CITY OF SPOKANE HEARING EXAMINER

Re:	Appeal of Planning and Development Director's Decision Approving the Type II Conditional Use Permit, File No. Z24-217CUP2 CLAYTON ELLIOTT, Appellant, v. CITY OF SPOKANE, AND RAMKA PROPERTIES, LLC, Respondents.	FINDINGS, CONCLUSIONS, AND DECISION File No. Z24-347APPL

I. SUMMARY OF APPEAL AND DECISION

Summary of Appeal: Mr. Elliott appealed the City of Spokane's (the "City's") decision to approve a Type II conditional use permit (CUP) application ("Decision") submitted by Ramka Properties, LLC (the "Applicant"). The Applicant sought to convert the existing legal neighborhood commercial structure at 601 W. Mansfield Avenue to a retail sales and service use, specifically a neighborhood convenience/grocery store ("Project"). The Appellant contended that the approval of the application is inappropriate because the proposed location exceeds 3,000 square feet, requiring a Type III process. *See* Exhibit 1. While other appeal topics were raised in the appeal, many were abandoned during the hearing, or are barred from consideration due to a lack of pleading in the original appeal.

Summary of Decision: The Hearing Examiner remands this matter with Order to the City to re-process the Project as a Type III CUP application.

II. FINDINGS OF FACT – PROCEDURAL BACKGROUND

Appellant: Clayton Elliott
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Spokane, WA 99205

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Applicant: Dave Nagra
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Represented by: Brian McGinn
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601 W. Main Avenue, Suite 1400
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Respondent: City of Spokane
808 W. Spokane Falls Boulevard
Spokane, WA 99201

Represented by: Lynden Smithson and Megan Kapaun, Assistant City Attorneys
City of Spokane
808 W. Spokane Falls Boulevard
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Authorizing Ordinances: Spokane Municipal Code (SMC) 17G.050.320 *et seq.*

Date of Decision being Appealed: June 20, 2024

Date of Appeal: July 18, 2024

Hearing Date: September 24, 2024

Testimony:

Appellants

Clayton Elliott
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Ron Devonport
rondevonport@hotmail.com

City of Spokane

Steven Bafus, Planner
City of Spokane Planning Services
808 W. Spokane Falls Boulevard
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Ali Brast, Senior Planner
City of Spokane Planning Services
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Spencer Gardner, Director
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Applicant

Dave Nagra
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Exhibits:

1 Appeal for Type 2 Conditional Use Permit Z24-217CUP2
2 Decision being Appealed
3 Order Setting Hearing and Briefing Schedule
4 Order of Continuance and Revised Briefing Schedule
5 Appellant Attorney Notice of Appearance

6 Correspondence re: Continuance Discussion
7 Second Order of Continuance and Revised Briefing Schedule
8 City Attorney Notice of Appearance
9 Appellant Request for Documents and Subsequent Request for Extension
10 Order Modifying Briefing Schedule
10a: Revised Order Modifying Briefing Schedule
11 Appellant Opening Brief
12 Project File, containing six items and further organized as follows:
Affidavits (folder) containing three items
Appeal (folder) containing two items
Applications (folder) containing three items
Decision (folder) containing six items
NOA (folder) containing seven items and **Comments** (folder) containing one item and further organized as follows:
Comments for (folder) empty
Comments opposing (folder) containing 161 items and Z24-217CUP **Combined PDF comments** (folder) containing 71 items
Comments received after NOA (folder) containing 13 items
Public comments received during RFC (folder) containing 14 items
Permit History (folder) containing six items and **Historic Preservation docs** (folder) containing two items (abbreviations_for_sandborn_maps.pdf added on 9/19/24)
RFC (folder) containing three items and further organized as follows:
Comments (folder) containing six folders and further organized as follows:
DSC Engineering (folder) containing two items
Fire (folder) containing two items
ICM Traffic (folder) containing two items
Spokane Tribe (folder) containing four items
SRHD (folder) containing two items
Traffic Signs & Markers (folder) containing three items
Public comments received during RFC (folder) containing 14 items
WEB (folder) containing five items
13 City of Spokane's Response in Opposition to Appeal, including
13a: Declaration of Steven Bafus
13b: Declaration of Ali Brast
13c: Declaration of Spencer Gardner
14 Correspondence re: Addition to Mansfield full file – abbreviations for Sanborn map (file added to Exhibit 12 under **Permit History** [folder]/**Historic Preservation** docs [folder])
15 Applicant Response Brief, including:
15a: Affidavit of B. McGinn
16 Appellant Reply to City of Spokane's Response
17 Appellant Objection to addition to Exhibit 12 (see Exhibit 14)
18 Appellant Reply to Applicant's Response
19 Appellant's Witness List
20 Appellant Objection to Untimely Disclosure, including:
20a: Declaration of Ron Devonport
21 Staff Presentation

