

CITY OF SPOKANE HEARING EXAMINER

Re:	Conditional Use Permit and Variance Applications by the City of Spokane Engineering Services to construct a water tower at 2101 E. Thurston Avenue.)))))	FINDINGS, CONCLUSIONS, AND DECISION FILE NO. Z22-429CUP3
------------	---	-----------------------	--

SUMMARY OF PROPOSAL AND DECISION

Proposal: The City of Spokane Engineering Services proposes to construct a 2,000,000 gallon (approximate size) reservoir on property owned by Spokane Public Schools. The proposed water reservoir will be at a height of up to 110 feet and a diameter of up to 100 feet. To allow this proposal, the City must obtain both a Conditional Use Permit (CUP) and a height variance.

Decision: The CUP and Variance are approved, with conditions.

FINDINGS OF FACT **BACKGROUND INFORMATION**

**Applicant/
Owner:** City of Spokane Engineering Services
808 West Spokane Falls Boulevard
Spokane, WA 99201

Agent: Dan Buller, P.E.
City of Spokane, Engineering Design
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Property Location: The proposed site is located at 2101 E. Thurston Avenue, Parcel No. 35333.0004.

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

Comprehensive Plan Map Designation: The property is designated as Residential 4-10 in the Comprehensive Plan for the City of Spokane ("CP").

Site Description: The site of the proposed reservoir is owned by Spokane Public Schools. The location of the proposed reservoir will be at the northeast corner of the site, near the intersection of S. Crestline Street and 39th Avenue. The proposed location of the reservoir is an undeveloped area of the property, consisting mostly of rock and clay soils and covered with trees. The proposed site is generally flat, with the steepest slopes being approximately 5% in grade. The proposed reservoir would share the site with the existing Hamblen Elementary School that is located to the south of the proposed location.

Surrounding Conditions and Uses: The land in all directions of the site is zoned RSF. The reservoir will be installed on the same parcel with Hamblen Elementary School. The land to the east, west, and south is improved with single-family residences. The land to the immediate north

is Hamblen Park and is designated as Open Space. The area further to the north is improved with single-family residences.

Project Description: The City of Spokane Engineering Services is proposing a new reservoir approximately 2,000,000 gallons in size, and up to 110 feet in height. The facility will consist of a concrete pedestal with a steel tank on top. See Exhibit 8, p. 8 (design concept). The proposal also includes site piping to connect to the water main in South Crestline Street. The existing walking path will be used as a construction haul route during the construction phase and later restored when the construction is complete. The applicant is requesting a height variance to accommodate the 110-foot height needed to match the other reservoirs in the area's pressure zone.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code (SMC) 17C.110, Residential Zones; SMC 17C.320.080(F), Conditional Use Criteria; and SMC 17G.060.170(C) and (E)(1), Decision Criteria.

Notice of Community Meeting: Mailed: September 29, 2022
Posted: October 7, 2022

Notice of Application/Public Hearing: Mailed: December 1, 2022
Posted: December 1, 2022

Community Meeting: October 26, 2022

Public Hearing Date: December 21, 2022

Site Visit: December 21, 2022

State Environmental Policy Act (SEPA): A Determination of Nonsignificance (DNS) was issued by the City of Spokane Engineering Department on September 16, 2022. Any appeal of the DNS was due on September 30, 2022. No appeal was filed.

Testimony:

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

Reilly Whitewolf
1809 E. 39th Avenue
Spokane, WA 99203
Reillywhitewolf@gmail.com

Dan Buller, P.E.
City of Spokane Wastewater Department
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Jan Oliver
1809 E. 39th Avenue
Spokane, WA 99203
Oliverj08@gmail.com

Present at hearing or submitted comments to the record:

Greg Forsyth
Spokane Schools
2815 E. Garland Avenue
Spokane, WA 99202
gregoryf@spokaneschools.org

Julie & Terry Cope
4111 S. Napa Street
Spokane, WA 99203
jmcope15@gmail.com

Carol Tomsic
Carol_tomsic@yahoo.com

Carol Ellis
2015 E. 36th Avenue
Spokane, WA 99203
carolellisspokane@hotmail.com

Debbie Walker
Debbie6829@comcast.net

Juniper Morgan-Schmidt
wrenjuniper@outlook.com

Dave M
99203wa@gmail.com

Exhibits:

1. Planning Services Staff Report, 8 pp.
2. Application, including:
 - A General Application, pp. 1-2
 - B Conditional Use Permit Application, pp. 3-4
 - C Variance Application, p. 5
 - D Notification Map Application, with attachments, pp. 6-20
3. Request for Comments letter dated 11/8/22, pp. 1-2
 - A Spokane Tribe of Indians dated 11/14/22, p. 3
4. Determination of Nonsignificance "DNS" dated 9/16/22, pp. 1-5
 - A SEPA Environmental Checklist dated 9/15/22, pp. 6-20
5. Notification District and Parcel List, 2 pp.
6. Community Meeting Materials, including:
 - A Meeting instructions dated 9/21/22, pp. 1-2
 - B Notice of Community Meeting, pp. 3-7
 - C Summary of Input Received at Community Meeting, pp. 8-10
 - D Community Meeting Presentation, pp. 11-27
 - E Noticing Affidavits, 4 pp.
7. Notice of Application Materials, including:
 - A Instructions dated 11/29/22, pp. 1-2
 - B Notice of Application & Public Hearing, pp. 3-4
 - C Public Comment, pp. 5-7
 - D Noticing Affidavits, 3 pp.

