CITY OF SPOKANE HEARING EXAMINER

Re:	Shoreline Conditional Use Permit Application by John Woodhead Jr. for the reconstruction of a single-family residence located at 2209 W. Falls Avenue, on the shoreline of the Spokane River	DECISION TO SCHEDULE A NEW PUBLIC HEARING FILE NO. Z1500004-SCUP

SUMMARY OF PROPOSAL AND DECISION

Proposal: John Woodhead Jr. has applied for a shoreline conditional use permit in order to reconstruct a single-family home within the shoreline of the Spokane River. The proposed home will be one story above ground with a full basement and a garage, with a footprint of approximately 2,300 square feet.

Decision: A new public hearing must be scheduled because the original notice of public hearing was defective.

FINDINGS AND CONCLUSIONS

The public hearing on the above-referenced Shoreline Conditional Use Permit was conducted on January 7, 2016. During that hearing, a neighboring property owner objected that the notice of application/hearing was inadequate. *Testimony of K. Noble.* She testified that the sign was posted on the corner of Summit Parkway and Elm Street, rather than on the site of the proposed residence. *See id.* This was not disputed. The affidavit of posting verifies that the sign was posted on the southwest corner of Summit Parkway and Elm Street. *See* Exhibit 15B. In addition, the Applicant confirmed that the sign was not posted on the project site, but instead at a higher-traffic location in Kendall Yards, so that it would be seen by more people. *Testimony of J. Kolva.*

The neighbor's objection raises a threshold question about the sufficiency of the notice of application/hearing. If the notice was defective, then the hearing process may be tainted by a fundamental, legal flaw. Accordingly, this question must be considered first, before reaching the merits of the proposal. The type of notice that is required, and the procedures for giving notice, are dictated by the nature of the application.

This administrative proceeding concerns a Shoreline Conditional Use Permit ("SCUP"). A SCUP is a Type III application. *See* Table 17G.060-1. A SCUP requires both "posted" and "individual" notice. *See* Table 17G.060-3. Individual notice is given in writing by regular U.S. mail to property owners within a 400-foot radius of the boundary of the project site. *See* SMC 17G.060.120(A)(1)(a). To satisfy the requirement for posted notice, the Applicant must erect a sign advising the public of the project. *See* SMC 17G.060.120(B). In addition, the notice must be posted, in letter form, at specified public locations, including the Spokane Public Library and City Hall. *See* SMC 17G.060.120(C).

The Applicant followed the procedures to provide notice of the application and hearing. On

November 11, 2015, the Notice of Application/Hearing was mailed to property owners within 400 feet, as required under the municipal code. *See* Exhibit 14B. That same day, a sign conforming to the code requirements was erected at the corner of Summit Parkway and Elm. *See* Exhibit 15B. In addition, the notice was posted, in letter form, at the main branch of the Spokane Public Library and at City Hall, also conformity with the code. *See id.* Despite all this, it is conceded that the sign was posted not on the project site, but some distance away, in Kendall Yards.

The issue, then, is whether the failure to post the Notice of Application/Hearing on the subject site undermines the validity of the hearing, even though all the other notice requirements were satisfied and a proper sign was erected, albeit off-site. For the reasons that follow, the Hearing Examiner concludes that the hearing process was legally flawed due to the failure to post the Notice of Application/Hearing at the project site.

First, the municipal code plainly requires that the sign be posted at the property being developed. Specifically, the relevant part of the code provides as follows:

> Posted notice is given by **installation of a sign on the site of the proposal** adjacent to the most heavily traveled public street and located so as to be readable by the public.

See SMC 17G.060.120(B) (emphasis added). The municipal code does not list any exceptions to this requirement. The code does not provide, for example, a description of circumstances in which the sign can or should be located off-site.

Second, the Hearing Examiner does not have authority to waive or overlook notice requirements adopted by the local legislature. Nor can the Hearing Examiner decide that because some forms of notice were given, that not all are required. Facing a similar circumstance, the Court of Appeals explained it this way:

> Where a legislative body has set minimum public notice requirements consisting of publication in two newspapers and posting for three weeks in order to achieve that purpose, a court does not have the discretion to decide that some lesser quantum of notice—like publication in one newspaper or posting for only two weeks—substantially complies.

See Prekeges v. King County, 98 Wn. App. 275, 281, 990 P.2d 405 (1999). In other words, under the law of Washington, the Hearing Examiner cannot decide that compliance with most, but not all, of the notice requirements is sufficient. Even if the concept of "substantial compliance" could be relied upon, the Hearing Examiner would reject its application to this case. The failure to post the sign on the project site is not "substantially" in compliance with the code mandate to install the sign "on the site of the proposal." See e.g. Prosser Hill Coal. v. Spokane County, 176 Wn. App. 280, 291-92, 309 P.3d 1202 (2013) (holding that the developer did not substantially comply with notice requirements when, among other things, the sign was posted in the wrong location).

The Applicant might argue that any deficiency in the posting was harmless. However, there is no way to determine how the lack of on-site posting impacted the hearing. As the Court of Appeals in Prosser pointed out, "it is difficult to measure the impact the faulty notice had on concerned individuals" because that would require proving a negative. See Prosser Hill, 176 Wn. App. at 291. The public notice procedures are intended to ensure that decision-makers received enough

information from those affected by the action to make an informed decision. See Prekeges, 98 Wn. App. at 281. That information-gathering function is undermined when the notice procedures are not followed. See Prosser Hill, 176 Wn. App. at 291.

Third, the placement of the sign at the southwest corner of Summit Parkway and Elm Street did not provide proper notice. The sign was placed about 1/4 mile, as the crow flies, from the project site. The sign is located on an open space in Kendall Yards, giving the initial impression that the undeveloped ground where the sign sits is the location of the development. The sign contains no address or specific location of the property (and if it were on the project site, it would not need to). The project site cannot be seen from the position of the sign, due to the distance and topography. The site is down a long hill and at the terminus of a narrow road along the shoreline. In addition, there is no signage at all on the project site itself. The former residence was removed and the site is largely covered in snow. For the average person, not already well versed about the project, it would be difficult to identify the project site.

DECISION

The Hearing Examiner directs the City of Spokane Planning & Development Department to schedule a new public hearing on this application after all notice requirements under the municipal code have been satisfied. The Hearing Examiner concludes that the notice for the public hearing conducted on January 7, 2016, was legally defective because the Notice of Application/Hearing was not posted on the project site as required under the municipal code. Despite the obvious inefficiencies involved, the Hearing Examiner feels compelled to require that a new hearing be scheduled before determining whether to approve the application or not.

DATED this 11th day of January, 2016.

Brian T. McGinn
City of Spokane Hearing Examiner