

upholstery shop, which closed within the last year. To facilitate the proposed use, the applicant intends to complete tenant improvement to the interior, aesthetic improvements to the façade, and to add a new dumpster enclosure. No enclosed building additions are proposed.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code (SMC) 17C.110, Residential Zones; SMC 17C.320.080(F), Decision Criteria for Institutional and Other Uses in Residential Zones; SMC 17C.370, Existing Neighborhood Structures in Residential Zones; and SMC 17G.060.170, Land Use Decision Criteria.

Notice of Community Meeting: Mailed: September 1, 2020
Posted: September 1, 2020

Notice of Application/Public Hearing: Mailed: November 3, 2020
Posted: November 3, 2020

Community Meeting: September 15, 2020

Public Hearing Date: December 3, 2020

Site Visit: December 2, 2020

State Environmental Policy Act (SEPA): The proposal was determined to be categorically exempt from SEPA analysis.

Testimony:

Tami Palmquist, Principal Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Daniel Ghebream
5125 S. Julia Street
Spokane, WA 99223

Saegen Niemen
207 E Liberty Avenue
Spokane WA 99207

In attendance or submitted comments to the record:

LaDonna Mooney
Lamoon08@hotmail.com

Melanie DeVries
228 E Bridgeport Avenue
Spokane WA 99207

Ronette Richardson
Rbakergirl98@gmail.com

Jarred Gibson
Corrison01@gmail.com

Steve Brauner
127 E Liberty Avenue
Spokane WA 99207

Kate Neitz
314 E Liberty Avenue
Spokane WA 99207

Joan Zamora
124 E Liberty Avenue
Spokane WA 99207

L. Scott Labes
408 E Liberty Avenue
Spokane WA 99207

Ayaka Dohi
207 E Liberty Avenue
Spokane WA 99207

Emanuel Araya
3211 E 55th Avenue
Spokane WA 99223

Robel Araya
5000 S Palouse Highway
Spokane WA 99223

Exhibits:

1. Planning Services Staff Report received 11/20/20
2. Application, including:
 - A General application
 - B Conditional use application
 - C Notification map application
 - D Site plan
3. Notice of Application Instructions dated 02/02/20, including:
 - A Notice of Application & Public Hearing
 - B Affidavits of Individual Notice and Posting for Public Hearing
4. Request for Comments letter dated 09/25/20, including:
 - A Spokane Tribe of Indians dated 01/29/19
 - B City of Spokane Engineering Department dated 01/29/20
 - C City of Spokane Street Department dated 10/2/20
5. Public Comments
6. Planning Staff's follow-up regarding web posting
7. Community Meeting Instructions dated 08/20/20, including:
 - A Notice of Community Meeting for 09/25/20
 - B Affidavit of Individual Notice on 09/01/20
 - C Affidavit of Posting at Project Site on 09/01/20
 - D Community Meeting Sign-in Sheet
 - E Community Meeting Summary
 - F Community Meeting Recording
8. Pre-Development Conference Notes dated 10/24/19
9. Historical property information
10. Staff Presentation
11. Email dated 12/03/20 from Ayaka Dohi re: inability to connect to online hearing
12. Email dated 12/03/20 to Ayaka Dohi re: leaving the record open for comment
13. Email dated 12/09/20 closing the record – no additional comments received

FINDINGS AND CONCLUSIONS

To be approved, the proposed CUP must comply with the criteria set forth in SMC Section 17G.060.170 and 17C.320.080. The Hearing Examiner has reviewed the proposed CUP 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 RSF, a residential category. The uses allowed in the residential zones are shown on Table 17C.110-1. See SMC 17.110.110. A mini-market/grocery store is considered "Retail Sales and Service," a commercial category. See Exhibit 1, pp. 3-4. Normally, a "Retail Sales and Service" use is not permitted in the RSF zone. See Table 17C.110-1. However, in this case there are two legal grounds to permit the proposed use in the RSF zone. First, the proposal is allowed consistent with the existing nonconforming use rights. Second, the proposal is expressly allowed by a recently adopted ordinance that authorizes the reuse of existing commercial buildings in residential neighborhoods.

