

Meeting Date: September 3, 2020

convenience store with a gas station or fueling center is not an allowed use under the current zoning. Additionally, other areas within the original zoning area allowed “automotive uses” and this area specifically did not list automotive uses. In other areas of Town, retail uses do not include automotive fueling centers. Therefore, the Zoning Manager determined that if the PD zoning intended to include fueling stations, it would have been expressly called out as an allowed use for this parcel.

The Board of Adjustment shall review this appeal and per Municipal Code “determine whether the Manager’s decision was consistent with application of this title [Title 17] and either affirm or reverse the Manager’s decision.” The Board of Adjustment is not determining if a gas station use is appropriate at this location, but instead is determining if the Town’s Zoning Manager made the correct or incorrect determination regarding the allowed uses for this property.

### **Background Facts:**

The Town of Castle Rock had previously reviewed the request to allow a gas station use on the property located at the southwest corner of the intersection of Crystal Valley Parkway and Montaine Circle, also referred to as Lantern’s Planning Area 14 (previously Heckendorf Ranch Area I) (the “the Property”) and made a determination. In June of 2019, the Town received an inquiry regarding if a gas station/fueling center was an allowed use on the Property, per the existing Heckendorf Ranch PD zoning on the Property.

On June 27, 2019, a Letter of Determination was issued by Zoning Manager, Tammy King (the “2019 Determination Letter”). See **Staff Exhibit A**. In summary, the 2019 Determination Letter states that retail and convenience good uses are separate from automotive services, including gas stations/fueling centers, and are, therefore, not allowed by the current zoning. From the date of issuance, the 2019 Determination Letter served as the Town’s official determination regarding the Property.

Also on June 27, 2019, the Town provided written information indicating that a gas station/fuel center on the Property could be achieved through a PD amendment to allow for a gas station/fueling center use. The land owner, Mr. Carlson, was already working with staff at this time on a zoning amendment that including taking, this parcel out of the Heckendorf Ranch PD zoning area and incorporating it into the Lantern’s PD zoning area. At that time, the allowed uses in the new Lantern’s zoning text allowed the exact same uses as the original Heckendorf Ranch PD zoning, and that rezone application had already been heard by Planning Commission on May 23, 2019. Mr. Carlson indicated to staff that he did not want to change the Lantern’s rezoning that was in process at that time to add the gas station/fueling center use.

On December 17, 2019, Town Council approved the Lantern’s rezoning that changed this parcel from Heckendorf Ranch Area I to Lantern’s Planning Area 14, however the official zoning document was not ready for recording until May 8, 2020.

On February 28, 2020, the Town received a Pre-Application Meeting Request to rezone

this property to allow the convenience store with gas station use. Staff routed this preapplication meeting request, which is not a formal submittal, and worked with the Applicant to schedule their neighborhood meeting. This neighborhood meeting was scheduled for March 30th, however due to the COVID19 pandemic and associated orders on limiting public gatherings, this meeting was cancelled. In the written Preapplication meeting comments that were sent to the Applicant on March 16, 2020, staff confirmed a major zoning amendment was needed in order to add the proposed gas station with convenience store use.

The Town then received an email on March 17, 2020, that included a forwarded email from the Town's previous Zoning Manager, dated August, 2016, regarding a different lot in Use Area H of Heckendorf Ranch PD (the "2016 Email"), which pertains to a different Use Area than the Property. The 2016 Email stated "convenience store/gas station = retail sales and service and convenience goods." The 2016 Email is not an official signed Letter of Determination with any references to definitions or PD language. Additionally, the 2016 Email pertains to Use Area H, which is not the Use Area of the Property. See **Staff Exhibit B**.

In response to the March 17, 2020 email, sometime between March 17 and March 20, 2020, the Development Services Director at the time, Bill Detweiler, had a phone conversation with Mr. Carlson regarding uses on the Property. The Town received an email on March 20, 2020 (the "March 2020 Email"), containing the Applicant's summary of the conversation with Mr. Detweiler stating that Mr. Detweiler had determined a convenience retail with gas is not the same as automotive uses and, therefore, the existing zoning allows for a contemporary designed convenience store with gas. The March 2020 Email also states that Mr. Detweiler asked the Applicant to write up what the Applicant wanted to do and outline the details of the uses and request staff to "respond on the record" if those uses would be allowed.

