

CITY OF SPOKANE HEARING EXAMINER

Re: Conditional Use Permit Application by) FINDINGS, CONCLUSIONS,
KSS Holdings LLC to allow a retail) AND DECISION
sales and service use at 1801 E. 11th)
Avenue, in an RSF zone.) FILE NO. Z18-202CUP3

SUMMARY OF PROPOSAL AND DECISION

Proposal: KSS Holdings LLC proposes to operate a coffee shop, a retail sales and service use, in the existing structure located at 1801 E. 11th Avenue, in a single-family residential zone.

Decision: Approved, with conditions.

FINDINGS OF FACT BACKGROUND INFORMATION

Applicant/ Steve DeWalt
Agent: KSS Holdings, LLC
1429 12th Avenue, Ste. C
Seattle, WA 98122

Owner: KSS Holdings, LLC
1429 12th Avenue, Ste. C
Seattle, WA 98122

Property Location: The property is located in the Perry District, in southeast Spokane. The site is situated on the northeast corner of the intersection of 11th Avenue and South Pittsburgh Street. The address of the site is 1801 E. 11th Avenue, Spokane, Washington, 99202. The site is designated as Parcel No. 35213.1126.

Zoning: The property is zoned RSF (Residential Single Family).

Comprehensive Plan Map Designation: The property is designated as Residential (4-10 units).

Site Description: The site is a developed lot in a residential neighborhood. The lot is approximately 6,570 square feet in size and is relatively flat. The existing building, originally constructed as a grocery store, is approximately 1,975 square feet. The existing building is located in the southwest corner of the lot, with its entrance facing 11th Avenue. There is also a small garage in the northwest corner of the lot.

Surrounding Conditions and Uses: The land to the north, south, east and west of the property is zoned Residential Single Family (RSF). There are single family residences in all directions in the vicinity of the property.

Project Description: The applicant is proposing to renovate the existing structure into a retail sales and service use, specifically a coffee shop. Based on historical records, previous uses of the structure include a grocery store, which is a commercial use. The prior commercial use of the site makes it eligible for use for commercial purposes once again, despite the residential zoning. Proposed updates to the property include a tenant improvement to the interior, aesthetic improvements to the façade, as well as an outdoor patio on the eastern side of the existing building. No enclosed building additions are proposed.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code ("SMC") 17C.110, Residential Zones; SMC 17G.060.170, Decision Criteria; and SMC 17C.370, Existing Neighborhood Structures in Residential Zones.

Notice of Community Meeting: Mailed: January 12, 2018
Posted: January 12, 2018

Notice of Application/Public Hearing: Mailed: March 9, 2018
Posted: March 9, 2018

Community Meeting: January 26, 2018

Public Hearing Date: April 12, 2018

Site Visit: April 2, 2018

SEPA: This project is exempt from SEPA pursuant to SMC 17E.050.080.

Testimony:

Ali Brast, Assistant Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Anders Meyer
1429 12th Avenue
Seattle, WA 98122

Linda Bond
1728 E. 11th Avenue
Spokane, WA 99202

Steve DeWalt
1429 12th Avenue
Seattle, WA 98122

Dave Tuck
1728 E. 10th Avenue
Spokane, WA 99202

Duwane Huffaker
1824 E. 11th Avenue
Spokane, WA 99202

Sola Raynor
402 S. Blake Road
Spokane, WA 99216

Rachel Stankey
1808 E. 11th Avenue
Spokane, WA 99202

Cynthia Schroeder
1844 E. 11th Avenue
Spokane, WA 99202

Amy Mickelson
1804 E. 12th Avenue
Spokane, WA 99202

Exhibits:

1. Planning Services Staff Report
 - 1A Amended Page 1, received at time of hearing
 - 1B Amended Page 3, received at time of hearing
2. Application, including:
 - 2A General Application
 - 2B Conditional Use Permit Application
 - 2C Notification Map Application
 - 2D Site Plan
3. Historic Preservation comments dated 09-12-17
4. Developer Service comments dated 02-27-18
5. Avista Comments dated 03-05-18
6. Department of Ecology comments dated 03-02-18
7. Notice map
8. Parcel listing
9. Notice of Community Meeting
10. Notice of Application and Public Hearing
11. Affidavit of mailings:
 - 11A Community meeting dated 01-12-18
 - 11B Combined application and hearing dated 03-09-18
12. Affidavit of posting:
 - 12A Community meeting dated 01-12-18
 - 12B Combined application and hearing dated 03-09-18
13. Affidavit of Removal of Public Sign for Community meeting dated 01-27-18
14. SEPA Exemption dated 04-02-18
15. Community Meeting Sign in sheet, undated
16. Letter dated 01-09-18 to Steve DeWalt from Ali Brast
re: community meeting instructions
17. Letter dated 02-19-18 to Interested Parties from Ali Brast
re: requesting comments
18. Letter dated 03-06-18 to Steve DeWalt from Ali Brast
re: notice of application/public hearing instructions
19. Public Comments
 - 19A 02-05-18, Duwayne Huffaker, opposing project
 - 19A-1 02-20-18, response from Lisa Key, Planning Director
 - 19B 02-16-18, Sola Raynor, opposing project
 - 19B-1 03-01-18, response from Lisa Key, Planning Director
 - 19C 03-15-18, Mike Hause, parking concerns
 - 19D 03-16-18, Lola Drynor, opposing project
 - 19E 03-16-18, Sandy Bareither, parking, congestion concerns
 - 19F 03-20-18, Sharon Batz, traffic and parking concerns
 - 19G 03-20-18, Duwayne Huffaker, parking, spot zoning