III. DISCUSSION

This appeal decision hinges on the singular legal issue of whether this Project should have been processed as a Type II or Type III CUP application. The Appellants contend that the City erred in

their interpretation and application of SMC 17C.370 Existing Neighborhood Commercial Structures in Residential Zones ("Statute"), specifically the 3,000 square foot threshold in SMC 17C.370.030(A)(1). The City contends that the Director is vested with the authority to interpret and apply the City's code, and that the Director's interpretation of how to classify "project" and calculate floor area was correct.

The Hearing Examiner ultimately agrees with Appellants on this issue of statutory interpretation. The applicable legal standards and supportive reasoning will be explained below. In short, the Hearing Examiner's role in this regard is to perform a *de novo* review while affording proper deference to the City's interpretation of the Statute. The Hearing Examiner's principal decision is that the Statute is unambiguous, and the word "project" should be used with its normal and everyday meaning. The Hearing Examiner will also provide a ruling in the alternative, wherein the Statute is analyzed as if it were ambiguous, which affords the City some deference. Several factors play into the Hearing Examiner's deference to the Director's determination if the Statute is ambiguous, with the most critical factor being that this was a matter of first impression for the Director on a relatively new code provision. Ultimately, the Hearing Examiner finds that the City's decision was an erroneous interpretation and application of an unambiguous Statute. Or that, alternatively, even with some deference to the Director's interpretation, it was an erroneous interpretation.

Because this decision is a remand to the City to re-process the application as a Type III, there will not be an exhaustive analysis of the substantive claims regarding the correctness of the underlying Decision. However, as a form of non-binding *dicta,* the Hearing Examiner will briefly assess the substance of the underlying Decision and provide some general guidance on how the public should understand this specific proposal, as well as the Statute more generally. In short, if the Hearing Examiner was making a ruling on the merits, the City's Decision would have been affirmed based on the record and applicable review standards. This, of course, does not bind the Hearing Examiner to a predetermined decision when this application is re-processed and comes to public hearing during the Type III CUP process.

IV. PERTINENT FACTS

1. On or about February 15, 2024, the Applicant and City representatives held a predevelopment conference. *Exhibit 2* p. 2.
2. At some unknown time, the Director, without temporal written findings or conclusions in the underlying record, determined that "the measure of the floor area of a project is limited to the portion of the building where the commercial use is proposed," but that the bathroom area and storage section are "accessory to the primary use" and, therefore, should not be included in the square foot calculation. *Exhibit 13c* p. 3. *See also* Exhibit 2 p. 5 ("remaining square footage is dedicated to storage and bathroom space, a non-Retail Sales and Service use.")
3. On or about April 12, 2024, the Applicant submitted a Counter Complete Application ("Application") package to the City. *Exhibit 2* p. 2.
4. The Application was processed by the City under the Type II requirements and procedures. *Exhibit 2.*
5. On July 9, 2024, the City reissued the Decision with a final appeal deadline of July 23, 2024. *Id.*
6. On July 18, 2024, the Appellant filed an appeal of the Decision, which alleged, among other things, that the City erred in processing the Application under the Type II process, requesting that the application be processed under the Type III procedures.

