

CITY OF SPOKANE HEARING EXAMINER

Re: Rezone Application by Land Use Solutions) FINDINGS, CONCLUSIONS,
and Entitlement to rezone properties located) AND DECISION
at Government Way and Sunset Boulevard)
from NR 35 to NR 55.) FILE NO. Z21-318REZN

SUMMARY OF PROPOSAL AND DECISION

Proposal: The Applicant, Dwight Hume, Land Use Solutions and Entitlement, seeks to rezone three lots located at the intersection of Government Way and Sunset Boulevard from NR-35 (Neighborhood Retail with a 35-foot height limit) to NR- 55 (Neighborhood Retail with a 55-foot height limit). The proposed rezone does not change the uses allowed at this location, only the allowable height of a structure. This is a Type III application process.

Decision: Approved, with conditions.

FINDINGS OF FACT
BACKGROUND INFORMATION

**Applicant/
Agent:** Land Use Solutions and Entitlement
c/o Dwight Hume
9101 N. Mt. View Lane
Spokane, WA 99218

**Property
Owner:** Gib & Susan Brumback
2937 W. 7th Avenue
Spokane, WA 99224

Property Location: The site is located west of Government Way and north of Sunset Boulevard, adjacent to the intersection of these roads. The properties are addressed as 2921 W. 8th Avenue, 2918 W. 8th Avenue, and 2937 W. 7th Avenue, Spokane, Washington. The properties are designated as Tax Parcel Nos. 25234.1102, 25234.1004, and 25234.1003.

Zoning: All three parcels are zoned Neighborhood Retail 35 (NR-35)

Comprehensive Plan Map Designation: The property is designated as Mini Center in the City of Spokane Comprehensive Plan (CP).

Site Description: There are three vacant parcels, totaling 1.43 acres in size. The site is a triangular area bounded by South Audubon Street, South Government Way, and West Sunset Boulevard. The site is generally flat with a basalt underlayment. There are no improvements on the property. There are no critical areas or environmentally sensitive areas on the site.

Surrounding Conditions and Uses: Land located to the east and south is zoned NR-35 and designated as Mini Center in the CP. Land to the west is zoned Residential Multi-Family (RMF) with a Residential 15-20 CP designation. Land to the north is zoned Residential Single Family

(RSF) with Residential 4-10 CP designation. To the north, there is also an area that is zoned and designated as office.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code (SMC) 17C.120, Commercial Zones and SMC 17G.060.170, Decision Criteria.

Notice of Community Meeting: Mailed: September 6, 2021
Posted: September 6, 2021

Community Meeting: September 21, 2021

Notice of Application/Public Hearing: Mailed: January 11, 2022
Posted: January 11, 2022

Public Hearing Date: February 3, 2022

Site Visit: February 3, 2022

State Environmental Policy Act (SEPA): A Determination of Nonsignificance (DNS) was issued by the City of Spokane on January 19, 2022. Any appeal of the DNS was due on February 2, 2022. No appeal was filed.

Testimony:

Donna deBit, Assistant Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Dwight Hume
Land Use Solutions and Entitlement
9101 N. Mt. View Lane
Spokane, WA 99218

Mike Gifford
West Hills Neighborhood Council
3109 W. Trinity Place
Spokane, WA 99224

Submitted comments to the record:

Bill Heaton
905 S. Pepper Tree Lane
Spokane, WA 99224

Josette Gates
josettegates@gmail.com

Karen Carlberg
West Hills Neighborhood Council
karencarlberg@comcast.net

Julieann and Lyle Morse
1001 S. Buena Vista Drive
Spokane, WA 99224

Shea and Kimberly Suski
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Teresa Hurliman
1021 S. Buena Vista Drive
Spokane, WA 99224

Exhibits:

Staff Report dated January 19, 2022, including the following attachments:

1. Application Materials
2. SEPA Checklist
3. Determination of Nonsignificance (DNS)
4. Public Comments
5. Request for Agency Comments, including:
 - a. Washington State Department of Archaeology and Historic Preservation (WSDAHP)
 - b. City of Spokane Engineering
 - c. Spokane Transit Authority
 - d. Spokane Tribe of Indians
6. Noticing Documents, including:
 - a. Notice of Application and Public Hearing
 - i. Public Notice Sign/Posting/Mailing instructions
 - ii. Parcel List
 - iii. Public Notice Letter with Map
 - iv. Title Company Certification
 - v. Affidavits
 1. Individual Notice
 2. Public Notice
7. Community Meeting Materials including:
 - a. Community Meeting Instructions
 - b. Notice of Community Meeting
 - c. Community Meeting Notes
 - d. Community Meeting Roster
 - e. Community Meeting Chat
 - f. Affidavits
 - i. Individual Notice
 - ii. Public Notice
8. Staff Presentation

FINDINGS AND CONCLUSIONS

Rezoning is a Type III decision that must satisfy the criteria set forth in SMC Section 17C.060.170. See SMC 17C.060.170(C)(1)-(5); see also Table 17G.060-1 (stating that zone reclassifications are Type III decisions). The Hearing Examiner has reviewed the proposed Rezone 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 Applicant proposes to rezone its properties from Neighborhood Retail with a 35-foot height limit (NR-35) to Neighborhood Retail with a 55-foot height limit (NR-55). This proposal would not change the uses allowed on the properties. However, if approved, the proposal would change the height limitations that apply to the properties. Changes to the height limits require a rezone. See SMC 17C.120.220(B)(1).

The site is located within an area of land designated as Neighborhood Mini-Center on the CP. Neighborhood Retail (NR) zoning is an implementing zone for this land use designation. See SMC 17C.120.030(C). The rezone is necessary to account for the modified height limitation, as discussed above, but the classification will remain NR. In addition, as a site-specific rezone that implements the CP, the proposal is quasi-judicial and can be considered at any time. See SMC 17G.020.020. A site-specific rezone application is governed by the procedures for Type III applications, as set forth in 17G.060 SMC. See *id.*

The Hearing Examiner concludes that the proposed zone change is allowed under the land use codes. 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).*

Under the CP, the land use designation for the property is “Neighborhood Mini-Center.” This designation recognizes the existence of small, neighborhood-serving businesses. See CP, Chapter 3, p. 3-40. “Mini-Center locations are encouraged to become small, mixed use centers with residential use as a major component.” See *id.* The CP recognizes that residential development adds market demand and enables enhanced transit service to these locations. See *id.*; see also CP, Chapter 3, LU 1.7, p. 3-10. It is not surprising, then, that high-density residential use is encouraged in these areas. See CP, Chapter 3, p. 3-39.

The current proposal is a non-project rezone. There is no specific development plan under consideration at this time. However, the Applicant has provided the City with a concept drawing that reveals that the Applicant plans to construct a multi-family residential building on the site. See Exhibit 8, Slide 6, p. 3. The Applicant stated that the 55-foot height allowance would be sufficient to construct four stories of residential units. *Testimony of D. Hume.* The future use of the property for higher intensity residential use is consistent with the intent of the CP. As stated above, the Mini-Center designation clearly contemplates a mixed-use area, with multi-family development as a central component. Thus, the proposed zone change will facilitate precisely the kind of development intended by the CP.

The proposed rezone is also consistent with the more generally applicable goals and policies of the CP. The site is located at the intersection of two busy roadways, in proximity to a variety of uses, including but not limited to a residential drug addiction treatment facility, a motel, and a church. The property to the west, north of the drug addiction treatment facility is zoned Residential Multi-family and will be developed in the future with apartments. *Testimony of D. Hume.* There is also an office building just northeast of the site. See Exhibit 8, Slide 5, p. 3. The development of this site with multi-family building will blend in well with both the existing and the planned uses in this area. The proposed use will also help to meet the current demand for additional housing. *Testimony of D. Hume & D. deBit.*

Given the foregoing characteristics, the proposal is supported by Goal LU 5, which promotes development in a manner that is attractive, complementary, and compatible with other land uses. See CP Goal LU 5, p. 3-27. Policy LU 5.5 also supports the zone change. That policy encourages that infill and redevelopment projects are well-designed and compatible with surrounding uses and building types. See CP, Policy LU 5.5, p. 3-28; see also Staff Report, p. 3. Additionally, Policy H 1.8 promotes a wide range of housing types and housing diversity to meet the needs of the diverse population and ensure that this housing is available throughout the community for people of all income levels. See CP, Policy H 1.8, p. 6-7.