- 19H 03-18-18, Kay and Paul Bivens, parking
- 19I 03-21-18, Susan Levernier, traffic and parking
- 19J 03-22-18, Kay Tuck, noise, congestion, traffic and parking
- 19K 03-22-18, Kristina, Michael, Ryan and Steven Sullins, parking, noise
- 19L 03-23-18, Cynthia Schroderer, traffic and safety concerns
- 19M 03-23-18, CJ Wheeler, traffic, safety and parking
- A Exhibits received at hearing
 - A-1 Planning's PowerPoint presentation
- B Public submittals received at hearing
 - B-1 Comments from Linda Bond
 - B-2 Comments from Amy Mickelson
 - B-3 Comments from Duwane Huffaker
 - B-4 Comments from Sola Raynor
 - B-5 Comments from Dave Tuck

FINDINGS AND CONCLUSIONS

To be approved, the proposed conditional use permit must comply with the criteria set forth in Spokane Municipal Code sections 17G.060.170 and 17C.320.080(F). The Hearing Examiner has reviewed the proposed conditional use permit and the evidence of record with regard to the application and makes the following findings and conclusions:

1. *The proposal is allowed under the provisions of the land use codes. See SMC 17G.060.170(C)(1).*

The project site is zoned Residential Single Family ("RSF"), a residential category. The uses allowed in the residential zones are shown on Table 17C.110-1. See SMC 17.110.110. A coffee shop is considered "Retail Sales and Service," a commercial category. *Testimony of A. Brast.* A "Retail Sales and Service" use is not permitted in the RSF zone. See Table 17C.110-1. As a result, the proposed coffee shop is generally prohibited in this zone. However, the City Council recently adopted Ordinance C35535, which has been codified in the city code as SMC 17C.370, entitled "Existing Neighborhood Commercial Structures in Residential Zones."

The purpose of SMC 17C.370 is "...to **allow existing neighborhood commercial structures that once housed a legal neighborhood commercial use to be reused** for low impact neighborhood scale and neighborhood serving businesses." See SMC 17C.370.010 (emphasis added).

*The neighborhood commercial structure **must have been in existence at the time of the adoption of this chapter.** Several examples exist of structures that once housed neighborhood serving businesses, which are now vacant, underutilized or are in disrepair. When meeting the code standards of this chapter, **these neighborhood commercial structures are allowed to be re-occupied with neighborhood scaled services.***

See SMC 17C.370.010 (emphasis added). This chapter only applies to "existing structures where it can be documented that they once contained a legal non-residential

use and where these structures are now located in a residential zone.” See SMC 17C.370.020.

A Type III application is required for projects with a floor area of 3,000 square feet or more, and for any non-residential project on a site that does not have frontage on a designated arterial. See SMC 17C.370.030(A)(1). The decision criteria for applications under this chapter is found at 17G.060.170, the same criteria that is applied to other conditional use permits. See SMC 17C.370.030(D).

The Hearing Examiner may approve an application when it is determined that the benefits of the proposed use and improvements would mitigate potential negative impacts on the residential character of the area. See SMC 17C.370.030(E). The uses that the Hearing Examiner may authorize under this chapter specifically include the following: “Retail sales and service uses found in SMC 17C.190.270.” See SMC 17C.370.030(E)(2)(b). “Cafes” are listed as an example of a “Retail Sales and Service” use. See SMC 17C.190.270(C)(3). The Planning Department also determined that the proposed coffee shop should be considered a retail sales and service use. *Testimony of A. Brast*. The Planning Department’s interpretation of the code in this regard is entitled to deference by the Hearing Examiner.

The existing building was constructed by William Woolsey in 1925. See Exhibit 3. The building permit confirms that the building was constructed as a store. See *id*. This was prior to the adoption of the zoning code. See Exhibit 1, p. 3. The zoning code was adopted about four years later, in 1929. See Exhibit 1, p. 3. At that time, it appears that the property was designated as R1, a single-family residential classification. See *id*. As a result of the adopting of the zoning, the structure became a legal non-conforming use. See *id*. Subsequent building permit records confirm this understanding. For example, building permits obtained in 1950 (Permit No. B 3474), 1956 (Permit No. B 35848), and 1958 (Permit No. B 41820) all refer to the property as “non-conforming.” See Exhibit 3.

The permit records also confirm that the property was used as a store for decades. As stated above, the building was constructed as a store in 1925. The building permits obtained in the 1950s show that this use was continuing, although a residential use had also commenced at some point in the interim. For example, the building permit obtained in 1950 (Permit No. 3474) states that the use is “Store & Residence.” The building permits obtained in 1952 (Permit No. B 14547), 1956 (Permit No. B 35848), and 1958 (Permit No. B 41820) all describe the use as “Grocery Store & Living Quarters.” From the records, the commercial use of the property continued in the 1960s. Building permits in 1963 (Permit Nos. B 55180 and 6433) characterize the use as “Store building” and “Grocery Store,” respectively. It was not until 1974 that the use of the property became solely residential, at least from the documentation in the file. See Exhibit 3 (Certificate of Occupancy #2455). From 1974 to present, it appears, the building has been used for residential purposes.

The record establishes that the property once housed a neighborhood commercial use. The proposal seeks to put that property, once again, to use for commercial purposes. The proposed coffee shop qualifies as “retail sales and service,” a category that is specifically authorized by the ordinance. Further, the proposed coffee shop is consistent with the ordinance’s objective to promote the re-use of existing structures for neighborhood-scale businesses. It seems to the Hearing Examiner that the 11th Avenue

property is an example of what the City Council had in mind when it passed the ordinance authorizing this type of use.