V. STANDARD OF REVIEW

The Hearing Examiner concedes that there is a varying and complex web of standards that apply to this appeal. As such, they will be laid out in as reasonable and logical way as possible.

A. City Code Standards for Review

The original basis for these appeals to come before this Hearing Examiner is within SMC 17G.061.340(B) and 17G.050.310. The City's standards for review by the Hearing Examiner are, in pertinent part:

> C. The original decision being appealed is *presumptively correct***.** The burden of persuasion is upon the appellant to show that the original decision was ***in error*** and the relief sought in the appeal should be granted.
> D. If the findings of fact upon which the original decision was based are *supported by substantial evidence*, the hearing examiner must accept those findings.

SMC 17G.050.320 (emphasis added). This language is understood to generally align with the judicial standards for review. The City's interpretation and application of the SMC is not a finding of fact and, therefore, section C above is the only standard of review to be applied to the procedural Type processing issue.

B. State Law and Case Law

1. Washington State Land Use Petition Act

Appeals of land use actions to Superior Court, such as the Decision in this case, are generally required to be filed and considered under the purview of the Washington Land Use Petition Act (LUPA), that is codified in RCW 36.70C. Pertinent to this Decision is the following:

> The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:
>
> …
>
> (b) The land use decision is an ***erroneous*** interpretation of the law, after allowing for *such deference as is due* the construction of a law by a local jurisdiction with expertise;

RCW 36.70C.130(1) (emphasis added). The Hearing Examiner understands this statutory imperative for LUPA cases in the Courts to generally align with the City's directive to the Hearing Examiner in SMC 17G.050.320 quoted above. As this Decision turns on an interpretation of law, the "clearly erroneous" standard does not apply, as factual determinations are not a part of this Decision on statutory interpretation. Nonetheless, in order for the Hearing Examiner to understand and apply these standards, directives from the Courts must be sought.

2. State Case Law

Many pronouncements from the Courts, if not always entirely congruent, set the standards by which the Hearing Examiner will examine the issue of the City's interpretation of the Statute. Of primary significance are the following:

Land Use Petition Act (LUPA) challenges alleging that the land use decision is an erroneous interpretation of the law are legal questions reviewed de novo, but only after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise. City of Federal Way v. Town & Country Real Estate, LLC (2011) 161 Wash.App. 17, 252 P.3d 382, corrected.

Meaning of a statute is a question of law reviewed de novo. State, Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash. 2d 1, 43 P.3d 4 (2002). Court's fundamental objective in construing a statute is to ascertain and carry out legislature's intent. Id. If statute's meaning is plain on its face, court must give effect to that plain meaning as an expression of legislative intent. Id.

If the plain language of a statute is susceptible to more than one reasonable interpretation, then the statute is ambiguous. Gordon v. Robinhood Fin., LLC, 547 P.3d 945 (Wash. Ct. App. 2024). The court's paramount concern is to ensure that the statute is interpreted consistently with the underlying policy of the statute. Id.

A court may overturn a land use decision that is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; this standard does not require a court to give complete deference, but rather, such deference as is due. Washington State Dept. of Transp. v. City of Seattle (2016) 192 Wash.App. 824, 368 P.3d 251.

Interpretation of a statute is a question of law that Supreme Court reviews de novo. Ellensburg Cement Prod., Inc. v. Kittitas Cnty., 179 Wash. 2d 737, 317 P.3d 1037 (2014). Courts' duty in conducting statutory interpretation is to discern and implement legislature's intent. Id. Where plain language of a statute is unambiguous, and legislative intent is therefore apparent, courts will not construe statute otherwise. Id. When interpreting statute, plain meaning may be gleaned from all that legislature has said in the statute and related statutes which disclose legislative intent about provision in question. Id. Local entity interpreting ambiguous local ordinance bears the burden to show its interpretation was a matter of preexisting policy in order for its interpretation to be given deference by court. Id.

