

CITY OF SPOKANE HEARING EXAMINER

Re: Conditional Use Permit and Variance) FINDINGS, CONCLUSIONS,
Applications by the City of Spokane) AND DECISION
Engineering Services to construct a)
water tower at 3302 W. Thorpe Road) FILE NO. Z23-308CUP3

I. SUMMARY OF PROPOSAL AND DECISION

Proposal: The City of Spokane Engineering Services proposes to construct a 5,000,000-gallon (approximate size) reservoir on property owned by the City of Spokane. The proposed reservoir will be a diameter of up to 135 feet and height of up to 75 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.

**II. FINDINGS OF FACT
BACKGROUND INFORMATION**

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

Agent: Kristy Warren
City of Spokane, Engineering Design
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Property Location: The proposed site is located at 3302 W Thorpe Road, Parcel No. 25351.0008.

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 is located at 3302 W Thorpe Road and is currently owned by the City of Spokane. The location of the proposed reservoir will be at the west side of the site. The site mostly consists of marble loamy sand and is generally flat (14% max slope on site and 33% max slope at drainage pond). The proposed reservoir would share the site with the existing 1,200 square foot, 11-foot-high (approximate) booster station and an existing 3.5-million-gallon water reservoir, which is 64 feet in height and 104 feet in diameter. There is a drainage pond in the northeast corner of the site. Thorpe Road runs along the southerly border of the site. The site is fenced around its entire perimeter. There is a gated access into the site.

Surrounding Conditions and Uses: The land in all directions of the site is zoned RSF (Residential 4-10). The surrounding land is either undeveloped or residential. The surrounding

properties include single-family residences on large lots. The smallest lots near the site are approximately one acre in size.

Project Description: The proposed reservoir will be approximately 5,000,000 gallons in capacity, 75 feet in height, and 135 feet in diameter. The proposal also includes the construction of a 10-foot tall, 400 square foot concrete masonry unit valve building, associated site piping, and expansion of the existing overflow pond from 350,000 gallons to 850,000 gallons. The reservoir is needed to provide a more reliable drinking/fire suppression supply to Spokane's low-pressure zone. Additionally, the reservoir will also be used to store water to be pumped to the Spokane International Airport and West Plains pressure zones. The applicant is also requesting a height variance to accommodate the 75-foot height needed to meet pressure zone requirements.

III. 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: June 20, 2023
Posted: June 20, 2023

Notice of Application/Public Hearing: Mailed: August 8, 2023
Posted: August 7 & 8, 2023

Community Meeting: July 10, 2023

Public Hearing Date: September 6, 2023

Site Visit: September 23, 2023

State Environmental Policy Act (SEPA): A Determination of Nonsignificance (DNS) was issued by the City of Spokane Engineering Department on June 16, 2023. Any appeal of the DNS was due on June 30, 2023. No appeal was filed.

Testimony:

Steven Bafus, Assistant Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Kristy Warren
City of Spokane Engineering Services
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Present at hearing or submitted comments to the record:

Dan Buller
City of Spokane Engineering Services
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Exhibits:

1. Planning Services Staff Report, 8 pp.
2. Application, including:
 - A General Application, pp. 1-2
 - B CUP Application, pp. 3-6
 - C Variance Application, p. 7
 - D Notification Map Application, with attachments, pp. 8-12
3. Request for Comments letter dated 7/14/23, pp. 1-2
 - A Spokane Tribe of Indians dated 7/17/23, p. 3
 - B Washington State Department of Archaeology and Historic Preservation (WSDAHP) dated 7/26/23, p. 4
 - C Washington State Department of Ecology dated 7/27/23, pp. 5-6
 - D City of Spokane Treasurer dated 7/14/23, p. 7
 - E Spokane Fire Department dated 7/17/23, p. 8
 - F City of Spokane Engineering dated 7/26, 23, p. 9
4. DNS dated 6/16/23, pp. 1-3
 - A SEPA Environmental Checklist dated 6/13/23, pp. 4-22
5. Notification District and Parcel List, 2 pp.
6. Community Meeting Materials, including:
 - A Noticing Affidavits, pp. 1-3
 - B Meeting instructions dated 6/9/23, pp. 4-5
 - C Notice of Community Meeting, pp. 6-7
 - D Attendance Roster, p. 8
 - E Summary of Input Received at Community Meeting, pp. 9-10
 - F Community Meeting Presentation, pp. 11-31
7. Notice of Application Materials, including:
 - A Noticing Affidavits, pp. 1-3
 - B Instructions dated 8/2/23, pp. 4-5
 - C Notice of Application & Public Hearing, pp. 6-7
 - D Statement regarding Public Comments, p. 8

Exhibits received at the hearing:

8. Staff Presentation

Exhibits received after the hearing:

9. Applicant's inquiry re: Consideration in the addition of alternate construction material.
10. Applicant's request to reopen the record and Planning Services response to request.