There will certainly be some impacts from this project, in particular from additional traffic and parking issues. However, as the Hearing Examiner discusses elsewhere in this decision, the impacts from traffic and parking are not so significant that specific mitigation measures are required. There are also limits, given the scale and nature of the proposal, to what kind of mitigation can be implemented. In addition, there are other mitigation measures that can alleviate some of the concerns about this type of use, such as the design standards found in SMC 17C.110.500 *et seq.* In any event, the Hearing Examiner concludes that the public benefits that arise from the limited development of small-scale, neighborhood commercial, outweigh the countervailing concerns raised at the hearing. The Hearing Examiner does not disagree with the neighbors that some inconveniences will arise. On balance, however, the Hearing Examiner finds that the conflicts will not cause significant problems for the neighborhood, again given the size, scale, and intensity of the proposed use.

Despite the foregoing, one project opponent contended the application failed to satisfy the requirements of SMC 17C.370. *Testimony of S. Raynor.* Specifically, Ms. Raynor asserted that the record does not establish that the structures at the 11th Avenue property once contained a legal non-residential use. She insisted that the permit records should be discounted or disregarded because the information they contain was not specific enough and failed to distinguish between legal and illegal uses. She contended that the only way to establish a former use is legal is through the certificate of occupancy process described in SMC 17G.010.070. Ms. Raynor further suggested that the only certificate of occupancy issued for the property was to use it as a residence. On that basis, she concluded that single-family occupancy is the only legal use of the property. The Hearing Examiner does not agree with these contentions.

The record clearly establishes that a commercial use was commenced and that building permits were issued to allow the original construction and subsequent improvements at the property. The fact that the use started prior to the adoption of zoning suggests that the use was certainly legal at its commencement. The legality of the use is tacitly recognized in the permit history, irrespective of the fact that the building records do not reference the zoning. The city often looks to historic records, such as the permit history in this record, to assist in establishing the existence of a legal use or a historic use. *Testimony of A. Brast.* The ordinance merely requires that there be proof that a property "once housed a legal neighborhood commercial use" or "once contained a legal non-residential use." See SMC 17C.370.010 & 020. The record in this case is more than sufficient to establish that a commercial use was legally commenced and carried on at the property for a period of time.

In adopting the ordinance, the City Council established a new procedure to authorize the re-use of existing commercial buildings in a residential zone. They set forth separate standards to authorize such uses, and required a conditional use permit to be obtained to support such a use. This process is separate and distinct from the certificate of occupancy process described for nonconforming situations generally. See SMC 17G.210.010 *et seq.* For example, a nonconforming use that is discontinued for a period of two years loses its rights to continue. See 17C.210.030(A). Under SMC 17C.370, there

are no provisions that restrict the revival of former commercial uses to a specific time period. All that is required is that the structure be used for neighborhood commercial purposes in the past. Thus, contrary to Ms. Raynor's claim, the recently passed ordinance certainly has the effect of superseding the nonconforming use provisions, in the narrower set of cases where this new ordinance applies. Further, the ordinance authorizes certain neighborhood commercial uses upon the issuance of a conditional use permit. It is not accurate, then, that the process described in SMC 17G.010.170 is the "only way" to establish a former use is legal. The whole point of SMC 17C.370 is to authorize commercial use of small-scale, commercial structures that exist in residential areas.

The Hearing Examiner concludes that the proposed coffee shop is authorized pursuant to the municipal code, provided the criteria for existing structures in residential areas is satisfied, and the conditional use standards are met. Therefore, this criterion is satisfied.

2. *The proposal is consistent with the comprehensive plan designation and goals, objectives, and policies for the property. See SMC 17G.060.170(C)(2).*

The project will refurbish a former grocery store into a coffee shop. While it is true that the building has been used for residential purposes since 1974, the building was constructed as a store and has the architectural design of a commercial building. The property was originally used as a grocery store serving the nearby residential properties. It seems appropriate for this property to serve as a small, local coffee shop. The remodeling project to enable this vision seems consistent with Goal LU 5, entitled "Development Character." That goal promotes development in a manner that is attractive, complementary, and compatible with other uses. See CP, Goal LU 5. Similarly, Policy LU 5.5 seeks to ensure that redevelopment projects are well-designed and compatible with surrounding uses and building types. See CP, Policy LU 5.5.

Nearby residents who oppose the project understandably contend that the coffee shop is not compatible with neighboring homes. There is no question that there are competing interest and tradeoffs to consider when allowing commercial uses in residential areas. On balance, however, the Hearing Examiner finds that the proposal meets the intent of the Comprehensive Plan. There are several reasons the Hearing Examiner reaches this conclusion.

The building is a commercial-style building that was used as a grocery store for decades. Thus, the building has already been used for commercial purposes and served the immediate neighborhood. It does not seem unreasonable to use the building for commercial purposes again, given this history. The building is very small, having less than 2,000 square feet of space. The intensity of the use and probable impacts of the project are naturally limited by the necessarily small scale of the enterprise. Policy N 4.4, Neighborhood Business Traffic, recognizes that neighborhood businesses should be of a size and type that fits with the character of a neighborhood. See CP, Policy N 4.4. A small coffee shop seems to fit this ideal. In addition, the limited size of the business should result in less non-local traffic through the neighborhood. See *id.* This is not a use that will likely generate a large amount of community or regional traffic. See *id.*

Chapter 11 of the Comprehensive Plan concerns neighborhoods. That chapter recognizes that it is beneficial to neighborhoods to have a “variety of compatible services” available to residents. See CP, p. 11-4. The plan also notes that the quality of life in neighborhoods is improved with additional social opportunities and the addition of gathering spaces. See CP, Policy N 2.1 & N 7.1. A small-scale neighborhood commercial use can contribute to the vitality, diversity, and quality of life within a neighborhood. See *id.* The Comprehensive Plan also includes policies consistent with the objective of the ordinance. Policy N 2.4, entitled “Neighborhood Improvement,” seeks to encourage “...revitalization and improvement programs to conserve and upgrade existing properties and buildings.” See CP, Policy N 2.4.