3. Federal Case Law; *Loper Bright*

Plainness or ambiguity of statutory language is determined by reference to language itself, specific context in which that language is used, and broader context of statute as a whole. Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

Under *Skidmore* deference, the interpretations and opinions of the relevant agency, made in pursuance of official duty and based upon specialized experience, constitute a body of experience and informed judgment to which courts and litigants can properly resort for guidance, even on legal questions, but the weight of such a judgment in a particular case depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

The Hearing Examiner includes these citations to two United States Supreme Court cases for two reasons. First, and much more simply, is the Robinson citation showing that Washington case law closely aligns with the Federal precedent on the broader idea of performing a preliminary analysis

of whether a Statute is ambiguous or not. Second, and certainly with more intricacy and uncertainty, is when and how a Court shows deference to an agency interpretation on ambiguous statutory provisions (which is more important to the Hearing Examiner's ruling in the alternative below).

VI. ANALYSIS

A. The Statute is Unambiguous

As a preliminary matter, there is the question of whether the Statute, including specifically the term "project," is legally "ambiguous." As cited above, if the plain language of a Statute is susceptible to more than one reasonable interpretation, then the Statute is ambiguous. Gordon*, supra.* The Hearing Examiner finds that the Statute is unambiguous. A plain reading of the text, including the use of the words "project" and "including building additions" calls for consideration of the entire area to be used in the calculation, in accordance with the common and ordinary definition of the word "project" that is used by planning and legal professionals alike on a daily basis. The full text to the critical portion of the Statute is:

> Establishing a use under this chapter in an eligible structure requires following the same application and posting process as a Type II or III Conditional Use Process as provided in chapter 17G.061 SMC. A Type III application is required for ***projects*** that have *a floor area of three thousand square feet or more**, including building additions***, and for any non-residential project on a site that does not have frontage on a designated arterial (principal, minor, or collector). For projects that do not exceed this threshold, a Type II conditional use permit application is required, except the planning and economic development services director may require a Type II conditional use permit application be processed as a Type III application when the director issues written findings that the Type III process is in the public interest. *SMC 17C.370.030(A)(1)* (emphasis added).

1. The City's Interpretation.

The Director's interpretation of "project" concluded that only the floor area specifically dedicated to only the proposed commercial use should be considered. *Exhibit 13c* p. 3. Under that interpretation, the commercial use proposed (in this case Retail and Sales Service) would only have a floor area of 2,950 square feet that is the sales floor, inventory racks, and checkout station, and that the floor area within the same building dedicated to a bathroom and storage area (128 square feet and 402 square feet, respectively) are "accessory to the primary use of the site" and, therefore, should not be included in the calculation. *Id.* After much questioning at the hearing, it remains uncertain how or what these "accessory uses" are to be considered, as in "commercial," "residential," or otherwise. *Testimony A. Brast, Testimony S. Gardner*.

This issue remains unresolved under the City's interpretation. It also leaves open and undefined what potentially connected "uses" that are physically connected, supportive, or incidental to the "primary" use (using the City's distinction) are to be considered or not. There is no direction within the Statute or anywhere else in the City's code to make this distinction. Nor is it within City proclamations, rulings, or published memorandum, of how these varying "uses" will be classified and treated on future applications under purview of the Statute.

