the other potential allowed uses for the Subject Property with higher trip counts does not support Applicants' claim that the proposed hotel use is more consistent with the requested zoning or development code standards or less burdensome than the other proposed where the proposed alternatives would require significant additional analysis before approval or simply could not fit within the site without waiver of significant development standards, similar to the current proposed use.

The last issue Applicants attempt to address in their supplemental written submission is the access easement in favor of the Garten Property. Pursuant to Section 3 of the Easement Agreement, recorded in Marion County at Reel 1709, Page 450 on August 4, 2000 (the "Easement"):

> Kyotaru hereby grants and conveys to TOP, its heirs, successors and assigns forever, easements for access and driveway purposes for vehicular and pedestrian use to and from Hawthorne Ave. S.E. over the two existing asphalt driveways located on the Kyotaru Property...The access easements shall run with the land and shall benefit the TOP Property and burden the Kyotaru Property, provided, however, that Kyotaru, its heirs, successors, and assigns shall have the right to use both driveways for purposes of access to and from the Kyotaru Property.

There is no dispute or claim that Applicants, as the successors in interest to Kyotaru, have rights to use of the existing norther driveway for access to and from the Subject Property pursuant to the terms of the recorded Easement. However, by its express terms, the Easement defines that Garten, as successor in interest to TOP, is the benefited party, with Applicants as the burdened party. The general rule in determining rights for use in an non-exclusive easement is that the grantee or benefited party of an easement (in this case TOP, with Garten as successor in interest) acquires a non-exclusive right, with the grantor or burdened party (Kyotaru, with Applicants as successor in interest) retaining the right to use the property or permit others to use it in a manner *not inconsistent with the grantee's rights*. *See* William B. Stoebuck & Dale A. Whitman, *The Law of Property* §§ 8.9, 8.11, at 458–63, 464–65 (3d ed 2000)(see OSB Oregon Real Estate Deskbook, Chapter 11, Easements §11.2-1(b)(2015 edition)(emphasis added). As such, where Kyotaru granted TOP a right to benefited access along the existing norther driveway, with a reservation for Kyotaru for joint access to the Subject Property along that same driveway, Applicants through Kyotaru, do retain access and use rights over the easements, but such rights and use by Applicants cannot be inconsistent with, nor inhibit Garten's use and access rights as obtained through TOP. For this reason, the burden is on Applicants to provide adequate evidence of the safe and efficient use of the access driveway for the proposed development, and the ability to avoid encroachments or other actions that would inhibit or be inconsistent with Garten's continued use of the easement for semi-trailer, heavy truck, and delivery van traffic to and from Garten's loading dock.

Applicants do not provide adequate evidence that the proposed use of the easement and access driveway for the proposed 82-room hotel will not interfere with or inhibit Garten's continued use of the driveway access. Applicants claim only that because the drive aisles and parking spaces are

of the size required in the UDC, they have proven their use will not interfere with Garten's access rights. However, Applicants have only just recently corrected its Site Plan to avoid direct encroachment onto the access driveway based on the purported adjustment in Applicants' most recent written submission. Garten, conversely, has provided photographic evidence of the encroachments and safety issues created by the Hampton Inn property south of the Subject Property, which development contains parking only along one side of that existing access. Further, Applicants' continued failure to address parking for recreational and large sized vehicles as part of its plan will result in other encroachments on the easement and on Garten's actual property as shown by the included picture of RV traffic from Hampton Inn parking in Garten's parking lot taken by Garten following the public hearing. Thus, based on the evidence in the record, Applicants fail to meet the burden of proof in showing their proposed use for the Subject Property is consistent with and supportive of the surrounding industrial uses where they cannot provide adequate evidence that their use will not impede or impair Garten's use of its established access driveway and easement rights.

Applicants seek to circumvent the restrictions on development of a new hotel under the current IBC zoning by switching to the IP zone. However, where the IP zone development standards do not allow for the size of Applicants' desired use, Applicants seek to avoid the standards of the requested zoning through multiple Adjustments to pick and choose between the various zoning standards and restrictions they would like to follow. Further, Applicants fail to provide adequate evidence that its use of the Subject Property will not impede or interfere with Garten's easement rights, or will provide safe and efficient access to and from both properties. In addition, speculation on alternative uses of the property that could have higher trip counts does not provide evidence in support of Applicants' development where such uses would not fit the property or would require further (TIA) analysis to determine feasibility and safety. For these reasons, and as addressed in Garten's previous submissions, Applicants proposed use is inconsistent with the goals of the IP zone, where the use is over-sized and not supportive of surrounding industrial uses. Therefore, Applicants' Quasi-Judicial Zone Change, Class 3 Site Plan Review, and Adjustment applications should be denied in full at this time.

Thank you for your time and consideration in this matter.

Very truly yours,

Andrew W. Sprauer
Lawyer
asprauer@churchill-law.com
Attorney for Garten Services, Inc.

Enclosure

cc: Garten Services, Inc.