The Hearing Examiner concludes that the proposed rezone is consistent with the designation, goals, and policies of the CP. Therefore, this criterion for approval of the rezone is met.

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 mandate that all proposals satisfy the concurrency requirements under SMC 17D.010. See SMC 17G.060.170(C)(3). Accordingly, on December 6, 2021, a Request for Comments on the application was circulated to all City departments and outside agencies with jurisdiction. See Exhibit 5.

The City received comments from various departments and agencies. See e.g. Exhibit 5. However, none of those comments indicated that concurrency could not be achieved. See *id.*; see also Staff Report, pp. 3-4. In addition, a review of the record confirms that there is no substantive evidence that the project transgresses any concurrency requirements. There was no testimony at the public hearing suggesting that the concurrency standards would not be satisfied.

The Hearing Examiner finds that the project satisfies the concurrency requirements of the SMC. Therefore, this criterion for approval 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 proposal to rezone the property is a non-project action. See Staff Report, p. 4. A site plan is not required in order to process or consider a rezone application. Therefore, this criterion has limited relevance to this proposal. At this stage, there are no specific development plans to consider. However, as previously mentioned, the Applicant has submitted a conceptual site plan that is part of the record. See Exhibit 1, p. 8. As a result, we know the Applicant's intention is to develop the site with a multi-family structure and related improvements.

In order to obtain approval of its future development plans, the Applicant will be required to demonstrate that the project complies with land use (landscaping, screening, and design), engineering, utility, building, and all other applicable construction-related standards associated with new development. See Staff Report, p. 4. The City's Development Services Center will review the permit application to ensure that the proposal satisfies those standards. That said, there are no obvious conditions that make the property unsuitable for a future Neighborhood Retail use at the higher building height.

The site is located at the intersection of two busy thoroughfares, and is situated among a mixture of uses. The location is thus appropriate for a multi-family structure or another use consistent with the NR zoning. The site is triangular in shape, which does pose some potential limitations, as a practical matter. However, the site is approximately 1.43 acres and there are no existing structures. See Staff Report, p. 4; see also Exhibit 2 (Environmental Checklist ¶ B(8)). There is sufficient area to support development, as the conceptual plans demonstrate. See Exhibit 1, p. 8. The site is also relatively flat. See *id.* Topography does not impose any significant obstacles to development.

There is no evidence of other physical or environmental conditions that make development of the site problematic. There is no evidence, at this non-project stage, that the soils are not appropriate for a future commercial development, or that there are problematic groundwater conditions. There are no surface waters or wetlands on the site. See Exhibit 2 (Environmental Checklist ¶ B(3)(a)(1)). There do not appear to be any physical characteristics of the site that make it unsuitable for uses allowed in the proposed zone. Even so, it should be emphasized that there will be a SEPA review at the project stage, at which time the specific impacts of a particular proposal can be considered and addressed. See Paragraph 5.

There are no known natural, historic, or cultural features on the site. See Exhibit 2 (Environmental Checklist ¶ B(13)). However, the WSDAHP reported that there was a “high probability of encountering cultural resources in the project area.” See Exhibit 5. The WSDAHP recommended that the Applicant complete a professional archaeological survey prior to ground disturbing activities. See *id.* This recommendation has been incorporated as a project condition. See Condition 2.

The Hearing Examiner concludes that there is nothing about the size, shape, topography, or location that makes the site unsuitable for future uses allowed in the NR-55 zone. Therefore, this criterion for a rezone 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 prepared an environmental checklist for the proposed zone change. See Exhibit 2. The information supplied is somewhat limited, due to the non-project nature of the proposal. Even so, the non-project portions of the checklist were completed. Based upon its review of the available information, the City of Spokane (Planning Department) issued a DNS for the proposal. See Exhibit 3. The deadline to appeal the DNS was February 2, 2022. No appeals were filed and thus the city’s evaluation of the environmental conditions is uncontested.