The Hearing Examiner is unconvinced that the City's reference to SMC 17C.190.270 Retail Sales and Service, which includes a provision that allows accessory uses, is instructive or controlling on this issue. *See* SMC 17C.190.270(B). With this portion of the City's code, Retail and Sales

Service uses are permitted to have accessory uses. *Id.* This is a logical, almost boilerplate, provision that is likely included to avoid situations where an allowed retail use could conceivably be prevented from having supportive, incidental, or accessory uses necessary or desired to be a part of its operation. Furthermore, there is no reference in the Statute to accessory uses, and again, no direction to exclude any such uses from floor area calculations. There is no indication within SMC 17C.190.270 that these accessory uses should be considered in the manner proffered by the City in their interpretation of the Statute.

We are dealing with a proposed Project in which the entirety of an existing 3,480 square foot building will be operating as a convenience store. Yes, part of the square footage will have a bathroom, which may not be open to the public, but is required to be included in commercial structures. *See* SMC 3.03.030 (Referenced Codes; IBC 101.4.4-Plumbing). Yes, this Project will dedicate some of the square footage of the building to storage, but is this storage integral to the functioning of the underlying Retail and Sales Service use? In this case, testimony from the Applicant was "no" as they do not intend to store inventory there. *Testimony D. Nagra.* The 402 square feet will be used to store mops and cleaning supplies. *Id.* Still, while the Hearing Examiner's questioning of the Applicant along these lines was intended to show that the storage space was more than just "accessory" to the underlying use, this now begs the question of how the City will assess and apply this amorphous standard in the future? When and where will storage, bathrooms, manufacturing or assembly space, office space, or any other connected use (even in the same building) be excluded or included in the calculation?

There is no specific direction in the Statute or elsewhere in the SMC to make this distinction, and Staff will be forced to make these determinations on a case-by-case basis, and without foreseeability to the Applicant or public at large. Further, there was already discrepancy between different Staff members as to how this would apply to hypothetical situations. The question was proffered at hearing as to how the City would apply their standard to a proposal that had 2,000 square feet of Retail and Sales Service Space (the primary use), but a 10,000 square foot connected warehouse. One Staff member replied that it would be processed as a Type II because the primary use is retail, while another answered that it would be processed as a warehouse use. *Testimony S. Bafus, S. Gardner,* respectively. This begs the question of how the City will process future applications with varying situations. What if there is 2,000 square feet of retail space, with a 5,000 square foot connected warehouse? What if it is 2,000 square feet each? Or for three different commercial uses? What if it is 2,950 and 500? The City's interpretation is simply unworkable.

As testimony from the City correctly confirms, there are situations in which excluding portions of an existing structure from the floor area and square footage calculation will be necessary and proper. *Testimony S. Gardner.* That is, where a portion of an existing structure will be converted or used for a commercial purpose, and the remaining portions will retain their residential use. *Id.* In those instances, only the floor area devoted to the commercial enterprise will be considered, and other contemporaneous modifications (i.e., adding storage space to be used with the residential portion) that remain disconnected from the commercial enterprise will not be considered part of the "project." *Id.* This is a correct application of the Statute. However, to take further steps of trying to delineate supportive, subordinate, incidental, or accessory commercial uses that are connected to the commercial enterprise and even within the portion of an existing structure that will be converted or continued to be used as commercial rather than residential is illogical and ripe for arbitrary or inconsistent application.

Expanding beyond a myopic view of the word "project," we have other instructive language in the Statute that hints at intent. That is, specifically, the use of the language "including building

additions." Under the City's interpretation, a proposed building addition that would be used for storage would not be included in the calculation. This approach frustrates or contravenes what appears to be the plain language of the code. Furthermore, this apparent intent to be inclusive of proposed floor area is bolstered by the language in the Statute that affords the Director with discretion to process a proposal as a Type III if "it is in the public interest." All told, it appears that the intent of the legislature would be to lean towards a Type III process, not lean away with an interpretation of the word "project" that would artificially lower the threshold.