The Comprehensive Plan itself is the result of an effort to weigh competing objectives and policies. In the Hearing Examiner’s experience, the Comprehensive Plan does an admirable job of weighing the various interests, but inevitably there is tension, if not inconsistency¹, in the implementation of goals and policies. With this in mind, it must be acknowledged that there are elements of the Comprehensive Plan that do not support the placement of the coffee shop in a residential neighborhood. The surrounding land is designated as R 4-10, a category that does not generally anticipate commercial uses. When neighborhood commercial uses are discussed, those uses are typically expected to be developed in Neighborhood Centers or mixed-use locations. The Comprehensive Plan also discourages activities that lead to pass-through traffic by automobiles.

The Hearing Examiner cannot conceive of a way to perfectly address or completely resolve the competing interests. On balance, the Hearing Examiner believes the scale and nature of this proposal is not unduly burdensome on the neighborhood, and that it fulfills the policy objectives of the City Council in passing the ordinance that authorized this use.

The Hearing Examiner concludes that the proposal generally fulfills the policies and objectives of the Comprehensive Plan. Therefore, this criterion is satisfied.

3. *The proposal meets the concurrency requirements of Chapter 17D.010SMC. See SMC 17G.060.170(C)(3).*

The decision criteria for Type III decisions (such as a conditional use permit) mandate that all proposals must satisfy the concurrency requirements under SMC 17D.010. See SMC 17G.060.170(C)(3). Accordingly, on February 19, 2018, a Request for Comments on the application was circulated to all City departments and outside agencies with jurisdiction. See Exhibit 17.

The city received various comments in response to its request for comments. See e.g. Exhibits 3-6. City staff noted that “...there were no departments or agencies that reported that concurrency could not be achieved.” See Exhibit 1, p. 3. In addition, there was no testimony at the public hearing suggesting that the concurrency standards would not be satisfied.

¹ To the extent that there is any direct conflict between the ordinance and the Comprehensive Plan, the ordinance legally prevails. See *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997).

The Hearing Examiner finds that the project satisfies the concurrency requirements of the municipal code. Therefore, this criterion for approval of the conditional use permit is met.

4. *If approval of a site plan is required, the property is suitable for the proposed use and site plan considering the physical characteristics of the property, including but not limited to size, shape, location, topography, soils, slope, drainage characteristics, the existence of ground or surface water and the existence of natural, historic or cultural features. See SMC 17G.060.170(C)(4).*

The Hearing Examiner finds that the property is suitable for the proposed use given its physical characteristics. The site is relatively flat and is already improved with an existing primary building and a garage. The existing structures are modest in size and will not be expanded under this proposal. There is no evidence that the size, shape, topography, slope, soils, drainage characteristics or other physical conditions pose a genuine issue for this project. There is no evidence of surface water on the site, or the presence of natural, historic or cultural features in need of protection. The site is in the Critical Area Recharge Zone and therefore any activities must adhere to the standards found in SMC Chapter 17E.010, Critical Aquifer Recharge Areas-Aquifer Protection. See Exhibit 1, p. 4. There is no reason to suspect that this project will impact the aquifer, however, or that the CARA standards will not otherwise be satisfied.

The Hearing Examiner concludes that the property is suitable for the proposed use, given the conditions and characteristics of the site. As a result, this criterion is satisfied.

5. *The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effect or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use. See SMC 17G.060.170(C)(5).*

The project primarily involves remodeling the interior of an existing building, along with improvements to the building façade. The existing building is relatively small, at less than 2,000 square feet, and the applicant is not proposing any additions to the structure. The applicant proposes to convert an old, neighborhood grocery store into a coffee shop. Thus, the proposal is a small-scale retail operation, which would primarily serve people in the neighborhood, as opposed to drawing patrons from greater distances. The property is located in the middle of a residential area, at the intersection of two residential streets. However, there is no evidence that the capacity of these streets will be taxed by the proposed use, given its relatively small size and scope.

The presence of a commercial use, even a small one, in this location will create some inconveniences for neighbors, in particular due to the lack of parking. There is also a concern about noise coming from a commercial use which is surrounded by residences. However, the impacts on the neighborhood will not constitute a *significant* interference on the uses of neighboring property or the area, in the Hearing Examiner's judgment. The limited hours and noise limitations (per the applicable ordinance) will

mitigate some of the potential issues arising from the proposed use. The project will also be required to satisfy the standards for conditional uses in residential areas, providing some additional assurance that the project design will be compatible with the neighborhood. See SMC 17C.110.500 *et seq.* Finally, it must be acknowledged that the project is categorically exempt from SEPA review, suggesting that the environmental impacts are *de minimis* in the judgment of the policy-makers. See Exhibit 14.

The Hearing Examiner concludes that the project will not have significant impacts on the environment or the surrounding properties, and therefore this criterion is satisfied.