The future development of the property is not likely to result in significant impacts on the environment. There are no environmentally sensitive features of the site. For example, no part of the site has been classified as a critical area. See Exhibit 2 (Environmental Checklist ¶ B(8)(h)). There is no evidence that the soils are not appropriate for a future commercial development, or that there are problematic groundwater conditions. There are no surface waters on or near the site. See Exhibit 2 (Environmental Checklist ¶ B(3)(a)(1)-(2)). The property does not lie within a 100-year floodplain. See Exhibit 2 (Environmental Checklist ¶ B(3)(a)(5)). No threatened or endangered species are known to be on or near the site. See Exhibit 2 (Environmental Checklist ¶¶ B(4)(c) & B(5)(b)).

The Hearing Examiner does not view the proposed change as radical in nature. The zone will change from one type of Neighborhood Retail to another. The same uses are permitted in both the NR-35 and NR-55 zones. Thus, the potential impacts to the environment or surrounding properties are largely the same, with and without the rezone. The difference is that structures of greater height are allowed in the NR-55 zone, resulting in higher intensity use and the potential for greater impacts. The anticipated impacts of the rezone, however, are not significant. For this reason, the City issued a DNS for this proposal.

The impacts of the proposed rezone will not materially exceed the impacts of developing the property in accordance with the current zoning. Possible exceptions include traffic and parking, concerns that some neighbors contend have not been adequately addressed. See Exhibit 4 (Comments of J. & L. Morse). The greater height will result in additional residential units, for example, likely increasing traffic and potentially creating additional impacts.

That being acknowledged, there is no specific evidence in the record suggesting that the future use of the site will generate a significant amount of traffic, or will have any particular impacts on the capacity of the roads or safety. There were no substantive comments from the Traffic Department, the Engineering Department, or any other agency raising traffic concerns. The City did not require a traffic analysis for the proposed rezone. The record also does not contain any evidence that traffic from future NR uses will create any specific deficiencies in the transportation system. Finally, there was no independent, expert testimony raising concerns about traffic. Under the circumstances, the Hearing Examiner concludes that the proposed rezone, in and of itself, will not result in significant traffic impacts requiring mitigation.

In the Hearing Examiner's view, parking should be less of a concern. The conceptual plan for a multi-family structure shows how parking can be laid out on the site to accommodate the use. See Exhibit 1, p. 8. In addition, the Applicant plans to install underground parking to accommodate the planned use. *Testimony of D. Hume*. In any case, the extent of the traffic and parking, and the particular impacts of each, cannot be specifically determined at the non-project stage.

Since this is a non-project proposal, the environmental analysis does not end here. If, in the future, the owner proposes a development that exceeds the minimum SEPA thresholds, then that development will be evaluated for compliance with SEPA. See Staff Report, p. 4. The project will also be evaluated for compliance with all the relevant development standards. See *id.*; *Testimony of D. deBit*.

The Hearing Examiner concludes that the proposed rezone will not have significant impacts on the environment, which cannot be adequately addressed through mitigation. When a specific project action is proposed in the future, that project will again be evaluated under SEPA as appropriate. Therefore, this criterion for approval is satisfied.

6. *The Hearing Examiner concludes that the proposed rezone should be approved, although some neighboring owners raised understandable concerns about the proposal.*

There were public comments both for and against the proposed rezone. In general, opinions were evenly split regarding the proposal. The primary concerns of the opponents included traffic and parking impacts, obstruction of views, light and noise pollution, infrastructure capacity, and incompatibility caused by the increased height limit. See *id.* (Comments of T. Hurliman, J. & L. Morse, & J. Gates). One neighbor contended that the proposal did not address the requirements of the 2021 Sustainability Action Plan (the "SAP"), recently adopted by the City Council. See *id.* (Comment of J. Gates). Finally, there was a concern about the removal of a mature tree from the development site. See *id.* (Comments of K. Carlberg & J. Gates).

The Hearing Examiner concludes that the rezone will not have significant impacts related to public infrastructure, traffic, and parking. As previously discussed, the comments regarding traffic raised very general concerns. No specific evidence was submitted identifying specific impacts on the transportation system. No comments or testimony explained how the proposed rezone would impact parking or why the parking for the future use could not be accommodated on the subject site. No evidence was submitted that demonstrated that public infrastructure was

not adequate to support the future use of the site. Commenting agencies did not identify any deficiencies in public infrastructure that corroborated this concern. Without more specific evidence or data to consider, the Hearing Examiner is not inclined to condition or deny the proposed rezone on such grounds.