The City's interpretation thus flies in the face of an underlying policy within the Statute. That is, there is a certain threshold where the legislature anticipated a need for greater public input (over 3,000 square feet), but also that even if the "project" is under 3,000 square feet, they empowered the Director to reclassify the "project" as a Type III if it serves the "public interest." This seems to take into account the reality that some of these commercial projects in residential zones will be controversial or otherwise opposed by the public. Yet, this Statute was created as a way to balance the reality of these existing, often unused or underused, structures, with the need to take full account of reasonably anticipated public angst. An interpretation of the Statute that seems to lean away from more public participation and input is antithetical to the underlying policy the Statute appears to elicit.

Therefore, the Hearing Examiner finds that the City's interpretation is not a reasonable interpretation of the Statute, especially considering the Hearing Examiner's proffered interpretation below. The City's interpretation creates uncertainty and ambiguity, which is not reasonable; whereas a plain reading of the Statute would not and is, therefore, reasonable. The City's erroneous interpretation itself cannot create the ambiguity.

Is the Director's interpretation of the Statute reasonable? As a matter of law, the Hearing Examiner finds that no, it is not a reasonable interpretation of the Statute. Which, for the sake of thoroughness, begs the question of whether there are other reasonable interpretations. The Hearing Examiner can think of none, especially in light of what will be discussed below.

2. Interpretation of the Statute; the plain meaning of "project," considering the Statute as a whole and with reasonable inference as to the legislature's intent.

The only reasonable interpretation and application is to consider the "project" as a whole.

The Hearing Examiner finds it exceedingly difficult to conclude that the intent of the legislature in this matter was for the City to engage in apportioning square footage of the proposal to varying underlying or accessory uses. The Hearing Examiner finds that the intent of the legislature was to include the entire square footage of the proposed "project," which in this case is to use the entirety of an existing structure for a commercial use. The plain meaning of "project" within the Statute would be to consider the entirety of the proposed use, including those that the City may, rightfully or wrongfully, consider "accessory uses."

The Hearing Examiner proffers the following dictionary definitions for “project”:

1. A specific plan or design.[1]
2. A piece of planned work or an activity that is finished over a period of time and intended to achieve a particular purpose.[2]
3. Something that is contemplated, devised, or planned; plan; scheme.[3]

As is exceedingly common, applications such as this convenience store will describe the “project” in a sentence and then denote it for further reference as “the Project” or “the Proposal” (typically in a definition parenthetical). For example, this exact standard practice was used by the City in their reply briefing. *See City’s Response* (Exhibit 13) p. 1; *Declaration of S. Bafus* (Exhibit 13a) p. 2; *Declaration of A. Brast* (Exhibit 13b) p. 2; *Declaration of S. Gardner* (Exhibit 13c) p. 2. *See also* Decision (Exhibit 2) p. 2 (“Project Description: The applicant is proposing to convert the existing structure… into a retail sales and service use…”). The City’s interpretation and use of the word “project” in the Statute is inapposite to the plain and ordinary meaning of the word and as it is regularly used by numerous staff members daily. To encompass the entire plan, design, work, or scheme into one complete conceptual word, typically with “Project” or “Proposal,” is the common and ordinary usage of the either, interchangeable word.

The “Project” in this case is to use an entire existing 3,480 square foot building, historically used for a variety of commercial endeavors, for a new commercial use. No further analysis is required. In fact, the Statute language itself, as discussed above, seems to support this encompassing definition by including the words “including building additions.” Under the City’s misuse of the word “project,” an applicant who is proposing a building addition to be used for an “accessory use” such as storage (in the City’s interpretation of the Statute), would then have that floor area not included in the 3,000 square foot calculation. This approach by the City would then be in direct contradiction with the explicit wording of the Statute. This is entirely unnecessary and not supported by any explicit language in the Statute, nor elsewhere in the SMC.

The Statute is unambiguous, and the use of word “project” should be given its common and ordinary definition that is used by both the planning and legal professionals on a regular basis. The “project” in this case is to use an existing 3,480 square foot building, which was historically used in its entirety for a variety of commercial operations, for a new commercial enterprise that will use the entirety of the building.