Nonconforming Use Rights. The applicant may operate a mini-market/grocery store at this location as a non-conforming use. As the Staff pointed out, the property has been continually used for commercial purposes for many years, even though it has been classified for residential use during the majority of that time. See Exhibit 1; *Testimony of T. Palmquist*. The building was used as the Rosenbaum Grocery beginning in 1923, about six years before the adoption of the first zoning code. See Exhibit 1, p. 4. The city's building records confirm that various commercial uses were conducted at the property, including a meat market, food shop (1951-), beauty shop (1974-), and an upholstery shop (1974-2019). See *id.* When the City adopted its first zoning code in 1929, the property was classified as R1, a residential zone. See *id.* In 2006, the zoning was changed to RSF, and has remained that way ever since. See *id.* Thus, the use of the property has been a legal, nonconforming uses since at least 2006.

The nonconforming use rights for the property remain valid. There is no evidence in this record that the nonconforming use rights have been abandoned or extinguished. For example, a nonconforming use that is discontinued for a period of two years loses its rights to continue. See 17C.210.030(A). In this case, however, the nonconforming commercial use was ongoing.

The upholstery shop continued operations until approximately June-July 2019. See *id.*, p. 2. The application for the mini-market/grocery store was submitted approximately six months later. See Exhibits 2A & 2B. This confirms that there was no intent to relinquish the nonconforming use rights for this property. In addition, by early February, the application was deemed complete by the City. See Exhibit 3. Thus, the Applicant established a vested right to have the application processed in accordance with the rules and standards in effect at that time. Those vested rights include the right to continue the nonconforming uses of the property, consistent with the codes governing nonconforming uses.

According to the municipal code, a nonconforming use in a residential zone may, through a CUP, be changed to an equal or more compatible use so long as no new building, enlargement, or extensive alteration is involved. See SMC 17C.210.060(B). The most recent use of the property was an upholstery shop. That use is considered a retail use with an emphasis on repair. See Exhibit 1, p. 3; see *also* SMC 17C.190.270(C)(4). The proposed mini-market/grocery

store is also a retail use, but one which is oriented on sales. See Exhibit 1, p. 3; see also SMC 17C.190.270(C)(1). There is a change of use from an upholstery shop to a mini-market/grocery store. However, both uses fall within the same general category, i.e. "Retail Sales and Service."

The proposal seeks to re-purpose an existing building. No additions to the building are proposed. The Applicant will be making tenant improvements to the interior to prepare the building for use as a mini-market/grocery store. See Exhibit 1, p. 5. The Applicant will also be making improvements to the façade, including new signage. See *id.* However, no new structures are proposed with the exception of a new trash enclosure. See *id.* Thus, this proposal honors the limitations found in SMC 17C.210.060(B). No additions or new buildings are proposed, and the building will not be enlarged. The only question is whether the proposal involves "extensive alterations" to the property.

An "alteration" is a physical change to a structure or site. See SMC 17A.020.010(S). The term "alteration" does not include normal maintenance and repair or total demolition. See *id.* To the extent that any repairs are being undertaken as part of the tenant improvements, those repairs would not qualify as "alterations." That being said, the proposed improvements generally qualify as "alterations" under the code. Changes to a façade, interior improvements, as well as the development of new structures (the trash enclosure) are all considered "alterations" under the code definition of the term. However, SMC 17C.210.060(B) only limits a change of use if the proposal involves "extensive alterations."

The municipal code does not define the term "extensive." When a term is not defined by the code, ordinary dictionary definitions are applied. See e.g. SMC 17A.020-005(A). The term "extensive" means "having wide or considerable extent"¹ and "very large in amount or degree."² Synonyms for "extensive" include "broad," "deep," "expansive," "far-reaching," "sweeping," and "wide-ranging."³

The Hearing Examiner concludes that the proposal does not involve "extensive alterations" and, therefore, the existing building can be converted to a mini-market/grocery store consistent with SMC 17C.210.060(B). Improving the façade and adding signage, making tenant improvements, and adding a trash enclosure are not "sweeping" or "wide-ranging" changes to the existing structure. The changes are not considerable or expansive. The most significant changes will be to the interior of the structure. These changes will not alter the footprint of the building or intensify the use outside of its historic applications. Improving the façade and enclosing the trash would seem to be beneficial to the neighborhood, as well as to the proposed business. Moreover, as noted above, the proposed conversion merely changes the use from one type of retail use to another type of retail use. This satisfies the code requirement that the proposed use be roughly equivalent in nature and impact.