The Hearing Examiner is skeptical that this proposal will have a detrimental impact on views. The site is located at the corner of a busy intersection, close to motels, a drug addiction treatment facility, a church, and an office. There is also a residential area adjacent and to the west/northwest. However, this area is slated for development with apartments, which is the most likely use of this site. Just west of the drug addiction treatment facility (a former motel), there is a large, elevated embankment supporting a railroad track. There are also numerous mature trees, including a number of tall evergreens, adjacent to the railroad line. These conditions create some visual barriers between the area to the west and the site. This would seem to have more of an effect on views from the west (and near Sunset Boulevard) than a new apartment building. Even so, it may be that there will be some effect on views from the west/south, but again the concern raised was very general. No information was provided regarding the relative elevations, height of structures, view corridors, or the like. There was no specific analysis describing precisely how views would be impacted, or any evidence demonstrating the potential effect (diagrams, photographs, etc.).

Even assuming, for the sake of discussion, that views were substantially impacted, in all likelihood this would not provide proper legal grounds to condition or deny this proposal. The DNS was not appealed, and thus SEPA would not be a proper basis to condition or deny the proposal. Thus, impacts to views could not be mitigated based upon an environmental rationale. Setting aside any environmental arguments, the neighbors would need to establish that they had a right to preserve their view. However, in the absence of an easement, covenant, or a statutory provision, a neighboring property owner does not have a right to a view across another person's land. See *Asche v. Bloomquist*, 132 Wn. App. 784, 797, 133 P.3d 475 (2006) (confirming that there is no common law right to a view). In this case, there is no evidence that any of the neighbors have a legal right to preserve their view across the Applicant's property.

There was no substantive evidence that the rezone would result in significant glare or noise. A concern was raised, but no specific information or analysis was provided on this issue. Assuming the owner develops its concept plan for an apartment, the noise and light from that use would be the same as any other higher density residential use. The Hearing Examiner doubts that such a project would result in levels of noise or glare that require mitigation, based upon past experience with such developments. In any case, it would seem that evaluation of such concerns is better left to the project stage.

The Hearing Examiner concludes that it is not appropriate to condition or deny the proposed rezone for the alleged failure to address the requirements of the SAP. The SAP is a broad planning document setting forth the City's vision to address climate change. The SAP does not include specific development standards that the Hearing Examiner can apply to this application. The City has not reached that level of implementation. The SAP does reference Chapter 15.05 SMC, which codifies city policies regarding climate change. However, Chapter 15.05 SMC does not set forth specific criteria or development standards that govern a quasi-judicial decision on a permit or development application. Until specific standards are adopted, the Hearing Examiner must base his decisions on the existing land use codes and decision criteria.

Finally, there was a concern about removal of a mature tree from the Applicant's property. However, there is no legal basis to require a property owner to preserve the trees located

entirely on his or her land. A property owner has sole discretion whether to remove such trees. That is a right that accompanies property ownership.

DECISION

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

1. If/when development occurs, the project will be developed in substantial conformance with SMC 17C.110.500, Land Use Standards, Commercial Zones, Commercial Design Standards, to maintain compatibility with, and limit the negative impacts on surrounding areas.
2. Provide an archaeological survey of the project area and a report of the findings prior to any ground disturbing activities. This survey and report shall be submitted to WSDAHP and shall meet WSDAHP's Standards for Cultural Resource Reporting.
3. Compliance with City noise standards stated in SMC 10.08D, Public Disturbance Noise. The City's quiet hours are from 10 pm to 7 am. This is important due to Residential uses in area.
4. This approval does not waive the applicant's obligation to comply with all of the requirements of the SMC, including the International Codes, as well as requirements of City Departments and outside agencies with jurisdiction over land development.
5. 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.
6. SMC 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.
7. 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 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.

SIGNED this 8th day of February, 2022.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by SMC 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding rezones 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 February 9, 2022. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS MARCH 7, 2022, 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.