The Town disagrees with the March 2020 email's characterization of a determination, as the Town does not make use determinations outside of official Letters of Determination. Town staff did receive comments from Mr. Detweiler indicating an anticipated new, written submission from the Applicant requesting a review of permitted uses on the Property and indicated to staff that he had not made any new determinations during his phone call with the Applicant. The Town notes that the 2019 Determination Letter still served as the Town's official determination regarding the Property. Additionally, the Town notes that there was no new submission, as outlined in the March 2020 Email, or request to review the uses on the Property from March 20, 2020 to June 4, 2020.

On June 4, 2020, Zoning Manager Tammy King received an email requesting a confirmation that the 2016 Email was applicable to the Property. The Town notes that this email also did not contain a new submission to request a review of proposed uses, as described in the March 20, 2020 Email. Without a new submission as outlined in the March 20, 2020 Email, but with a new request for determination, Town staff again reviewed the approved zoning for the Property.

After the aforementioned review, on June 17, 2020, staff reissued a Letter of Determination (the "2020 Determination Letter"), see **Staff Exhibit C**, with the same conclusion as the 2019 Determination Letter, and indicated the appeal period, per Municipal Code 17.06.020.B.3, which is 15 days from the date of that decision. The Code states that an appeal of an administrative decision may be appealed to the Board of Adjustment.

The Town received an email response on June 17, 2020, where Mr. Carlson indicated a reliance on the verbal conversation with Mr. Detweiler referenced above. The email also stated that Mr. Carlson had pulled the application for rezoning the Property. Please note, the Town did not have a formal submittal seeking to rezone the Property on file and, therefore, could not act on the request to pull said application. Mr. Carlson had been preparing to submit this rezoning application, and had been working with staff to have the neighborhood meeting scheduled prior to formal submittal, as is required. This neighborhood meeting had been scheduled for March 30, 2020, however with the COVID19 pandemic ramping up in Colorado and various Stay at Home orders, this meeting was canceled and the Applicant did not reschedule it.

On July 2, 2020, the Town received an email from the Applicant requesting to appeal the Zoning Manager's determination. See **Staff Exhibit D**.

A hearing date was set for August 20, 2020, which complies with the requirement to schedule the hearing within 60 days of appeal, per CRMC Chapter 17.06.020.B.3.

The Town has provided two Letters of Determination correlating to the two requests for determination of the Property, the 2019 Determination Letter and 2020 Determination Letter. Both official determinations conclude that a gas station/fueling center is not an allowed use on the Property. Although the zoning name for the property has changed from Heckendorf Ranch PD to Lantern's PD, the list of allowed uses has not changed. See **Staff Exhibit E**.

### **Zoning Manager's Determination:**

The original zoning on the property, Heckendorf Ranch PD, was established in 1984. This property was identified as Use Area "I" and had the following list of allowed uses:

#### **2.5 Areas "I" and ("F")**

**Land Uses: Village Center (VC)**

**Use: Retail sales and service, grocery, drugstore, convenience goods, personal services, shops, restaurants, banks, offices, medical/dental, insurance, and related services**

Mr. Carlson recently rezoned this property into the Lanterns PD Zoning Regulations, recorded on May 8, 2020, identifying this property as Planning Area 14, zoned Non-Residential Use Area Commercial, and the same allowed uses are listed as:

## Permitted Uses

- A. Retail sales and service
- B. Grocery
- C. Drugstore
- D. Convenience goods
- E. Personal service shops
- F. Restaurants
- G. Banks
- H. Offices
- I. Medical/dental
- J. Insurance, and related services

Neither of these lists of Permitted Uses specifically call out an allowance for a fueling center. Nor do they indicate any sort of automotive service type uses. In the original Heckendorf Ranch PD zoning, Automotive Uses are expressly allowed in a different Use Area "A", so it can be interpreted that if automotive services such as a fueling center had been intended for this parcel, they would have been listed as allowed.

It is not untypical for a specific use to not be mentioned by name in custom PD zoning, or in some cases, the allowed uses are not defined. In this case, none of these permitted uses are further defined in either the original Heckendorf Ranch PD or the more recent Lanterns PD Zoning regulations, so it is not clear what "retail sales and service" or "convenience goods" includes. When PD zoning regulations do not include definitions, the Town Zoning Manager must rely on the definitions in Title 17 of the Municipal Code.