Exhibits received at the hearing:

8. Staff Presentation

FINDINGS AND CONCLUSIONS

A. Conditional Use Permit

To be approved, the proposed CUP must comply with the criteria set forth in SMC Sections 17G.060.170(C) and 17C.320.080(F). 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 17C.110T.001. The table does not specifically identify water towers, reservoirs, or related infrastructure among the regulated uses. See Table 17C.110-1. However, those uses are elsewhere identified as Basic Utilities, an institutional category of use. Examples of Basic Utilities include water and sewer pump stations, sewage disposal and conveyance systems, water towers and reservoirs, water quality and flow control facilities, water conveyance systems, and stormwater facilities and conveyance systems. See SMC 17C.190.400(C). SMC 17C.110.110 provides that any new buildings that house a basic utility are required to obtain a CUP, which is processed as a Type III application. See Exhibit 1, p. 3; see also SMC 17C.110.110(C).

The land use codes permit Basic Utilities, such as the proposed project, to be constructed in the RSF zone, so long as the project satisfies the criteria for a conditional use and the other development standards in the SMC. The Hearing Examiner finds that 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 site has a Residential 4-10 designation under the CP. While the provisions describing this land use designation do not directly address utilities, residential uses and developments certainly require adequate infrastructure for water service. There are various provisions in the CP that directly support this premise.

For example, the first goal of the Land Use element of the CP memorializes the objective of providing coordinated, efficient, and cost-effective public facilities and utility services. See CP, Goal LU 1, Citywide Land Use. Policy 1.12 of the Land Use element recognizes that adequate public facilities and systems must exist to accommodate proposed development and must be installed before development is permitted to occur. See CP, Policy LU 1.12, Public Facilities and Services.

Similarly, the Capital Facilities element calls for the City to provide and maintain adequate public facilities and utility services, as well as to ensure reliable funding is in place to protect the public's investment in this infrastructure. See CP, Goal CFU 1, Adequate Public Facilities and Services (also noting that such investments ensure adequate levels of service). Policy CFU 1.2 of the Capital Facilities Element further provides as follows:

Require the development of capital improvement projects that either improve the city's operational efficiency or reduce costs by increasing the capacity, use, and/or life expectancy of existing facilities.

See CP, Policy CFU 1.2, Operational Efficiency.

The project satisfies the foregoing goals and policies by providing a more reliable supply of water for domestic use and fire suppression for the area. See Exhibit 1, p. 3. For example, Washington State Department of Health (WSDOH) regulations require additional storage in the City's high-pressure system to provide adequate fire flow. See Exhibit 4A (Environmental Checklist ¶ A(11)). These requirements prompted the need for this project. *Testimony of D. Buller.*

The Hearing Examiner finds that the project is consistent with the goals and policies of the CP and, therefore, this criterion 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 satisfy the concurrency requirements under SMC 17D.010. See SMC 17G.060.170(C)(3). Under the concurrency standards, facilities for public water must be evaluated for concurrency. See SMC 17D.010.010(B). Accordingly, on November 8, 2022, a Request for Comments on the application was circulated to all City departments and outside agencies with jurisdiction. See Exhibit 3.

The city received limited responses to its request for comments. See e.g. Exhibit 3A. Upon reviewing the comments, City staff noted that "...there were no departments or agencies that reported that concurrency could not be achieved." See Exhibit 1, pp. 3-4. To the extent that there was a lack of substantive comments from departments and agencies with jurisdiction, the Hearing Examiner must conclude that concurrency standards are satisfied. See SMC 17D.010.020(B)(1); see also Exhibit 3.

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 proposal, by its nature, does not place substantive demands on public infrastructure. See Exhibit 4A (Environmental Checklist ¶ B(15)). If anything, the proposal improves public facilities by increasing the City's capacity to provide water. See *id.* As a result, the project will enable other projects to satisfy the concurrency requirement. See Exhibit 2, p. 3.

The Hearing Examiner finds that the project satisfies the concurrency requirements of the SMC. Therefore, this criterion for approval of the CUP 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 site selected for the proposed reservoir is well-suited to the proposed use. The site is one of the highest points on the South Hill, thus reducing the overall required height of the reservoir. See Exhibit 1, p. 4. The site is also located within several hundred feet of the large diameter transmission main that connects other reservoirs in this zone to the primary source of supply, the Lincoln Heights Booster Station, which makes it an ideal location hydraulically. See *id.* The property is generally flat, and there is plenty of undeveloped open space within which to situate the proposed reservoir. The site is also primarily rock a couple feet below the surface, making it an ideal site upon which to situate a reservoir. See *id.*

There is no surface water on this site, and no impacts to surface water are anticipated. See Exhibit 4A (Environmental Checklist ¶ B(3)(a) & (c)(2)). It is acknowledged that the site is located within the Aquifer Critical Area Recharge Zone and must comply with the aquifer protection measures contained in SMC 17E. See Exhibit 1, p. 4. However, no impacts to groundwater are anticipated from this project. See Exhibit 4A (Environmental Checklist ¶ B(3)(b) & (c)(2)). For example, the groundwater is below the limits of the planned excavation activity. See Exhibit 4A (Environmental Checklist ¶ A(14)(b)(1)).