What portion of the existing structure will be converted from residential to commercial use? That is the project. What is the size of the existing commercial structure that is proposing to resume in a commercial capacity? That is the project.

B. Ruling in the Alternative: The Statute is ambiguous.

If the Statute were to be found legally ambiguous, then the Hearing Examiner is required to give *some* deference to the City’s interpretation before making a final determination. Several factors influence the amount of deference the City should be afforded. Then, given that appropriate amount of deference, the Statute must be interpreted to give effect to the legislature’s intent. The Hearing Examiner finds that, even given the appropriate amount of deference, the City’s

[1] https://www.merriam-webster.com/dictionary/project
[2] https://dictionary.cambridge.org/dictionary/english/project
[3] https://www.dictionary.com/browse/project

interpretation of the Statute was erroneous, and the proper interpretation of the Statute is to give the term "project" its plain meaning and calculate floor area accordingly.

1. Deference to the City's interpretation.

As cited above, deference to the City's interpretation does not require complete deference. Washington State Dept. of Transp., *supra.* The weight of the City's judgment is dependent upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. Loper Bright, *supra.* The City is also charged with showing that its interpretation was a matter of preexisting policy in order for its interpretation to be given deference. Ellensburg Cement, *supra.* The most critical factor in this case is that the interpretation of the Statute with regards to the term "project" and calculation of the applicable floor area is a matter of first impression for the City. *Testimony S. Gardner.* Under Loper Bright, it is also appropriate for the Hearing Examiner to consider the thoroughness and validity of the Director's consideration and reasoning.

The Hearing Examiner finds that, even with some deference to the Director based on their expertise in this subject area, little more should be given because this is a matter of first impression, the City's interpretation is not based on any preexisting policy, and the Director's reasoning and consideration is not well supported. As such, a nearly whole *de novo* review, even if the Statute is ambiguous, is appropriate.

2. Construing the Statute with deference.

The Hearing Examiner hereby incorporates the analysis of the City's interpretation of the Statute from above, including the Hearing Examiner's findings on the plain meaning of the Statute. *Section A.1, supra.* Even with some deference to the Director's interpretation based on his subject matter expertise, the Hearing Examiner finds that the Statute should be interpreted to include the entire square footage of the "project" without inquiry into or delineation of subordinate, secondary, or accessory uses. *Section A.2, supra.*

C. Substance of the proposal and the City's Decision; Non-binding *dicta.*

1. The Application is substantively compliant with the Statute and CUP requirements.

As previously stated, the Hearing Examiner will not be providing a detailed analysis of how the Application and City's Decision comply with the requirements and findings necessary for approval. The record is ample to support such findings, and likely would have survived under the presumptive correctness with substantial evidence and clearly erroneous standards.

Without immediate access to legislative deliberations, or any other documents by which to clearly ascertain the exact intent of the legislature with regards to the language in the Statute, the Hearing Examiner can still make some logical inferences. First, The Hearing Examiner agrees that this specific building is exactly the type of situation for which the Statute was intended for. Credible testimony from Staff confirms that the intent of this Statute was to enable a more straightforward set of criteria and path to permitting for existing commercial structures in residential zones. *Testimony A. Brast, S. Gardner.* Logic follows that, without an opportunity to resume commercial operations within a building that was originally constructed for such uses, that these buildings become an unusable albatross for their owners. That is, these existing structures have value, but only insofar as they can be used for commercial endeavors. The conversion of many of these types of structures, including this building, is costly even if feasible. The only other

option would be to demolish the building and rebuild to existing zoning requirements, including a likely residential use. This is an unreasonable burden to place on property owners who are affected by area-wide rezones. Thus, this Statute.