It is recognized that custom PD zoning regulations may not include all of the details that the Town covers in Title 17, and therefore 17.32.040 indicates that Title 17 shall apply in a PD District, unless the PD zoning regulations expressly address the area in question:

### **17.32.40 - General application.**

All provisions of this Title, as amended from time to time, shall apply in PD

Districts unless otherwise expressly provided in the PD documents.

For this parcel, because the PD zoning regulations do not define retail sale and service or convenience goods, the Zoning Manager looked to the definitions within Title 17.

Per 17.14.010, "retail" and "automotive service/fuel station/wash/rental" are defined; however "convenience goods" is not:

***"Retail"*** means commercial and retail uses and ancillary outdoor storage uses subject to requirements of [Section 17.52.150](#), including but not limited to art galleries and studios, bakeries, pharmacies and dog grooming facilities (without an overnight boarding facility of animals)."

***“Automobile service/fuel station/wash/rental.*** This use does not include auto body (e.g., collision repair), paint or upholstery services. This use includes, but is not limited to:

- a. Fuel service station (including a fuel service station that is associated with a grocery store and/or warehouse club);
- b. Fuel convenience mart (a gasoline service station with a convenience store);
- c. Auto repair, quick service oil, tune-up, brake, and muffler shops not including auto body (e.g., collision repair), paint or upholstery services;
- d. An establishment engaged in the retail sale of vehicle fuel, tires, lubricants, parts and accessories;
- e. Businesses that exclusively rent vehicles;
- f. Self-service, in-bay automatic, or conveyor equipment for cleaning and washing motor vehicles.”

The Zoning Manager determined per the Town Code definitions, retail does not include the sale of fuel for automobile use. The code clearly puts “fuel stations” into a different category with similar automotive related uses. Moreover, Automobile service/fuel station/wash/rental does contain a definition for the proposed use under section b, a “fuel convenience mart (a gasoline service station with a convenience store).” This is also clearly seen in practice in Town, where other fuel centers are allowed if the PD language clearly allows fueling stations or automotive stations, as allowed under the “Automobile service/fuel station/wash/rental” defined uses.

Although the Town code does not have a definition for “convenience goods”, the Zoning Manager reviewed practical planning definitions in the American Planning Association Definitions publication *Planning and Urban Design Standards* (APA Design Standards). This publication compiles common definitions used in jurisdictions across the nation.

The APA Design Standards define “convenience good” as “retail items generally necessary or desirable for everyday living, usually purchased at a convenient nearby location.” There is no mention in this definition of fuel sales. Instead, fueling stations or gas stations are referenced under these other, separate definitions as “convenience store (see also gas station minimart)”, “gas station (see also automobile service station; oil change facility)”, “gas station, full service”, “gas station limited service” and “gas station minimart (see also convenience store)”. It is important to note that the zoning allows “convenience goods,” which is clearly defined separately from “convenience store.” See **Staff Exhibit F**.

A hearing was set and advertised for August 20, 2020 and that afternoon the Applicant requested that the meeting be continued to the next hearing date. The meeting was opened and continued to September 3, 2020 by a unanimous vote.

### **Applicant's Position:**

In the Applicant's request for an appeal, Mr. Carlson states that his "position is that "convenience goods" as stated in the existing PD should allow a modern convenience store with gas because of the emphasis on non-gasoline sales and the fact that these stores are often found within neighborhood retail centers. Many neighborhood centers would not exist without a convenience store acting as anchor tenant."