The project does not alter drainage patterns from the site. See Exhibit 4A (Environmental Checklist ¶ B(3)(c)(3)). The site stormwater will be collected, treated, and disposed of in accordance with the Spokane Regional Stormwater Manual. See Exhibit 4A (Environmental Checklist ¶ B(3)(c)(1) & (d)).

There are no known cultural or historic resources on this site that warrant against approval of the proposal. See Exhibit 4A (Environmental Checklist ¶ B(13)). The Spokane Tribe of Indians acknowledges that the area has been extensively developed and has requested an Inadvertent Discovery Plan. See Exhibit 3A. That request has been incorporated into the project conditions. See Condition 3.

The Hearing Examiner concludes that this site is a proper location for the proposed utility, given the physical characteristics of the property. As a result, this criterion for approval 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 environmental review process, completed pursuant to the SEPA, demonstrates that the project will not have significant environmental impacts.

On or about September 15, 2022, the City of Spokane prepared an environmental checklist, pursuant to SEPA, for this project. See Exhibit 4A (Environmental Checklist). The checklist supports the conclusion that this project will not have significant impacts on the environment or the surrounding properties.

For example, there are no wetlands or streams on the site. See Exhibit 4A (Environmental Checklist ¶ B(3)(a)(1)). The property does not lie within a 100-year floodplain. See Exhibit 4A (Environmental Checklist ¶ B(3)(a)(5)). No waste materials will be discharged into the ground or

into surface waters. See Exhibit 4A (Environmental Checklist ¶¶ B(3)(b)(2) & B(3)(c)(2)). With the exception of the initial painting of the water tower with paint that may be described as a hazardous chemical, no other environmental hazards (e.g., exposure to toxic chemicals, risk of fire or explosion, hazardous wastes, etc.) are anticipated to arise due to this project. See Exhibit 4A (Environmental Checklist ¶ B(7)(a)(3)). In addition, no threatened or endangered species were identified on the site. See Exhibit 4A (Environmental Checklist ¶¶ B(4)(c) & B(5)(b)).

The only environmental impacts that are apparent from this project concern aesthetics and light. The proposed water tower will be up to 110 feet tall and 100 feet in diameter and, thus, will have some aesthetic impact. There will also be impacts to adjacent neighbors caused by shade from the reservoir, which would be in addition to the shade they already receive from the existing tall trees. See Exhibit 1, p. 4. The shade from the water tower will be most significant during the winter months when the sun is lower in the sky. *Testimony of D. Buller*. In the Hearing Examiner's estimation, some shade is inevitable from this structure, given its height and mass, as well as the proximity to the homes to the immediate east.

Despite the concerns, the Hearing Examiner believes that the impacts of a water tower are not so great that the project should be denied. There will undoubtedly be disproportionate impacts to the closest residences along Crestline, just east of the site. However, the public good calls for taking a wider perspective when evaluating this type of facility. There are tradeoffs and competing interests involved in most property developments. Perhaps the tradeoffs are more dramatic or obvious in a case like this one. Here, for example, health regulations compel the need to upgrade the high-pressure water system in order to provide proper fire flow to the South Hill. On the other hand, a handful of residences adjacent to the site will experience periods when the sunlight to their properties is diminished or cut off because of the proposed water tower. Views in the vicinity will also be diminished by this type of structure. These kinds of impacts are nearly inevitable when placing a tall water tower in a residential area.

Water reservoirs, of various shapes and sizes, are a part of residential living in a city. These facilities can be somewhat difficult to locate, given the technical requirements. *Testimony of D. Buller*. The location of the proposed water tower is the highest point on the South Hill, and happens to provide a solid rock platform for construction. This location also provides an ideal location to upgrade the high-pressure system, which requires that all such water towers have a matching height. See *id.* These facilities cannot readily be relocated in order to eliminate the potential impacts to neighbors. See *id.*

The residences to the immediate east of the site already experience significant shade from the tall trees within the project site. Thus, there is already, naturally, a limitation on the amount of sunlight to these residences. The addition of a water tower will exacerbate the problem. However, this is not a situation in which a water tower is built on flat ground and surrounded by residences. In addition, the impact will be fairly concentrated to a relatively small area, and the impact will vary depending on the season and time of day.

In the Hearing Examiner's estimation, some shade is inevitable from this structure, given its height and mass. Having said all that, there are still compelling reasons to approve this project, even though some impacts appear to be unavoidable.