6. *The overall residential appearance and function of the area will not be significantly lessened due to the construction of utilities and infrastructure. The project will not result in the construction of improvements that are disproportionate to the residential household uses in the surrounding area. See SMC 17C.320.080(F).*

The residential appearance and function of the area will not be negatively impacted by this project. The site is already improved. The applicant intends to re-purpose the existing building, which will not be expanded to accommodate the proposed use. The site already has utilities and is supported by basic infrastructure. In addition, the project consists primarily of interior remodeling work and a refresh of the exterior façade. The proposed work will "...make the site more attractive and complimentary to the neighborhood." See Exhibit 1, p. 5. The existing building was constructed as a small, neighborhood grocery store. The building is one story tall with less than 2,000 square feet of usable space. The building is roughly proportional in size to the nearby residences. Thus, the building is already of a size/scale that fits with the neighborhood. The Hearing Examiner concludes that this criterion for approval is met.

7. *The proposal will be compatible with the adjacent residential developments based on characteristics such as the site size, building scale and style, setbacks and landscaping. The proposal will mitigate the differences in appearance or scale through such means as setbacks, screening, landscaping and other design features. See SMC 17C.320.080(F)(2).*

The lot is approximately 6,570 square feet in size. See Exhibit 2A. The lot is slightly larger than the surrounding residential lots, but not markedly so. The site does not stand out as being out of proportion to the residential lots in the neighborhood. The existing building is a one-story, flat-roofed commercial building, so its style is distinct from the houses that surround it. However, the existing building was originally constructed as a neighborhood grocery store, so the distinct style and architecture is not surprising. The building is clearly a commercial type, but it nonetheless blends well with the neighborhood given its scale and style. Further, the building is comparable in size the residences in the neighborhood. See Exhibit 1, p. 5.

Because this project concerns a new commercial use of an existing structure, rather than new construction, there are limitations on the types of mitigation that can be employed. For example, the existing building is already situated in the southwest corner of the lot. The setbacks to the sidewalks or frontage roads cannot reasonably be increased. Nonetheless, the project will be required to satisfy the design standards for conditional uses in residential zones. See SMC 17C.110.500 *et seq.* This includes

measures such as design requirements and landscaping, which should be sufficient for a proposal of this scale and type.

The Hearing Examiner finds that the proposal is generally compatible with the adjacent residential development. The Hearing Examiner therefore concludes that this criterion for approval is satisfied.

8. *The proposal will not have significant adverse impacts on the livability of nearby residential lands due to noise, glare, late-night operations, odors and litter, or privacy and safety issues. See SMC 17C.320.080(F)(3).*

The Hearing Examiner concludes that the proposal will not have a significant adverse effect on the livability of the surrounding neighborhood. Although some concerns were understandably raised about the issue, there was no evidence that a coffee shop would be a significant source of noise. Certainly, there will be some noise from the establishment, most notably due to people gathering and talking on the outdoor patio. The operation will be required to comply with the restrictions of the noise ordinance, which includes quiet hours from 10 p.m. to 7 a.m., among other things. See Exhibit 1, p. 5. In addition, the hours of operation for the coffee shop will be 7:00 a.m. to 5:00 p.m., at the latest. *Testimony of S. DeWalt*. The hours are also being limited in the conditions of approval, in order to further ensure that the impacts of the proposal are minimized. As conditioned, the Hearing Examiner does not anticipate that noise will have a significant impact on the neighbors.

There was no evidence that the coffee shop would result in significant light or glare. Given the size and design of the building, the Hearing Examiner would not anticipate much more light that might emanate from a single-family residence. In any case, to the extent there is extra lighting to support the commercial use, any new overhead lighting is required to be contained on-site consistent with SMC 17C.110.520. See Exhibit 1, p. 5.

As already pointed out, the coffee shop's hours are limited. Thus, no late-night activities are anticipated. There was no evidence that the coffee shop would be the source of significant odors. Consistent with that, the Staff concluded that no odors were anticipated. See Exhibit 1, p. 6. There was also no evidence that litter or refuse would pose a genuine problem for the neighborhood. The property would continue to have regular refuse pick-up, just like the residences in the vicinity. See *id.* Similarly, there was no support for the notion that the proposal would negatively affect the privacy of residents in the neighborhood. Thus, privacy concerns do not warrant project conditions or denial of the project.

There were some comments that could bear on the question of "safety." The issues of traffic and parking are discussed elsewhere in this decision. The one safety issue that is addressed here concerns the service of alcohol. Several neighbors were worried about the impacts of the service of alcohol, including drunk driving and other bad behaviors associated with alcohol use or abuse. In response, the project sponsor clearly stated that they had no intent to sell alcohol from this property. *Testimony of S. DeWalt*. As a result, a "no alcohol" condition is incorporated into this decision, given the developer's stipulation. Thus, the alcohol question is no longer a relevant issue.

The Hearing Examiner concludes that this criterion for approval has been satisfied.

9. *The proposed use is in conformance with the street designations of the transportation element of the comprehensive plan. The transportation system is capable of supporting the proposed use in addition to existing uses in the area, upon consideration of the evaluation factors provided in the municipal code. See SMC 17C.320.080(F)(4).*

This project does not create any new or unique burdens on the transportation system or on other public facilities. As stated above, no department reported that public facilities were not adequate to support the project. See Paragraph 3 above. Further, the Staff specifically noted: "The site will continue to have access to all City of Spokane public services, and will not require any additions to be made in order to fully accommodate the proposed expansion." See Exhibit 1, p. 6. As such, there is no concern about impacts to the transportation system. The Hearing Examiner concludes that this criterion is satisfied.