Authorized by Ordinance. The use of the existing commercial building as a mini-market/grocery store is expressly authorized by SMC 17C.370. 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). 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. This is a

¹ <https://www.merriam-webster.com/dictionary/extensive> (adjective, definition no. 1).

² <https://www.macmillandictionary.com/us/dictionary/american/extensive> (adjective, definition no. 1).

³ <https://www.merriam-webster.com/dictionary/extensive> (synonyms).

more liberal standard than the non-conforming use rules discussed above, in the Hearing Examiner's view.

This does not mean, however, that every old commercial building in a residential area can automatically resume operations. The building must be in existence at the time the ordinance was adopted by the City Council. See SMC 17C.370.020. Historically, the building must have housed a legal neighborhood commercial use. See SMC 17C.370.020. A Type III CUP 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). In such cases, the applicant must satisfy the conditional use criteria found in Section 17G.060.170. See SMC 17C.370.030(D). The applicant must also demonstrate that the proposed use is allowed, consistent with the limitations of the ordinance. See SMC 17C.370.030(E). 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 *id.*

The Hearing Examiner concludes that this proposal satisfies all the requirements of SMC 17C.370. The Applicant seeks to repurpose a commercial building that was in existence when SMC 17C.370 was adopted. The historical record establishes that the property was the location of a string of neighborhood commercial uses. The most recent use (upholstery shop) ceased only six months prior to the application for a mini-market/grocery store. Thus, the threshold questions under the ordinance are clearly satisfied.

The Applicant has submitted a complete application for a Type III CUP, as required under SMC 17C.370. The criteria to issue a CUP have been satisfactorily addressed, as has been discussed throughout this decision. Moreover, the proposed mini-market/grocery store is among the uses authorized pursuant to SMC 17C.370. Uses authorized by SMC 17C.370 include: "Retail sales and service uses found in SMC 17C.190.270." See SMC 17C.370.030(E)(2)(b). "Stores" selling consumer goods, dry goods, groceries, household products, and similar items are examples of "Retail Sales and Service." See SMC 17C.190.270(C)(1). The Planning Department also determined that the proposed mini-market/grocery store should be considered a retail sales and service use. See Exhibit 1, pp. 3-4. The Hearing Examiner agrees. In short, the proposed mini-market/grocery store qualifies as "retail sales and service," a category that is specifically authorized by the ordinance.

Finally, the Hearing Examiner must consider whether the benefits of the project and improvements mitigate the impacts to the residential character of the neighborhood. There will certainly be some impacts from operating a grocery store in a residential neighborhood. Some of the potential impacts are additional traffic in the neighborhood, truck traffic due to delivery of inventory, and parking of vehicles on residential streets. There were also concerns about the potential effects of alcohol⁴ sales in the neighborhood, as well as the potential for loitering, littering, and crime. Although these concerns are genuine and understandable, the Hearing Examiner does not agree that the project should be denied on such grounds. In addition, the Hearing Examiner believes the project conditions, along with some additional screening, are sufficient to mitigate the impacts of the proposal.

Several neighbors were understandably worried about additional vehicles traveling through the neighborhood. However, general fears about the potential impacts of a project, without specific evidence, are not a proper basis to deny or condition a project. There is no evidence that

⁴ The issue of alcohol sales is addressed in Parts 5, 6, 7, and 8 of this decision.

significant amounts of traffic will result from this proposal. There was no evidence that the proposed use would stress the capacity of the local roads or create any specific safety hazards. No traffic analysis was required for this project. *Testimony of T. Palmquist.*

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. No traffic analysis was required for this project, and the proposal is exempt from SEPA. *See id.* The mere allegation that there will be some increase in traffic volumes is not legally enough to warrant specific traffic measures. 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. It is also possible that some measures, such as stop signs, may be implemented at the permitting stage. *Testimony of T. Palmquist & D. Ghebreab.*

The proposed mini-market/grocery store is a small store that is intended to primarily serve the neighborhood. As the Applicant stated, this type of shop is unlikely to generate significant traffic from outside the immediate vicinity, and caters to walk-in customers. *Testimony of D. Ghebreab.* The Staff agreed with this assessment, characterizing the proposal as a “walkable business that will serve the East Central Neighborhood,” which is complimentary to other neighborhood businesses located nearby. *See Exhibit 1, p. 6.* Mr. Neiman objected that the density of the neighborhood was insufficient to support the use. *Testimony of S. Neiman.* One of the implications of this is that the proposed use will need traffic from outside the immediate neighborhood to stay in business. The Hearing Examiner acknowledges that the business will attract some consumers from outside the surrounding homes. However, it is not necessary, to approve this admittedly commercial use, for the operation to be *exclusively* for the homes within a short walk of the premises.