Finally, the lead agency, City of Spokane Engineering Services, issued a DNS for the proposal on September 16, 2022. See Exhibit 4. No comments were submitted during the comment period for the DNS. In addition, any appeal of the DNS was due on or before September 30,

2022. See *id.* There was no appeal of the DNS. For purposes of the SEPA analysis, therefore, the potential aesthetic impacts or reduction in sunlight cannot be deemed “significant.”

For the foregoing reasons, the Hearing Examiner concludes that the project will not have significant impacts on the environment, which cannot be adequately addressed through mitigation. Therefore, this criterion for approval of the CUP 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 proposed reservoir, associated piping, and accessory building are part of an expansion of the water system that serves the South Hill. The proposed water tower will ensure sufficient water supply and fire flow for residences in the area, including the nearby homes. Water reservoirs of various shapes and sizes co-exist with residential development in many parts of the City. One example is the concrete water tower located near the intersection of 37th Avenue and Stone Street, which is not far from the proposed site. The residential neighborhood is developed in all directions from that facility. In other words, the construction of basic utilities that serve the residential development is an expected part of the landscape in an urban, residential area. Such utilities enable residential development to occur in the first place, and are essential to the public health, safety, and welfare. For this reason, the Hearing Examiner concludes that the proposed facility is consistent with the residential appearance and function of the area.

Having concluded that the water system is essential to the existence of residential neighborhoods, the Hearing Examiner also concludes that the proposed water tower should not be considered “disproportionate” to the nearby residential uses. It is obvious that a 110-foot water tower is not proportionate in size to any individual residence. However, such facilities are constructed in proportion to a demonstrated public need and, as such, are proportionate to the size and density of the residential uses in a service area. To a certain degree, the Hearing Examiner concludes that the standards requiring proportionality are intended to address other types of government or institutional uses. The construction of a water tower, in other words, has some unique characteristics and functions that must be taken into account.

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 proposed water tower will be situated on 6.7 acres of publicly owned property. There is plenty of space on this site to accommodate the facility, while leaving space around it as a buffer to the adjacent neighborhood. The school and school grounds/facilities to the south, southwest, and west provide some buffer between the proposed facility and the residential areas in those directions. The same is true with respect to the parkland to the immediate north. Although many trees will be removed, the City will retain trees on the site to partially screen the water tower, to the extent possible. *Testimony of D. Buller.* The City will be replanting many trees to assist with screening the water tower. See *id.* The City is also considering using paint colors that will minimize the visual impact by making the facility blend in with its surroundings to some degree. See *id.*

The proposed water tower cannot be reasonably screened through traditional methods, such as landscaping or setbacks. The proposed water tower is 110 feet tall and 100 feet in diameter. Its scale is governed by the need to store a sufficient amount of water to maintain the proper capacity and flow. *Testimony of D. Buller*. It is simply too tall to fully screen with fences or trees, for example. In addition, replanting will help, but it will be many years before the new trees reach maturity and provide the most benefit in terms of screening. It may be possible to select colors that better blend with the sky or surroundings, and that will likely mitigate some of the impact. Nonetheless, the project will result in a large reservoir being constructed relatively close to residential uses, and that structure will admittedly affect the view and light available on nearby properties, during certain times of the day or year.

Despite the limited options to mitigate the impacts, the Hearing Examiner concludes that the project is compatible with the neighborhood. The shadow cast by the water tower will directly impact a limited number of residents. Most of the residential users surrounding the site will not experience those types of impacts. In addition, as previously discussed, this type of facility makes residential use and development possible. In the Hearing Examiner's view, basic utilities that serve residential users can certainly have impacts, but are a necessary part of residential communities. To a certain extent, such facilities should be considered compatible with residential use.

Setting aside the design features, it should be reiterated that the proposed facility will ensure that all the residents within the pertinent pressure zone have an adequate supply of water, in particular for fire flow. This type of utility is essential to the public health, safety, and welfare because it is a critical part of the infrastructure to respond to a fire emergency. There are inevitably going to be some trade-offs, such as impacts to view, that arise when a facility of this nature is constructed. The public need should take precedence in cases like this, however, especially when the proposed facility serves residents throughout the South Hill.

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 project will not impact the livability of nearby residential lands due to the conditions listed in the SMC. For example, the only noise anticipated from this project is due to the construction activity. See Exhibit 1, p. 6. However, that noise source is temporary. See *id.* Once the project is completed, no significant source of noise will exist.

Per Federal Aviation Administration regulations, the water tower will include a light somewhere on the top to alert aircraft. *Testimony of D. Buller*. However, the light will not be visible to the immediate neighbors of the water tower. See *id.* No additional lighting is currently proposed for this facility. See *id.* In addition, any overhead lighting is required to be contained on site pursuant to the SMC. See SMC 17C.110.520. Thus, if any lighting is proposed at a later date, that lighting must be shielded or directed to mitigate impacts on neighbors.