10. *The proposed use should be allowed despite concerns related to traffic and parking.*

Several neighbors objected that the proposal would result in significant traffic impacts. *Testimony of L. Bond, A. Mickelson, & D. Huffaker.* There were some suggestions for mitigation measures as well, such as sidewalk bump-outs, speed limit signs, or other traffic calming measures. *Testimony of A. Mickelson.*

Another source of substantial worry for the neighbors was parking. *Testimony of L. Bond, D. Huffaker, & R. Stankey.* Some homes do not have off-street parking, and are understandably concerned about the interference with their use of the street in front of their homes. *Testimony of R. Stankey & D. Huffaker.* Mr. Huffaker, in particular, made the point that some folks need the parking because of age or disability. *Testimony of D. Huffaker.*

The concerns raised were certainly legitimate. However, the issues of traffic and parking do not warrant denial of the proposal, in the Hearing Examiner's view.

With respect to traffic, there are several points to consider. The proposed coffee shop will occupy a space less than 2,000 square feet. The amount of traffic generated by such a use is very small. The traffic likely to arise from this proposal does not warrant any modifications to the nearby roads. Moreover, it is unlikely that there is legal justification to require the proponent to implement traffic improvements. The reason is that the traffic impacts from such a small operation will not tax the capacity of the neighboring transportation system such as improvements are needed. The Traffic Department raised no concerns about traffic impacts from this project, and there was no expert testimony establishing that specific traffic impacts were likely to arise from this use. There mere allegation that there will be some increase in traffic volumes is not legally enough to warrant specific traffic measures. Similarly, the fact that the Pittsburgh is already busy, or that buses use that same route, does not suggest that the road do not have the capacity to safety handle additional traffic. If there are traffic calming measures to be implemented at

some point, those will have to be undertaken by the Traffic Department over time, if the road system proves ultimately insufficient as the area grows.

The parking situation is admittedly problematic. If there were parking requirements for this proposal, the Hearing Examiner would require those standards to be satisfied, and would deny the project if that were not possible. Here, however, there is no requirement for the proponent to provide off-street parking. This was a policy choice by the City Council, and was undoubtedly in recognition of the reality that neighborhood-scale commercial sites have often been developed without providing parking. The areas around such sites are already developed. If these buildings are to be re-purposed, an off-street parking requirement would be counterproductive or preclusive of the desired use. In addition, if neighborhood commercial is developed in the manner contemplated, the uses should predominantly serve the nearby residents, rather than the motoring public. Thus, the intent is undoubtedly to establish uses that are not dependent on the automobile. Parking and traffic are less of an issue in such cases.

The Hearing Examiner cannot accept the invitation to impose parking restrictions on the public streets. The public right-of-way is under the purview of the Traffic Department. If there are going to be any parking restrictions, such as parking spaces set aside for the disabled, those requests will have to be reviewed and approved by the Traffic Department on a case-by-case basis. There is also another point to be made about the public right-of-way, which is sure to be unpopular with homeowners in the city. The reality is that a homeowner does not have the "right" to park on the public street in front of his or her residence. The public right-of-way is owned by the "public," not any individual property owner. The use of the public right-of-way for parking is permissive. No specific proposal was advanced by the city, the project sponsor, or the opposing parties as to how to address the parking question. The Hearing Examiner has been unable to conceive of a solution that would address the competing concerns. It seems that the common resource will need to be shared. Under the circumstances, the Hearing Examiner is not inclined to impose a specific parking scheme.

11. The Hearing Examiner rejects the other legal arguments raised in opposition to the proposal, including (1) that the proposal is not categorically exempt from SEPA review; (2) that the SEPA review conducted prior to the adoption of the ordinance was insufficient; and (3) that approving the proposal constitutes an "illegal spot zone."

Ms. Raynor contended that the proposal was not categorically exempt from SEPA, as the Planning Department concluded on April 2, 2018. See Exhibit B-4; *Testimony of S. Raynor*. Ms. Raynor advanced several arguments in support of this claim. Ms. Raynor started by asserting that the proposed use is the legal equivalent of a rezone of 1801 E. 11th Avenue. She explained:

But for the provisions of SMC 17C.370, this applicant would have been required to apply for a rezone and this proposal would have undergone an entirely different level of scrutiny under SEPA & the municipal code.

Testimony of S. Raynor (quoted from hand-written script). Equating the proposal to a rezone, Ms. Raynor then contended that the proposal does not qualify for an exemption.

This was true, she maintained, because a rezone is not exempt from SEPA review unless it is “consistent with the comprehensive plan.” *Testimony of S. Raynor* (hand-written script). The Hearing Examiner disagrees with this logic for a number of reasons.

First, the application is for a conditional use permit, not for a rezone. As such, SEPA regulations governing rezones do not apply to the application. Ms. Raynor contends that the WAC provisions do not specifically address conditional uses. However, she does not explain why the general exemptions stated in SMC 17E.050.070 are inapplicable here. The Hearing Examiner agrees with the city that these provisions exempt the proposal from further SEPA review. Specifically, the environmental ordinance states that “minor new construction” is exempt from SEPA review. This exemption includes commercial buildings up to 12,000 square feet and up to 40 parking spaces. See SMC 17E.050.070(C). Here, the proposed building is already constructed and consists of less than 2,000 square feet, and there is no proposed parking. The proposed remodeling project easily fits the definition of “minor new construction.” Under the circumstances, the proposal clearly fits within the parameters of this exemption from SEPA review.