There was a concern that truck traffic may impact the neighborhood. However, the proposed mini-market/grocery store is a relatively small, at less than 3,500 square feet in size. The anticipated delivery traffic will be accordingly limited. The Applicant testified that approximately one truck delivery would occur per day, with the average stop to deliver goods lasting from 10-30 minutes, on average. *Testimony of D. Ghebreab.* There was no contrary testimony or evidence. Although having delivery trucks in the neighborhood may present a slight inconvenience at times, the impact will not be significant.

Some neighbors objected to the lack of parking spaces to support a retail business. There was also a concern that vehicles stopping at the mini-market/grocery store would park vehicles in front of residences. 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. *Testimony of T. Palmquist.* 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 concerns about alcohol sales, crime, littering, noise, and other impacts to the neighborhood are addressed in other parts of this decision. *See e.g.* Paragraphs 5 (environment), 6 (residential

appearance), 7 (compatibility), and 8 (livability). Those discussions are incorporated here by reference.

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 acknowledges 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.

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 upholstery shop into a mini-market/grocery store. The upholstery shop ceased operation in the summer of 2019, only six months prior to the submission of this application. The site has been the location of a variety of neighborhood commercial uses, including a grocery store starting in 1923. Other uses have included a meat market, a food shop, and a beauty shop. Thus, there is a long history of neighborhood commercial use of the property. It seems appropriate for this property to serve as a small, local mini-market/grocery store. This history is also incongruous with any claim that a small grocery store is incompatible with the neighborhood.

The Hearing Examiner believes that this remodeling project is 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. The building is small and fits in with the neighborhood. The Applicant has not proposed any expansions or additions to the building. There will be some improvements to the façade of the building, the trash container will be enclosed, and some fencing for screening will be installed. The remainder of the work will be to the interior of the building. And all of these improvements, on balance are positive for the neighborhood.

The project will clean up and improve a currently vacant, commercial site. Vacant buildings in disrepair constitute a blight and create nuisance conditions. One neighbor pointed out that the abandoned structure attracted illegal activity. See Exhibit 5 (E-mail of M. Devries 3-1-2020, 7:37 PM). Cleaning up and improving the property would go a long way to deterring such problems. See *id.*; see also Exhibit 1, p. 4. The Applicant noted that the property has deteriorated recently, and that the Applicant would be making a substantial investment into the site. *Testimony of D. Ghebreab.*

As suggested above, the building is quite small, having less than 3,500 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 mini-market/grocery store seems to fit this concept. Further, the proposed use is intended to serve the immediate neighborhood. See Exhibit 1, p. 4. In addition, the limited size of the business should result in less non-local traffic through the neighborhood. This is not a use that will likely generate a large amount of community or regional traffic.

Chapter 11 of the CP 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 CP 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. And, as the Staff points out, the CP also includes policies that encourage the development of small businesses, such as ED 3.5 and ED 3.6. See CP, Policy ED 3.5 & ED 3.6.

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 CP. Therefore, this criterion for a CUP is satisfied.

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

The decision criteria for Type III decisions (such as a CUP) mandate that all proposals must satisfy the concurrency requirements under SMC 17D.010. See SMC 17G.060.170(C)(3). Accordingly, on September 25, 2020, a Request for Comments on the application was circulated to all City departments and outside agencies with jurisdiction. See Exhibit 4. The city received limited comments in response to its request for comments. See Exhibits 4A-4C. The Staff noted that “...there were no departments or agencies that reported that concurrency could not be achieved.” See Exhibit 1, p. 4. In addition, there was no testimony at the public hearing suggesting that the concurrency standards would not be satisfied. The Hearing Examiner concludes that the project satisfies the concurrency requirements of the municipal code. Therefore, this criterion for approval is fulfilled.