The project will not include late night operations, except in the event of an emergency. See Exhibit 1, p. 6. In addition, the operation of a water tower does not generate odor. See *id.* No litter or garbage is generated on site. See *id.*

The proposal itself does not raise any concerns about privacy, and there was no evidence or testimony suggesting any ways in which the new reservoir could create such concerns. There

was public testimony suggesting that the presence of the facility would promote crime and endanger the children at the school. *Testimony of R. Whitewolf*. However, it was not clear why the presence of a water tower would attract criminal activity. There was no specific evidence demonstrating that these kinds of facilities promoted criminal behavior or posed a genuine danger to the school or the children. The Hearing Examiner concludes that these claims were speculative and cannot form a proper basis to condition or deny the proposal.

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).*

The proposal is to construct utility infrastructure. As a result, factors such as connectivity, circulation, and transit availability are not particularly relevant to the proposal or the nature of the use.

Traffic generated from the utility operation is minimal. *Testimony of D. Buller*. It is estimated that there will be one or fewer trips per day to the site. See Exhibit 4A (Environmental Checklist ¶ B(14)(f)). As a result, the area transportation system will easily accommodate the proposed use. A gravel access road will be constructed from the street to the water tower entrance for maintenance vehicles. See Exhibit 4A (Environmental Checklist ¶ B(14)(d)). However, no other improvements are necessary to accommodate access to the site.

The project does not decrease the level of service of any adjacent street. See Exhibit 1, p. 6. No improvements to the transportation system are necessitated because of this proposal. See Exhibit 4A (Environmental Checklist ¶ B(14)(d)). Not surprisingly, then, no traffic study was required for this proposal. See Exhibit 1, p. 6.

The proposal is consistent with the transportation element of the CP and, therefore, this criterion to approve a conditional use is satisfied.

B. Variance

To be approved, the proposed variance must comply with the criteria set forth in SMC Section 17G.060.170(E)(1). The Hearing Examiner has reviewed the proposed variance and the evidence of record with regard to the application and makes the following findings and conclusions:

- a. *The variance or modification of the standard or requirement is not prohibited by the land use codes. See SMC 17G.060.170(E)(1)(a).*

The question here is whether the land use codes specifically forbid the Hearing Examiner from granting the requested deviation from the 35-foot height limitation applicable in the RSF zone. The Hearing Examiner did not find any such prohibition in the land use codes. Staff also verified that there is no prohibition against utilizing a variance to increase the height of a structure beyond the 35-foot restriction. See Staff Report, p. 7; *Testimony of D. deBit*. As a result, the Hearing Examiner concludes that this criterion for approval is met.

- b. *No other procedure is provided in this chapter to vary or modify the standard or requirement, or compliance with such other procedure would be unduly burdensome. See SMC 17G.060.170(E)(1)(b).*

Staff confirmed that there are no other provisions in the SMC that allows for an increase in the height for a basic utility. See Staff Report, p. 7; *Testimony of D. deBit*. The Hearing Examiner is not aware of any procedures to increase the height of a structure other than a variance. Because there are no other reasonable options, this criterion for approval is satisfied.

- c. *Strict application of the standard or requirement would create an unnecessary hardship due to the physical characteristics of the land. See SMC 17G.060.170(E)(1)(c).*

The Hearing Examiner concludes that a variance from the strict application of the development codes is proper under the circumstances of this case. The City proposes to construct this water tower in order to match the other reservoirs in the pressure zone. See Exhibit 1, p. 7. This utility would simply not work if this height allowance is not granted. See *id.* The reservoir is anticipated to serve water and fire storage to more than 50,000 people on the South Hill. See *id.* The location is ideal, considering the proximity to an existing large transmission main, the elevation of the site, and the open land surrounding the property. See *id.*

The Hearing Examiner's research revealed very few cases that provided any direct guidance on the situation presented by the City's variance application. The Hearing Examiner did not discover any Washington cases, for example, that discussed an application for a height variance related to a water tower or a similar utility. However, there is some authority for granting a height variance, most notably with respect to a cell tower.

In one such case, the City of Medina challenged a hearing examiner's decision approving a special use permit and a height variance¹ for a cell tower. See *City of Medina v. T-Mobile USA*, 123 Wn.App. 19, 95 P.2d 377 (2004). In *T-Mobile*, the hearing examiner concluded that a 55-foot cell tower was necessary to provide adequate coverage to Medina residents. See *T-Mobile*, 123 Wn.App. at 30. The hearing examiner determined that a height variance for the cell tower was justified because of the existing vegetation and topography of Medina required the structure to be that high. See *id.* The Hearing Examiner believes that the conclusion reached in *T-Mobile* is instructive here.

From *T-Mobile*, it is clear that exceeding the height limit was justified in large part by the fact that the cell tower needed to be a certain height in order to function properly. A cell tower cannot transmit through earth and vegetation. The structure must be high enough to achieve an unobstructed line-of-sight between transmission sites. The other important factor in the case was the existing topography and vegetation, which created the special circumstances that warranted a deviation from the zone code requirements. The same reasoning applies to this case.