All told, this is to say that there is a sound, logical underpinning to allowing the continued commercial use of these types of structures, even in residential zones. The record indicates that the City did fully consider and incorporate the public's opposition and concerns to the Project. Several conditions were imposed that serve to ameliorate the public's perceived potential harm, namely the restriction on operating hours and the requirement that no hard alcohol can be sold. The conditions imposed are eminently reasonable. The Applicant will not be able to enjoy unfettered use of their property with the ensuing commercial operation. Some of these restrictions in the conditions of the CUP would otherwise be things the Applicant is allowed to do if this Project was in a commercial zone. This balancing of interests is exactly what is anticipated to take place during a CUP process, and is the intent of the Statute.

This is all to say that the public must understand that the City's legislative process to enact this Statute enabled the Applicant to pursue this CUP under the Statute, rather than the more generalized process and criteria that may have applied. While the commercial use in this instance is not permitted *outright*, the CUP process exists to *allow* the use with conditions that are tailored to the specific proposal. That was sufficiently accomplished here.

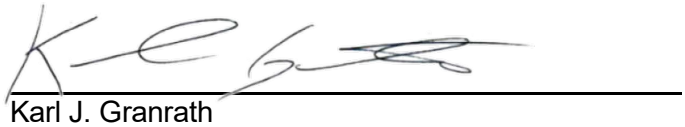
2. No evidence of collusion or conspiracy to deprive the public of an opportunity for input.

The Hearing Examiner finds no basis to conclude that the City willfully disregarded their own code requirements, especially as it relates to claims of collusion or conspiracy to prevent public participation. However, the City should understand that their decision to classify this proposal as a Type II, even with their supplied reasoning for doing so, can create the illusion of such. Members of the public were not unreasonable in their dismay with the City's decision to continue to process the proposal as a Type II. This is further understandable given that the Director is empowered with the ability to reclassify a Type II proposal as a Type III, when it is in the "public interest." *See* SMC 17C.370.030(A)(1). While the Director's discretion in this regard is not directly at issue here, the Hearing Examiner does believe that it would have been entirely reasonable and prudent for the Director to have exercised that discretion here, even with the Director's preferred interpretation of the Statute, especially given the volume and vociferousness of the public's opposition to this application. While, ultimately, the Hearing Examiner was unable to find any substantive error in the City's Decision, controversial projects such as this are better served by the Type III process that affords more direct communication with the public (via the Community Meeting) and direct input into the record (via the Public Hearing).

VII. DECISION

The Hearing Examiner finds that the Director's interpretation of the Statute was erroneous and has proffered a corrective interpretation. Therefore, the Hearing Examiner remands this matter to the City with an Order to re-process the application as a Type III CUP permit.

SIGNED this 16th day of October 2024.



Karl J. Granrath
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.

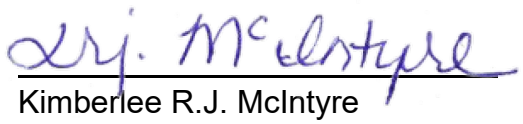
Decisions by the Hearing Examiner regarding appeals of department official decisions are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (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 will be e-mailed (stipulated by the parties) on October 16, 2024. **THEREFORE, THE DATE OF THE LAST DAY TO APPEAL IS THE 6TH DAY OF NOVEMBER 2024, AT 5:00 P.M.**

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

DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 16th day of October 2024, I caused a true and correct copy of the foregoing "FINDINGS, CONCLUSIONS, AND DECISION," to be delivered to the parties below in the manner noted:

Appellant (Clayton Elliott): Julie Watts The Law Office of Julie C. Watts, PLLC	VIA EMAIL julie@watts-at-law.com
Representing the Respondent: Megan Kapaun City of Spokane	VIA EMAIL mkapaun@spokanecity.org lsmithson@spokanecity.org
Representing the Applicant: Brian McGinn Witherspoon Brajchich McPhee	VIA EMAIL bmcginn@workwith.com thume@workwith.com



Kimberlee R.J. McIntyre
Office of the Hearing Examiner
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Spokane WA 99201-3326