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 property is already improved with a small commercial building. The history seems to confirm that this is a suitable site for a neighborhood commercial use. It has been used for such purposes since the late 1920s. The existing structure is relatively modest in size and appears to fit within the neighborhood. The proposed improvements will be made inside the building, with the exception of building a new trash enclosure and façade upgrades. See Exhibit 1, p. 5. No additions will be made to the building. See *id.*

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 (CARA)-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 applicant proposes to convert an old, neighborhood commercial building into a grocery store, a use that has been carried on in the past. 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 were concerns about a range of other things, as were discussed in Paragraph 2 above. 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)(1).*

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 an existing building. The building 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. Over the years the property has become dilapidated, unfortunately causing blight to the surrounding neighbors. See Exhibit 1, p. 6. The applicant plans to improve the exterior façade to make the site more attractive and complimentary to the neighborhood. See *id.* The existing building was constructed as a small, neighborhood commercial site. The building is one story tall consisting of approximately 3,405 square feet of usable space. The building is roughly proportional 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 5,450 square feet in size. See Exhibit 1, p. 6. 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 structure, so its style is distinct from the houses that surround it. However, it was originally constructed for commercial use, 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. There are no plans for structural expansion other than a dumpster enclosure area that will require screening. See *id.* Further, the building is comparable in size the residences in the neighborhood.

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's location on the lot is already established. The setbacks to the sidewalks or frontage roads cannot reasonably be changed. Nonetheless, changes to the exterior façade and the site will require the applicant to adhere to the Institutional Design Standards in Residential Zones, SMC 17C.110.500, at the time of building permit. See Exhibit 1, p. 6; *Testimony of T. Palmquist.*

Mr. Neiman pointed out that if a vehicle parks on the property, using the driveway shown on the site plan, the headlights will cause light to shine into the neighboring property to the west. *Testimony of S. Neiman.* He suggested that fencing should be installed on the west property line to screen the neighboring property. See *id.* At the hearing, this issue was discussed and Mr. Ghebreab stipulated to installing that screening fence. As a result, this measure has been incorporated as a condition of approval.

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. This record does not support the conclusion that the proposal will have significant effects in terms of noise, glare, operations, odors and litter, or diminished privacy or safety.

There was no evidence that a mini-market/grocery store would be a significant source of noise. Presumably, there will be a little bit of noise from the establishment, from traffic and customers and going in and out of the store. However, nothing in this record demonstrates that a greater effect is likely to occur. In addition, 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.

There is no reason to believe that the mini-market/grocery store will be a significant source of light or glare. There was no proposal to include unusual or extraordinary exterior lighting. Given the

size and design of the building, the Hearing Examiner would not anticipate much more light than might emanate from a single-family residence. 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. Finally, a screening fence will be installed to shield the property to the west from the potential impact of light emanating from vehicles parking in the driveway at the site.

The Applicant did not propose late-night operations. The proposed hours of operation are 7:00 a.m. to 10:00 p.m. Thus, there will be no impacts from late-night operations.

No odor is anticipated from the proposed use. See Exhibit 1, p. 6. A mini-market/grocery store is not the type of use associated with nuisance odors.

There was no evidence that 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.* There was some contention that the mini-market/grocery store may lead to littering the neighborhood by customers of the store. Although it is possible that some customers will litter, the objection was largely speculative. The evidence of potential problems with littering was not specific or substantial enough to warrant conditioning of denying the proposed use. In addition, a grocery store owner should not necessarily be held responsible for a customer's failure to properly dispose of waste.

No concerns were specifically raised about privacy, and the Hearing Examiner cannot conceive of any privacy-related impacts of this proposed use. Thus, privacy concerns do not warrant project conditions or denial of the project. There were concerns lodged about safety, however. Those concerns specifically related to the sale of alcohol. More than one area resident was worried that the sale of alcohol at the store would attract bad behavior, including public drunkenness, littering, drunk driving, and acts of violence or crime. In support of some of these fears, Mr. Neiman submitted scholarly articles that included correlations between alcohol sales and crime. See Exhibit 5.