The proposed water tower cannot function properly unless it is constructed to an elevation that matches the other water towers that make up the high-pressure system. Constructing the water tower in this manner ensures that the proper fire flow can be maintained throughout the system. The construction of the proposed water tower is, therefore, affected by not only the topography of the site, but the topography of the area. This is fairly analogous to the placement of cell towers as

¹ T-Mobile also applied for variances for setbacks and to locate support equipment above ground. However, those variance requests are not particularly relevant to this decision.

described in *T-Mobile*. For similar reasons as stated in that case, then, the variance for the proposed water tower should be approved.

Although there were no Washington cases directly on point, the Hearing Examiner did find one case from another jurisdiction that is worth discussing. Specifically, a fairly similar set of circumstances was described in an unpublished² decision by the Superior Court of Connecticut. See *Regional Water Authority v. Zoning Board of Appeals*, 1998 WL 560385. In that case, the water authority proposed to replace an existing water tower. The existing water tower was 60 feet in height and had a capacity of 800,000 gallons. See *Regional Water Authority*, 1998 WL 560385, p. 1. The water tower was designed to serve 12,000 people. See *id.* However, the water tower remained in operation and was being used to serve 50,000 people with drinking water and fire protection, despite the fact that many of those people lived at an elevation higher than the existing water tower. See *id.*

Because of the inadequate size and height of the existing water tower, the water authority proposed to replace the existing water tower with a 90-foot water tower having a capacity of 1,000,000 gallons. See *Regional Water Authority*, 1998 WL 560385, p. 2. A variance was required for this proposal because the proposed water tower exceeded the height limit³ of the residential zoning. See *id.*, p. 2. The Zoning Board of Appeals (“Board”) denied the water authority’s request for a variance⁴ to install a water tower that exceeded the height limits of the zoning code. The variance was denied because the Board “felt that [the proposed tower] was not appropriate for this zone and other locations could have been considered in industrial areas.” See *id.* The water authority appealed the denial of its variance application.

The court reversed the Board, finding that its conclusions were not supported by the record. See *id.*, p. 5. The court also emphasized:

The fact that the plaintiff could have considered other locations for the water tower in no way relates to pertinent considerations regarding exceptional difficulty, unusual hardship, special circumstances of the land or the welfare of the public.

See *id.* The court concluded that the water authority demonstrated that because of the low elevation of its property, enforcement of the zoning regulations resulted in an exceptional difficulty or unusual hardship. See *id.* (acknowledging that peculiar topography may justify a variance). The court also found that its conclusion was supported by the broader policies and public interests implicated by this type of proposal. The court explained:

² A decision by a Connecticut court is not controlling in Washington. In addition, an unpublished decision is typically considered to have no precedential value, even in the jurisdiction where the decision is issued. Nonetheless, given the paucity of relevant cases, it is worth discussing a decision that has so much in common with the situation presented here.

³ In the R-18 zone, there is a general height limitation of 35 feet. See *Regional Water Authority*, 1998 WL 560385, p. 2. However, the regulations provided that water tanks were allowed an additional 15 feet, resulting in a total height limit of 50 feet. See *id.* The existing tank was 60 feet in height, but was only allowed because it was a legal, nonconforming use. See *id.* Under the nonconforming use rules, the existing tank could be replaced with another 60 foot tank. See *id.* However, the height of the existing tank was inadequate, even at 60 feet. The Water Authority found it necessary to seek a variance to authorize a 90-foot tank.

⁴ The water authority actually submitted two different applications for a variance. In two separate votes, the Board voted 3-2 in favor of granting each variance application. See *Regional Water Authority*, 1998 WL 560385, p. 2. However, the voting rules required at least four affirmative votes to approve a variance. See *id.* Because four votes were not obtained, the Board was required to deny the applications. See *id.* To be clear, only the second request for a variance is relevant to the Hearing Examiner’s analysis, so only that request is discussed in this decision.

...the plaintiff maintains the unique and arduous responsibility of providing a vital public utility water supply to the City of Milford, and the plaintiff has demonstrated that the granting of the variance would do substantial justice and secure the public safety and welfare by providing the most reliable method of accomplishing this task. Indeed, the Court is concerned with the reliability of the existing water tank to provide an adequate water supply to the city at peak demand, especially for purposes of fire protection. Concerns for public health and safety dictate that the Court consider this issue in determining the propriety of the present appeal.

See *id.*, p. 6.

The situation faced in *Regional Water Authority* is very similar to the circumstances presented in this case, and the Hearing Examiner finds the court's analysis of the issues to be persuasive and relevant.

Like the situation here, the utility proposed a water tower in a residential zone, and the water tower is nearly three times the height allowed in the zoning. The water tower was necessary, not only to increase the capacity to serve the population, but also to ensure adequate fire flow. That is precisely the situation in this case. In that case, the additional height of the water tower was necessary to ensure the water supply could adequately serve the area, including residents whose homes were at a higher elevation than the site. Here, the height of the water tower is necessary because the system cannot operate properly unless the tops of all the high pressure water towers in the zone are basically even. To keep the water tower's overall height to the minimum, the proposed location of the water tower is the highest elevation on a site. This point also happens to be one of the highest points on the South Hill. Thus, the elevation of the site and the topography of the area, together with the technical demands of this type of utility, demonstrate that unique conditions exist in support of a variance. Finally, like the Connecticut case, there is an overriding public interest component to this case. The need to maintain adequate fire flow for the thousands of residents on the South Hill should not be ignored, in particular given the unique requirements for these types of facilities.