Second, Ms. Raynor’s argument seems to confuse the passage of the ordinance, which authorizes the proposed use on a conditional basis, with the CUP application to operate a coffee shop. These are two separate actions. The ordinance was passed by the city legislature and was not legally challenged. To the extent Ms. Raynor intends to challenge the validity of the ordinance, that matter was not properly appealed, nor would it be within the Hearing Examiner’s jurisdiction to decide.

Setting the jurisdictional issues aside, the Hearing Examiner notes that the passage of SMC 17C.370 did not rezone² the property. Rather, the ordinance identified a discrete list of neighborhood-scale commercial uses and allowed those uses in the RSF zone, if the conditional use permit criteria could be satisfied. In the Hearing Examiner’s view, changing the specific uses allowed in a zone is well within the City Council’s legislative authority. The City Council, it seems, made a policy choice about the re-use of historically established neighborhood commercial buildings and sites, and passed legislation to effectuate that policy choice. The 11th Avenue property is still zoned “RSF,” although given its unique history it may now be used for certain, small-scale commercial uses on a conditional basis.

Third, contrary to Ms. Raynor’s arguments, the Hearing Examiner has already concluded that the proposal is consistent with the Comprehensive Plan. Several policies and objectives of the Comprehensive Plan support the proposed use of the property. See Part 2 above. In addition, a property can be designated as “residential” in the comprehensive plan and zoned “RSF” and still be used for other things, under certain circumstances. For example, the following uses are allowed in the RSF zone by conditional use permit: Group Living; Commercial Outdoor Recreation; Colleges; Medical Centers; and Schools, to name some of the examples. See Table 17C.110-1. If the “Residential” designation of the property in the Comprehensive Plan literally mandated that

² Ms. Raynor also cites to WAC 197-11-800(6)(e) for the proposition that a variance application loses its categorical exemption if it results in a change of use. The application at issue does not include a variance request. In addition, a variance is a clearly distinguishable type of action. The Hearing Examiner concludes that a variance analysis is not warranted in this case.

only single-family residences were allowed, irrespective of the zoning regulations; then none of these uses would be permitted, conditionally or otherwise. The Comprehensive Plan is more flexible than that, as the previous review of the applicable goals and policies demonstrates.

Ms. Raynor next contends that the conditional use application is not exempt from SEPA review given the provisions of WAC 197-11-800(6)(b). That regulation provides:

Other land use decisions not qualified for exemption under subsection (a) (such as a home occupation or change of use) are exempt provided:

(i) The authorized activities will be conducted within an existing building or facility qualifying for exemption under WAC 197-11-800(1) and (2); and

(ii) The activities will not change the character of the building or facility in a way that would remove it from an exempt class.

See WAC 197-11-800(6)(b). Ms. Raynor contends, based on the foregoing, that the proposal results in a change of use. She further states that a "change in use in the eyes of SEPA requires a variance or rezone which are not categorically exempt." *Testimony of S. Raynor* (hand-written script). The Hearing Examiner finds that Ms. Raynor is mistaken, for at least a couple of reasons.

First, the city conclusion that the proposal is exempt from SEPA is consistent with WAC 197-11-800(6)(b). Subsection 6(b) states that "other land use decisions" are exempt if they qualify as "minor new construction" as defined under WAC 197-11-800(1). This is precisely the exemption that the city applied in this case. Further, Ms. Raynor did not explain how the proposal changed the character of the building or facility in such a way that it would be removed from an exempt class. The Hearing Examiner sees nothing in this record to support such a conclusion. In the absence of such a rationale, the proposal is still exempt, even if deemed an "other land use decision" under WAC 197-11-800(6)(b).

Second, the Hearing Examiner has already rejected the notion that the proposal is the legal equivalent of a rezone or a variance. As a result, the SEPA provisions that govern such actions do not dictate the result here. The Hearing Examiner also believes that these arguments confound various legal concepts (change of use, density, rezone, variance, etc.) in a way that makes it very difficult to understand the claims. As a result, the Hearing Examiner declines to consider such claims further.

Ms. Raynor next attacks the sufficiency of the SEPA review that was completed prior to the passage of SMC 17C.370. She argues that insufficient answers on the SEPA checklist prepared in support of the ordinance raise "a question regarding the **validity of the ordinance**...". *Testimony of S. Raynor* (hand-written script). However, as mentioned previously, there was no legal challenge to the ordinance or the SEPA review supporting the ordinance. *Testimony of A. Brast*. Such questions, therefore, are not properly before the Hearing Examiner. Moreover, the Hearing Examiner does not have jurisdiction to invalidate a legislative enactment. The Hearing Examiner can only interpret and apply the ordinance as it is written.

Ms. Raynor also points to the insufficient review at the non-project stage to highlight the need for more rigorous review when a specific proposal is made. However, a project-level analysis is case-by-case. Here, the project qualifies as exempt from further SEPA review precisely because it is "minor" in nature. Since the project is below the minimum thresholds, further analysis of the impacts is not required under SEPA.

Ms. Raynor's last argument is that the "proposal is nothing more than an illegal spot zone." *Testimony of S. Raynor* (hand-written script). Mr. Huffaker also strenuously contended that allowing the proposed commercial use in this residential area amounted to a spot zone. *Testimony of G. Huffaker*. Their argument is understandable, given their belief that the proposed commercial use creates an island of incongruous use within a single-family area. Despite these arguments, the Hearing Examiner does not believe that granting a conditional use permit qualifies as illegal "spot zoning" under the circumstances of this case.