The Hearing Examiner is sympathetic to the neighbors' concerns about alcohol sales, and did include a prohibition on alcohol sales at a coffee shop that was recently approved under the provisions of SMC 17C.320. However, the Hearing Examiner views this case differently and does not believe that a similar prohibition should be imposed on the proposed mini-market/grocery store. The Hearing Examiner reaches this conclusion for a variety of reasons.

The proposed mini-market/grocery store is not a place for individuals to gather and consume alcohol, potentially for an extended period of time, like a bar, night club, or some restaurants. Instead, it will be a convenience store, where someone can buy alcohol on their way home, for example. The Applicant has stated that only wine and beer will be sold. It is not for consumption at the premises, and this is fundamentally different than the coffee shop⁵ proposal. It is possible, as at least one neighbor suggested, that an intoxicated person may show up at the store to buy more alcohol. But in that case, the Applicant will have some discretion or perhaps a legal obligation to refuse to sell to that person. Either way, the operator of the store should not be blamed for such bad behavior.

⁵ It should also be emphasized that the owners of the coffee shop *stipulated* at the hearing that no alcohol would be sold at the premises.

For similar reasons, the Hearing Examiner is skeptical that the mini-market/grocery store will be linked with drunk driving. There is a much higher risk of that activity when patrons may stay and drink for extended periods of time before driving elsewhere. Here, it is far more likely, as the Applicant testified, that an individual in the area will stop by for a bottle of wine or some beer to drink at home.

The studies correlating alcohol sales with criminal behavior are concerning. However, it is very difficult to draw specific conclusions about this proposal based upon scholarly journal articles, in particular in the absence of expert testimony to explain the methodology, scope, and limitations of the relevant study, as well as to describe why the proposed use will contribute to the impacts identified in a given study. Without expert assistance, the Hearing Examiner cannot confidently determine whether a small grocery store, selling beer and wine, will have any actual impacts upon crime rates. The articles themselves stated that further study was needed to draw specific conclusions. In short, the Hearing Examiner concludes that expert testimony would be required to demonstrate that the cited studies actually apply to this proposal, and to explain the implications of such a determination.

Finally, the Hearing Examiner is hard-pressed to evaluate a convenience store based upon all the societal ills that can arise from alcohol sales and use. Alcohol sales are legal and common at convenience stores, grocery stores, and supermarkets. Alcohol sales are just one of many products sold at such businesses. The City Council made a policy decision to allow commercial uses, including retail sales and services, in a residential neighborhood. This undoubtedly includes the possibility of selling alcohol, provided the legal requirements for doing so are satisfied. The Hearing Examiner accepts the Applicant's assurance that the Applicant will operate this business responsibly, and in accordance with the rules, including checking identification, refusing to serve the visibly intoxicated, etc. Without more specific evidence that this proposal is a genuine cause of impacts on the neighborhood, the Hearing Examiner is inclined to approve the proposed use, including the retail sale of beer and wine.

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 proposal does not decrease the level of service on any adjacent street. The site has access to all City of Spokane public services, and will not require any additions to be made in order to fully accommodate the proposed site development." See Exhibit 1, p. 7. As such, there is no concern about impacts to the transportation system. The Hearing Examiner concludes that this criterion is satisfied.

10. *The alleged defects in the posting of notice do not justify remanding the matter for additional notice or a new hearing.*

There were two substantive objections to the form of the signage used to post notice of this proposal. First, it was argued that sufficient information was lacking in order to determine whether the signs (community meeting and public hearing) were posted to face the most heavily traveled public road next to the proposed project, as required by SMC 17G.060.120. See Exhibit 5 (Letter of S. Neiman). Second, it was asserted that the signs did not contain lettering in the

sizes required by SMC 17G.060.120. See *id.* For the reasons that follow, the Hearing Examiner declines the invitation to remand this matter for cure of the alleged defects.