IV. 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 Staff Report, 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 to supply Spokane's low-pressure zone. See Staff Report, p. 4. The project also supplies a service that is essential to future growth and development. See *id.* In this way, the project furthers the land use and capital facilities elements of the CP.

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 July 14, 2023, a Request for Comments on the application was circulated to all City departments and outside agencies with jurisdiction. See Exhibit 3.

The city received various responses to its request for comments. See *e.g.* Exhibits 3A-3F. Upon reviewing the comments, City staff noted that "...there were no departments or agencies that reported that concurrency could not be achieved." See Staff Report, p. 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 Applicant chose this site for a reservoir for a variety of reasons. See Staff Report, p. 4. The site contains an existing water reservoir, which when constructed in 1983, was designed to accommodate a second reservoir. See *id.* The location, site, topography, soils and drainage are

ideally suited for a second reservoir onsite. See *id.* Additionally, the reservoir can be served by the existing booster station onsite and the transmission main in Thorpe Road. See *id.* The City also owns the site. See Exhibit 2, p. 3. Thus, there is no need to acquire or develop additional land for this facility.

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 Staff Report, p. 4. However, no impacts to groundwater are anticipated from this project. See Exhibit 4A (Environmental Checklist ¶ B(3)(b) & (c)(2)).

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 approved stormwater best management practices. 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 reported that this area has high potential for archaeological resources. See Exhibit 3A. However, due to a small footprint of the project area, the Spokane Tribe is not requesting cultural survey at this time, and instead requested an Inadvertent Discovery Plan. See Exhibit 3A. WSDAHP came to the essentially the same conclusion. See Exhibit 3B. The request from the Spokane Tribe and WSDAHP 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 SEPA, demonstrates that the project will not have significant environmental impacts.

On or about June 13, 2023, the City of Spokane prepared an environmental checklist, pursuant to SEPA, for this project. See Exhibit 4A, pp. 4-22. 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 75 feet tall and 135 feet in diameter and, thus, will have some aesthetic impact. See Staff Report, p. 4. There will also be impacts to adjacent neighbors caused by shade from the reservoir. See Exhibit 1, pp. 4-5. Thus, some impact is likely to occur, given the nature of the proposed structure.

That said, the impacts are likely to be minimal. The residence nearest to the proposed tower is approximately 300 feet away. *Testimony of S. Bafus*. A 75-foot tower is unlikely to cause much shading on a residence that far away. See *id.* In addition, the area is heavily wooded. See *id.* The shading experienced by neighboring properties will likely come from the adjacent trees, and will not be altered by the proposed reservoir. *Testimony of S. Bafus*. The Staff's predictions in this regard were not rebutted. There were no public comments, either in writing or at the hearing. Thus, no neighboring property owners contended that the impacts were significant or needed additional mitigation.

With respect to aesthetics, trees will be planted around the tank to mitigate the impact, although it will take many years for the trees to reach the height of existing trees and provide additional screening of the tank. See Staff Report, p. 5. Some impact seems inevitable, but the City is proposing to do what it can to address the potential concern.

The lead agency, City of Spokane Engineering Services, issued a DNS for the proposal on June 13, 2023. 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 June 27, 2023. 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 development of adequate water systems is essential to the existence of residential neighborhoods. Given this reality, 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 75-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 governmental or institutional uses. The construction of a water tower, in other words, has some unique characteristics and functions that must be taken into account.

The potential impacts to the residential character of the area are also somewhat limited in this case. The adjacent residential uses are on large (one acre and larger) parcels with limited visual exposure to the site. See Staff Report, p. 5. The addition of a second reservoir on a site already containing a reservoir minimizes visual impact versus constructing an additional standalone

reservoir. *See id.* The site does not contain any residential uses, so expansion of the existing use is less impactful than residential development. *See id.* The further development of a site already being used for this kind of utility is arguably better than requiring the facility to be located elsewhere, which may require new land to be acquired and developed. Moreover, the tower would still need to be approximately 75 feet tall, regardless of where it was moved in the vicinity. *Testimony of K. Warren.* It is better to locate it here, given the current use and the relatively low impacts associated with this proposal.