For the reasons discussed above, the Hearing Examiner concludes that strict adherence to the height restrictions of the RSF zone would create a substantial hardship to the applicant. As a result, this criterion for approval of the variance is satisfied.

- d. The following objectives are reasonably satisfied: (i) surrounding properties will not suffer significant adverse effects; (ii) the appearance or use of the property will not be inconsistent with the development patterns of the surrounding property; and (iii) the ability to develop the property in compliance with other standards will not be adversely affected. See SMC 17G.060.170(E)(1)(d).*

The Hearing Examiner concludes that all of the objectives of SMC 17G.060.170(E)(1)(d) are reasonably satisfied by this proposal. As previously discussed, the proposed water tower will have impacts on the surrounding neighborhood, in particular due to the aesthetic effect and the casting of shadows on nearby residences. See Paragraphs A.5-A.8. Nevertheless, the Hearing Examiner concludes that the surrounding properties will not "suffer significant adverse effects" that would justify denial of the requested variance.

The proposed utility will not be inconsistent with the development patterns of the surrounding area. Here, the idea of "consistency" with the surrounding area needs to be considered in context. The proposal is for a Basic Utility. It is not a residential development of similar density,

types, or features as the nearby neighborhood. But that does not render the proposal “inconsistent” with the neighborhood, in the Hearing Examiner’s view.

The proposal is a utility that provides the water necessary for domestic use as well as fire protection to the surrounding residences. The utility directly serves the residential uses on the South Hill. In addition, utilities of this type are not only allowed in the residential areas, they provide a necessary service for residential use. Basic Utilities are commonplace in the neighborhoods in the city, including the area near the proposed site. The water tower at Garden Place, on 37th Avenue, is a prime example. The Hearing Examiner concludes that the proposed utility is an important component of the water system that enables residential development to take place in the first instance. The presence of such utilities is, therefore, consistent with the development patterns of the surrounding area.

The variance criteria require the Hearing Examiner to consider whether granting the variance will undermine the ability to develop the property in compliance with other applicable standards. In this case, the Hearing Examiner answers this question in the negative. Allowing the construction of the water tower does not prevent the city from complying with other development standards in the event other parts of the property are developed. There is no evidence in this record that granting a variance would have such an effect.

- e. The variance does not allow or establish a use that is not permitted in the underlying district, or modify or vary a standard or requirement of an overlay zone, unless a specific provision allows for such variance. See SMC 17G.060.170(E)(1)(e).*

The project site is zoned RSF. The land use codes permit Basic Utilities, such as the proposed project, to be constructed in the RSF zone. This conclusion was thoroughly discussed in Paragraph A.1 of this decision. Thus, approving the requested variance does not authorize a use that is otherwise disallowed in the applicable zone. In addition, approving the requested variance does not result in the modification of a standard found in an overlay zone. See Exhibit 1, p. 8. The Hearing Examiner finds that this criterion is satisfied.

C. Public Comments

There were a few written comments that supported the project. See Exhibit 5, pp. 5-7. However, there were also written comments and public testimony raising concerns about the proposal. See Exhibit 5, pp. 8-11; *Testimony of J. Oliver & R. Whitewolf*. Although the Hearing Examiner does not believe it is necessary to address every comment made, the primary objections to the project should be briefly addressed.

Some area residents objected to the proposed location of the water tower. See Exhibit 7, p. 9 (Comment of J. Morgan-Schmidt); see also Exhibit 7, p. 11 (Comment of Dave M.). One neighbor was concerned, understandably, about the impact to her view. *Testimony of J. Oliver*. Some residents did not believe the water tower should be located near of school. See Exhibit 7, p. 9 (Comment of J. Morgan-Schmidt); *Testimony of R. Whitewolf*. Some argued that building the water tower in that location took away places for children to play, resulted in the removal of trees, and would damage animal habitat. See Exhibit 7, p. 9 (Comment of J. Morgan-Schmidt); *Testimony of J. Oliver*. The neighbors suggested there were other, more appropriate places for the water tower. See Exhibit 7, p. 10 (Comment of J. Morgan-Schmidt); see also Exhibit 7, p. 11 (Comment of Dave M.); *Testimony of R. Whitewolf & J. Oliver*.

Two neighbors argued that the water tower created safety hazards. One stated that the water tower would result in numerous hazards, especially to the children at the school. *Testimony of R. Whitewolf*. Another neighbor suggested that the water tower “could endanger the students, staff and the surrounding homes in the area.” See Exhibit 7, p. 11 (Comment of Dave M.). There was even the claim that the water tower could increase the likelihood of school shootings. *Testimony of R. Whitewolf*.