### **Board of Adjustment Powers and Duties:**

The Board of Adjustment powers and duties are defined in the Municipal Code section 17.06.020 as it relates to appeals:

- A. The Board shall hear and decide appeals initiated by an applicant and review any order, requirement, decision or determination made by an administrative official charged with enforcement of the regulations established by this Title unrelated to a land development application, technical criteria variance or where the appeal process is set forth elsewhere in this Title.
- B. Appeal procedures shall be as follows:
  - 1. The submittal requirements and process to file for an appeal are set forth in the Development Procedures Manual.
  - 2. The Board shall determine **whether the Manager's decision was consistent with application of this Title and then either affirm or reverse the Manager's decision.**
  - 3. A written notice of appeal of any administrative decision shall be filed within fifteen (15) days of the decision being appealed. The notice of the appeal shall be filed with the Manager and shall state with specificity the reasons for appeal. The Board shall hear such appeal within sixty (60) days of the filing of the notice of appeal. At such hearing, both the applicant and the Manager shall have the opportunity to be heard and present evidence.
  - 4. A simple majority vote, but not less than three, is required to either affirm or reverse the Manager's decision. The Board may affirm the decision, reverse the decision, or affirm the decision with conditions. The ruling of the Board shall be final, subject to judicial review.
  - 5. The Board shall not consider an appeal which is the same or substantially the same as an appeal previously considered and ruled upon by the Board.



Unlike variance requests, there is no additional code criteria for the Board to review on appeals. The Board must determine “**whether the Manager's decision was consistent with application of this Title and then either affirm or reverse the Manager's decision.**” The Board of Appeals powers and duties do not include determining if a gas station should or should not be allowed on this property. Approving uses are actions that Town Council takes in approving zoning regulations. In this appeal, the Board of Appeals is determining if the Town Zoning Manager made a correct or incorrect interpretation of the PD zoning language.

### **Summary:**

In conclusion, the Zoning Manager has determined that the allowed uses for this parcel do allow for retail sales and the sale of convenience goods, however a gas/fuel station is not allowed because there is no reference to allowing fueling or any associated automotive services in this zoning area. The original zoning allowed automotive services in a different use area. Further, the Town definitions of “retail” and the APA definition of “convenience goods” do not include gasoline sales in those definitions. Fueling stations and gas stations are included in other definitions, so it is determined that they are clearly separately defined uses and are not interchangeable. Furthermore, the Applicant’s proposed use is a term defined in 17.14.010 under Automobile service/fuel station/wash/rental under section b, a “fuel convenience mart (a gasoline service station with a convenience store). The use is defined as an example of automobile services, not retail services. It is determined that a fuel station was not contemplated for this parcel as part of the zoning that was approved by Town Council originally in 1984 and reaffirmed more recently in 2019 with the rezoning to include the property in the Lanterns PD.

The Applicant is appealing this determination and has stated “that “convenience goods” as stated in the existing PD should allow a modern convenience store with gas because of the emphasis on non-gasoline sales and the fact that these stores are often found within neighborhood retail centers. Many neighborhood centers would not exist without a convenience store acting as anchor tenant.”

### **Proposed Motions:**

If the Board of Adjustment determines to **approve the appeal** by Mr. Carlson, the recommended motion is:

*“I move to **approve** the appeal by Mr. Carlson of the Zoning Manager’s determination for Lot 2 Block 2 Heckendorf Ranch Filing 2, based on the following findings:*

*The Zoning Manager’s determination was NOT consistent with the application of Title 17 based on:*

*The allowed use of “convenience goods” in the PD zoning does include a*



*convenience center with gas station, as defined under 17.14.010  
Automobile service/fuel station/wash/rental.*

*b. Fuel convenience mart (a gasoline service station with a convenience store)*

*[list out the specific elements that are inconsistent or otherwise state the basis of this determination.]”*

If the Board of Adjustment determines to **deny the appeal** by Mr. Carlson, the recommended motion is:

*“I move to **deny** the appeal by Mr. Carlson of the Zoning Manager’s determination for Lot 2 Block 2 Heckendorf Ranch Filing 2, based on the following findings:*

*The Zoning Manager’s determination WAS consistent with the application of Title 17 based on:*

*The definition of “retail” found in 17.14.010 includes “convenience goods” and does not include automotive uses such as gas stations, therefore the Applicant’s proposed modern convenience mart with gas is not an allowed use under the current zoning.”*

*[list out the specific elements that are consistent or otherwise state the basis of this determination.]”*

**Attachments:**

- Exhibit A: 2019 Determination Letter
- Exhibit B: 2016 Email
- Exhibit C: 2020 Determination Letter
- Exhibit D: Request to Appeal Zoning Determination
- Exhibit E: August 2020 Letter
- Exhibit F: American Planning Association Definitions
- Exhibit G: Public Comment
- Exhibit H: Director Letter