The Hearing Examiner concludes that the proposed facility is consistent with the residential appearance and function of the area. Therefore, this criterion for approval is satisfied.

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 site already contains a reservoir so the addition of a second reservoir will be consistent with the existing scale. *See id.* The new reservoir will be approximately 300 feet from the nearest residence. *Testimony of S. Bafus.* The facility will be situated on the west side of the site. *See e.g.* Exhibit 8 (Surrounding Land Use, Slide 6). Even so, the facility is set approximately 69 feet from the west property line, providing a fairly healthy setback. *Testimony of S. Bafus.* In any case, the facility will be required to meet setback standards defined in SMC 17C.110. *See id.* The applicant will also be required to integrate Institutional Design Standards in Residential Zones, SMC 17C.110.500, at time of building permit. *See id.* The City also proposed to retain the trees on the site not affected by the construction of the reservoir and plant new trees to further screen the proposed reservoir. *See Staff Report, p. 6.*

Despite the limited options to mitigate the impacts, the Hearing Examiner concludes that the project is compatible with the neighborhood. 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. 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. The Hearing Examiner concludes that this criterion 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 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 Staff Report, p. 6.* However, that noise source is temporary. *See id.* Once the project is completed, no significant source of noise will exist.

The municipal code provides that overhead lighting must be contained on site. *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 Staff Report, p. 6. The operation of a water tower does not generate odor. See *id.* Similarly, no litter or garbage is generated on site. See *id.*

The site currently contains a perimeter fence, which is expected to be maintained. 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 safety or security concerns.

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. It is estimated that there will be one or fewer trips per day to the site, and those trips will be by water department personnel. See Exhibit 4A (Environmental Checklist ¶ B(14)(f)). An access road will be constructed around the reservoir, and from the street to the water tower, for use by maintenance vehicles. See Exhibit 4A (Environmental Checklist ¶ B(14)(d)). However, no other improvements are necessary to accommodate access to the site.

The proposal places no stress at all on the public transportation system. The project does not decrease the level of service of any adjacent street. See Staff Report, p. 6. No improvements to the transportation system are necessitated because of this proposal. Not surprisingly, then, no traffic study was required for this proposal. See *id.*

The proposal is consistent with the transportation element of the CP. 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 using a variance to increase the height of a structure beyond the 35-foot restriction. See Staff Report, p. 7; *Testimony of S. Bafus*. 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. 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 serve drinking and fire suppression water storage to low pressure zones, Spokane International Airport, and West Plains. See Staff Report, p. 7. The location is ideal, considering the existing reservoir, infrastructure (overflow pond and booster station), open land surrounding the property, and initial design accommodating for an additional reservoir. See *id.* Given these circumstances, the question is whether strict application of the height limitation would create an unnecessary hardship and, therefore, justify a variance.

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 low-pressure system being served. *Testimony of K. Warren*. 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,

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.

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 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 approximately double 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 suppression 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 water towers in the low pressure zone are basically even. 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 water supply and fire suppression flow for the residents in the served areas 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. See Paragraph IV.A.7. Nevertheless, the Hearing Examiner concludes, as before, that the surrounding properties will not "suffer significant adverse effects" that would justify denial of the requested variance. See *id.*

As suggested in prior criterion, the nature of the basic utility development will be difficult to "blend in" to the neighborhood as it is inherently non-residential in character. However, the site contains existing facilities, so the impact is slightly lessened. See Staff Report, p. 8. In addition, the Applicant will mitigate the impact of the expanded use to surrounding properties as much as

reasonably practicable by planting trees, and retaining existing trees not impacted by construction. See *id.*

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 having similar density, characteristics, or features as the nearby neighborhood. But that does not render the proposal “inconsistent” with the neighborhood, in the Hearing Examiner’s view. Basic utilities, such as water towers make residential development possible. Without such utilities, and without projects to increase capacity and functionality, no residential development could take place.

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 IV.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 Staff Report, p. 8. The Hearing Examiner finds that this criterion is satisfied.

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 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 WSDAHP 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 comment or required by City of Spokane, Spokane County Washington State, and any Federal agency.

DATED this 25th day of September, 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 September 25, 2023. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS THE 16th DAY OF OCTOBER 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.