Finally, there was a claim that the proposed site was actually part of the adjacent park. *Testimony of R. Whitewolf*, see also Exhibit 7, p. 11 (Comment of Dave M.). It was suggested that the site is supposed to remain in a natural state as a community park. See Exhibit 7, p. 11 (Comment of Dave M.). One neighbor contended that this was a requirement of an agreement with the Hamblen family. See *id.* He also maintained that the site was likely “park property” that cannot be legally developed in the proposed manner. See *id.*

The Hearing Examiner is sympathetic with the neighbors who would prefer that the water tower be located somewhere else. There will undoubtedly be some impacts on nearby residences, both in terms of aesthetics and light, as well as upon the site itself. However, the Hearing Examiner concludes that the proposed location is appropriate for this utility.

Mr. Buller testified that the City followed an extensive public process to consider and evaluate potential locations for the water tower. *Testimony of D. Buller*. The City did not limit its evaluation to publicly owned properties. See *id.* Over time, the City narrowed its options down to just a few of viable sites. See *id.* Eventually, with the School District’s cooperation, the City determined that this site satisfied all the technical and practical requirements for this type of facility. See *id.* Those requirements are not easy to satisfy. In particular, the property must be at the appropriate elevation to function properly within its pressure zone. See *id.* The selected site turned out to be both available and ideal in terms of its conditions and location. See *id.*

The neighbors suggested there were other, better places for the water tower. While that sentiment is understandable, the specific evidence in this records suggests otherwise. In addition, the fact that there *may* be other options does not mean that the proposal for this location should be rejected. The question before the Hearing Examiner is whether this proposal satisfies the applicable criteria, not whether other proposals (which are not being currently considered) could also satisfy the requirements. And as Mr. Buller pointed out, there is no location that will not be objectionable to someone.

The fact that the water tower will be situated near a school does not warrant denial of the proposal. The water tower could not be constructed in that location without approval of the school. The school approved the proposal and granted the city an easement to allow this utility. *Testimony of D. Buller*, see also Exhibit 2, p. 19. It is true that the water tower will take up some space that could otherwise be used to play. However, the footprint of the water tower will only take up a small portion of the site, relatively speaking, and the site will be replanted and restored after the construction is completed. Thus, there will be plenty of area for children to play, even in the area impacted by the construction.

Some neighbors worried that the reservoir would pose safety hazards. However, if the proposal posed a genuine risk to children, the school would not have allowed the use on its property, or it would have proposed specific measures to ensure those risks were mitigated. That aside, there is no specific evidence in this record that demonstrates that the proposed facility poses an actual risk to children, school personnel, or neighbors. The mere statement that such risks exist, without any specific support, is not sufficient. There was no expert testimony, for example,

analyzing the risks of the project, demonstrating that the presence of the water tower creates any particular danger, or showing the probability of any harm occurring. The suggestion that the facility endangers anyone was not adequately explained, was not corroborated by any specific evidence, and was speculative. As a result, there are no grounds to condition or deny the project to address such concerns.

The Hearing Examiner acknowledges that the construction of the water tower will result the removal of many trees. This will have an aesthetic and environmental effect. However, the City intends to preserve as many mature trees as possible during the construction. *Testimony of D. Buller*. For example, the City plans to preserve the mature oak trees along Crestline, as much as possible. Outside the construction area, many mature trees will be untouched by the project, ensuring that trees remain around the perimeter of the site. Once the construction is completed, the City will be replanting to replace the trees that are lost, as requested by Ms. Morgan-Schmidt. *See id.* This will mitigate the impacts and provide new habitat. It should also be noted that there is no evidence of endangered species or priority habitat on this site. There were no comments from Washington State Department of Fish and Wildlife or other experts suggesting that there would be significant impacts on wildlife.

Finally, there was a suggestion that the project site cannot be legally developed due to prior agreements or designation of the site as parkland. The Hearing Examiner rejects this claim, given the record. No evidence was submitted to demonstrate that the site has been set aside as parkland, as a conservation area, or anything of that nature. A neighbor argued that records supporting the claim existed, but nothing was submitted into the record. As previously discussed, the property is owned by School District 81. *See Exhibit 2, p. 10* (showing ownership is vested in the School District). The School District granted the City an easement for this facility. *See Exhibit 2, p. 19*. Thus, the City may legally construct a basic utility on this site, given that the application satisfies the conditional use and variance criteria.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to approve the proposed CUP and variance 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. The site shall be developed in substantial compliance with the plans submitted with the application, SEPA, as well as comments received on the project from City Departments and outside agencies that reviewed the project for concurrency.
3. An Inadvertent Discovery Plan (IDP) will be required as part of the scope of work.
4. If any artifacts or human remains are found upon excavation, 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 the Washington State Department of Archaeology & Historic Preservation before excavating, removing, or altering Native American human remains or archaeological resources in Washington.

5. The project shall adhere to any additional performance and development standards documented in comments or required by City of Spokane, Spokane County Washington State, and any Federal agency.

DATED this 6th day of January, 2023



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 and variances 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 January 9, 2023. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS THE 2ND DAY OF FEBRUARY 2023 AT 5:00 P.M.**

In addition to paying any Court costs to appeal the decision, the ordinance requires payment of the costs of preparing a full certified 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.