As Ms. Raynor correctly states, a "spot zone" is a zoning action in which an area is singled out of a larger area and "specially zoned for a use classification totally different from and inconsistent with the classification of the surrounding land, and not in accordance with the comprehensive plan." See *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 368, 662 P.2d 816 (1983). There is no general rule, however, that all "spot zoning" is illegal. See *id.* Instead, an analysis of each case must be made. The primary inquiry is whether the zoning action bears a substantial relationship to the general welfare of the affected community. See *id.* Professor Settle's explanation, which has been quoted by the Court, is helpful:

The vice of "spot zoning" is not the differential regulation of adjacent land but the lack of public interest justification for such discrimination. Where differential zoning merely accommodates some private interest and bears no rational relationship to promoting legitimate public interest, it is "arbitrary and capricious" and hence "spot zoning."

See *id.* (quoting Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 2.11(c) (1983)).

The Hearing Examiner concludes that approving the proposal does not constitute an illegal spot zone. The property in question is being treated differently for rational reasons. The purpose of the ordinance is to promote the reuse of "structures that once housed neighborhood serving businesses" which are now "vacant, underutilized or are in disrepair." See SMC 17C.370.010. The concept is to put such structures to productive use, and to do so at a "low impact neighborhood scale" and with "neighborhood serving businesses." See *id.* Thus, the ordinance applies only in cases where there are existing, commercial-type structures in residential areas that are not being used to their potential. Undoubtedly, such structures exist in various locations in the city, and many are neglected. The ordinance promotes investment into such properties for the benefit of the neighborhoods. It does not contemplate placement of entirely new commercial developments in established residential neighborhoods, or the insertion of commercial uses at an inappropriate scale. The city council was surely intending to encourage neighborhood retail and commercial enterprises, but at a scale that provided an immediate benefit to the surrounding residences. The Hearing Examiner finds that these policy

choices are not arbitrary or capricious, or intended to only benefit property owners at the expense of the community at large. In addition, the Hearing Examiner has already discussed how the proposal is consistent with nearby residential uses and the goals and policies of the comprehensive plan. As a result, the Hearing Examiner rejects the claim that the proposal results in illegal spot zoning.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to approve the proposed conditional use permit subject to the following conditions:

1. Approval is for a conditional use permit to allow a retail sales and service use at the residentially-zoned property located at 1801 E. 11th Avenue. The property will be improved and used substantially as set forth in the plans and application on file in Planning and Development.
2. The project will be developed in substantial conformance with SMC 17C.110.500, Land Use Standards, Residential Zones, Institutional Design Standards, to maintain compatibility with and limit the negative impacts on surrounding residential areas.
3. The business hours of the approved use are limited to the hours of 7AM to 5PM. Alcohol (liquor, beer, wine, etc.) shall not be served or sold at the premises.
4. Department of Ecology requires proper hazardous waste disposal for any waste generated on site, as well as proper erosion and sediment control practices to be used on the construction site and adjacent areas to prevent upland sediments from entering surface water for any site improvements.
5. If any artifacts or human remains are found upon excavation, the Spokane Tribe of Indians and the City of Spokane Planning & Development Services should be immediately notified and the work in the immediate area cease. Pursuant to RCW 27.53.060 it is unlawful to destroy any historic or prehistoric archaeological resources. RCW 27.44 and RCW 27.53.060 require that a person obtain a permit from the Washington State Department of Archaeology & Historic Preservation before excavating, removing or altering Native American human remains or archaeological resources in Washington.
6. Consistent with the comments received from Avista, the developer will ensure that no new permanent structures or fencing interfere with Avista's access to their facilities.
7. This approval does not waive the applicant's obligation to comply with all of the requirements of the Spokane Municipal Code, including the International Codes, as well as requirements of City Departments and outside agencies with jurisdiction over land development.
8. This project must adhere to any additional performance and development standards documented in comments or required by the City of Spokane, the County of Spokane, the State of Washington, and any federal agency.

9. The applicant shall comply with the requirements of the Spokane Regional Clean Air Agency prior to the construction, installation or establishment of an air pollution source. A Notice of Intent must be submitted to the Spokane Regional Clean Air Agency prior to any demolition project or asbestos project.

10. Spokane Municipal Code section 17G.060.240 regulates the expiration of this approval, and Table 17G.060-3 sets forth the time frame for the expiration of all approvals.

11. Prior to the issuance of any building or occupancy permits, the applicant shall submit evidence to this file that the property owner has signed and caused the following statement to be recorded with the Spokane County Auditor's Office.

COVENANT

Development of this property is subject to certain conditions on file with the City of Spokane Planning Department and the Office of the City of Spokane Hearing Examiner. The property may not be developed except in accordance with these conditions. A copy of these conditions is attached to this Covenant.

This statement shall be identified as a Covenant. The owner's signature shall be notarized.

12. This approval is subject to the above-stated conditions. By accepting this approval the applicant acknowledges that these conditions are reasonable and agrees to comply with them. The filing of the above required covenant constitutes the applicant's written agreement to comply with all conditions of approval. The property may not be developed except in accordance with these conditions and failure to comply with them may result in the revocation of this approval.

DATED this 1st day of May 2018.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding conditional use permits are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE DECISION SET OUT ABOVE.** The date of the decision is the 1st day of May 2018. **THE DATE OF THE LAST DAY TO APPEAL IS THE 22nd DAY OF MAY 2018 AT 5:00 P.M.**

In addition to paying any Court costs to appeal the decision, the ordinance requires payment of a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.

Pursuant to RCW 36.70B.130, affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.