The signs were properly posted facing Lidgerwood. In the typical case, the Planning Staff consults with the Applicant about the notice procedures. A judgment call is made about the location of the sign, which the Hearing Examiner is not inclined to second-guess. There is no requirement to conduct a traffic analysis to determine what public road is the most heavily traveled, solely for purposes of locating a sign. This is not a case, for example, where the sign was posted facing the obviously less traveled route. See *Prosser Hill Coal v. Spokane County*, 176 Wn.App. 280, 284, 309 P.3d 1202 (2013) (signage facing a dirt road, rather than the paved, major thoroughfare, constituted defective notice). That said, the Planning Department properly exercised its discretion and directed the Applicant to erect the sign facing Lidgerwood. See Exhibits 3 (public hearing) and 7 (community meeting). The Hearing Examiner also concludes that this directive makes sense. The sign was placed in a plainly visible location, closest to the intersection of Lidgerwood and Bridgeport, the nearest arterial. Finally, as Mr. Neiman acknowledges, the site is located on the intersection of two side streets. The property is not on an arterial; there is no basis under the code to require a sign to be posted facing both streets. The Hearing Examiner concludes that the posting was proper.

It was acknowledged at the hearing that the signs did not satisfy the code requirements for the size of the lettering. Mr. Neiman submitted photographs and measurements that clearly demonstrated that the lettering employed was smaller than the standards specify. For example, some of the lettering that should have been 3 to 4 inches tall was actually 2.5 inches tall. Although the Hearing Examiner agrees that the signs contained minor defects in terms of the lettering size, this shortcoming does not justify remanding this matter or starting the process over again.

In the past, the Hearing Examiner has not hesitated to require new notice and a new hearing when the notice procedures were defective. Those cases have included errors such as posting a sign on the wrong property and removing a sign prematurely. The case law on this subject contains other examples, such as publishing notice only once when an ordinance required multiple publications. See *e.g. Prekeges v. King County*, 98 Wn. App. 275, 281, 900 P.2d 405 (1999). When there is a material defect in the notice, a “do-over” is required because there is no reasonable way to determine how and to what extent the process was undermined by the failure to advise the public. These concerns are simply not present in this case.

The property was posted with a large, white sign, with red lettering, facing Lidgerwood. From the site visit, and from the photographs provided by Mr. Neiman, it is apparent that anyone who passed by the property would be fully advised of the matter. The sign was relatively large, clear, readable, and obvious. The size of the lettering did not materially impact the ability to see, read, or understand the notice. There was no contention or evidence that the content of the notice was insufficient. There was no claim that the notice was not placed at the right property, or at the required time or for the necessary duration.

As the Staff noted, Mr. Neiman did participate in the community meeting and the public hearing, and thus, he received notice and had an opportunity to be heard. There is no substantive reason to believe that anyone failed to see the notice or missed their opportunity to participate because the lettering on the sign was a little smaller than technically required. The Hearing Examiner does not believe there was any defect in the signage that posed a genuine risk that members of the public would not receive or understand the notice, given its form. There was no evidence of any prejudice to Mr. Neiman or anyone else. Moreover, to the extent there were

technical deficiencies in the notice, the error was harmless. See e.g. RCW 36.70C.130(1)(a) (procedural errors that are harmless are not a basis for relief under the Land Use Petition Act). The Hearing Examiner concludes that the notice was legally sufficient, even though it contained minor deviations from the lettering requirements.

DECISION

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

1. 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.
2. *Per the stipulation of the Applicant at the hearing, alcohol sales at the mini-market/grocery store shall be restricted to beer and wine sales. The sale of hard alcohol is prohibited.*
3. *The Applicant will install a fence for screening purposes along the west boundary of the property. The fence shall be six feet tall, except where the fencing standards require a lower height, and shall be of a design that creates a visual and light screen for the benefit of the residential properties to the west.*
4. Washington State Department of Ecology (WSDOE) 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, Washington State Department of Archaeology & Historic Preservation (WSDAHP), the Spokane Tribe of Indians, and the Planning & Development Department should be immediately notified and the work in the immediate area cease. Pursuant to Revised Code of Washington (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 WSDAHP before excavating, removing or altering Native American human remains or archaeological resources in Washington.
6. Adhere to any additional performance and development standards documented in comment or required by City of Spokane, Spokane County, Washington State, and/or any Federal agency to include landscaping and screening, signage, parking, building code, etc.
7. 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.

8. SMC 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.
9. 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 22nd day of December, 2020.



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 ISSUANCE OF THE DECISION.** Pursuant to RCW 36.70C.040(4)(a), the date of the issuance of the decision is three days after a written decision is mailed by the local jurisdiction. This decision was mailed on December 22, 2020. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS JANUARY 18, 2020, 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.