BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON

In The Matter of the Appeal of	)	No. BP14-00063
	)	
Symbal, LLC	)	
	)	FINDINGS, CONCLUSIONS, AND
Of a Conditional Use Permit	)	DECISION

SUMMARY OF DECISION

The appeal is **GRANTED**. Condition 7 is deleted from the Administrative Conditional Use Permit (ACUP). All other conditions of the ACUP remain in force. When a specific development is identified through the building permit and occupancy process, the City must determine whether the proposed use is consistent with the remaining conditions of the ACUP, applicable City ordinances, any interpretations of ordinances by the director of the Department of Community Development (DCD), and applicable state and federal laws.

SUMMARY OF PROCEEDINGS

Hearing Date:
The Hearing Examiner held an open record hearing on the appeal on February 23, 2015.

Testimony:
The following individuals presented testimony under oath at the open record appeal hearing:

Appellant's Witness:
Adam Simon, Appellant Representative

City Witnesses:
Garrett Jackson, City Planner
Nicole Floyd, City Senior Planner
Andrea Spencer, DCD Director

Attorney Mark Koontz represented the City
Adam Simon represented the Appellant

Exhibits:
The following exhibits were admitted into the record:

Appellant Exhibits
None submitted

City Exhibits
C-1. Conditional Use Permit Application, with supporting documents, dated October 22, 2014

C-2. Administrative Conditional Use Permit Decision, dated January 13, 2015
C-3. ACUP Appeal, with attachments, dated January 26, 2015
C-4. Director's Interpretation of Bremerton Municipal Code 20.54.090, dated February 11, 2015

Pleadings, Briefs, Notices and Orders

- Statement of Appeal, dated January 26, 2015
- Respondent's Brief, dated February 9, 2015, with *AGO 2014 No. 2* attached
- Appellant's Reply, dated February 17, 2015
- Hearing Examiner Pre-Hearing Order, dated February 6, 2015

The Hearing Examiner makes the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record appeal hearing:

FINDINGS

Background

1. In 2013, Adam Simon purchased property at 1110 Wycoff Avenue as manager of Symbal, LLC (Appellant).[1] The multi-level building on-site has separate access points: the upper building fronts Callow Avenue[2] and is occupied by retail businesses; the lower level is accessed from Wycoff Avenue and is currently unoccupied. The lower level of the building has no connection to the upper level and is surrounded by commercial uses and abandoned homes. The property is zoned District Center Core. In a memorandum to the Department of Community Development (DCD) dated September 29, 2014, Mr. Simon indicated that he "would like to re-establish the Wycoff space's former use as warehouse and light manufacturing." *Exhibit C-1.* This memorandum noted that the space "has poor visibility, no natural light, and insufficient egress for higher occupancy uses like retail and business services" and that the site had "historically been used for the servicing of automobiles, the manufacturing of furniture and as a construction storage warehouse." *Exhibit C-1.* The memorandum stated that "[l]ocating a tenant for the basement will require the use to be broadened to include light manufacturing and warehouse tenants," but Mr. Simon did not identify a specific proposed use for the site or identify recreational marijuana production or processing as potential uses. Mr. Simon cited to Bremerton Municipal Code (BMC) 20.54.090(a) as support for reestablishing a nonconforming use. *Exhibit C-1.*

2. BMC 20.54.090(a) states:

[1] The property is identified by Kitsap County Assessor No. 152401-1-155-2001. *Exhibit C-1.* A legal description of the property is included in the ACUP decision. *Exhibit C-2.*

[2] The upper level of the building has a separate address of 1107 Callow Avenue. *Exhibit C-1.*

An existing structure constructed for a use no longer allowed by the zone, which has lost its legal nonconforming status, and is not suited for other uses permitted by the zone, may have its use re-established if a conditional permit is approved pursuant to BMC 20.58.020, provided that:

(1) The applicant demonstrates that the remaining life of the structure is adequate to warrant the proposed use of the structure;
(2) The applicant demonstrates that an allowed use of the zone cannot be established;
(3) The applicant demonstrates that there is a demand for the use in the community or region that provides a public benefit;
(4) The applicant demonstrates that the use and renovation to the structure is not inconsistent with the goals and policies of the Comprehensive Plan.

3. Mr. Simon's memorandum argued that all four criteria of BMC 20.58.020(a) were met and specifically noted:

1) The building and the spaces are in excellent structural and aesthetic condition and are not in need of redevelopment.
2) [District Center Core] conforming uses are impracticable in the subject space. It has low ceilings, little light, poor patron visibility and inadequate egress. It is very well suited, as it has been used in the past, for warehouse and light manufacturing. Retailers, community centers and business service (allowed uses) will not choose to locate on sparse Wycoff Avenue in a warehouse space when so much space is available in the more vibrant, street-facing, Callow Avenue spaces.
3) Businesses and residents in the area will benefit from having another active business on Wycoff Avenue, which is currently a forsaken strip. Even a warehouse with its flow of employees and visitors will increase traffic, visibility and security of the Wycoff strip.
4) Bremerton's Comprehensive Plan is to encourage retail and services along the Callow Avenue thoroughfare, the vibrant corridor. The Wcoff side of my property is not accessed or visible from Callow. The Callow side of my property will remain dedicated to providing vibrant retail storefronts. Wycoff continues to be a more industrial street which the requested re-establishment of [u]se will not be inconsistent with.

Exhibit C-1.

4. After sending the memorandum and consulting with City officials, Mr. Simon submitted the Symbal ACUP application on October 22, 2014, to reestablish "use of an 8,800 [square foot] basement warehouse to light industrial" because "[p]rior zoning permitted light industrial, but the zoning code was changed to DCC, and the use lapsed temporarily." *Exhibit C-1.* As with the memorandum, the ACUP application did not

identify a specific use for the site or reference the production or processing of marijuana. The City determined that the ACUP application was complete on November 10, 2014. *Exhibit C-1; Exhibit C-2.*

5. On January 13, 2015, DCD Director Andrea Spencer issued an ACUP to Symbal, LLC, reestablishing "auto service and repair, light manufacturing comparable to the extent of the former business, and/or warehousing" as allowed nonconforming uses for the property under BMC 20.54.090(a). *Exhibit C-2, page 7.* The ACUP specifically notes that "[t]his is an uncommon situation, as the applicant has not proposed a specific use" for the site and that "mitigation for the specific future use shall be reassessed when occupancy is sought." *Exhibit C-2, page 2.* The conditions of approval include Condition 7, which states: "The production and processing of marijuana for recreational purposes is prohibited at this site." *Exhibit C-2.*

6. The ACUP decision relates that the City received a public comment about the proposal from a resident "concerned that the proposed use would involve marijuana." *Exhibit C-2, page 6.* The City's staff response, included in the ACUP decision, states that "[t]he production and processing of marijuana for recreational purposes is prohibited at the site." The City did not cite to an ordinance in support of this statement or provide any legal analysis or reasoning. *Exhibit C-2, page 6.*

ACUP Appeal

7. The Director's decision is a final Type II decision appealable to the Hearing Examiner. *BMC 20.02.140(a)(3).* Adam Simon timely appealed the ACUP decision on behalf of Symbal, LLC, on January 26, 2015. The one issue identified in the appeal is whether the City erred in including Condition 7, prohibiting the production and processing of recreational marijuana on-site, with "no logical or factual support." *Statement of Appeal, page 4.* The appeal statement argues that "[t]here is no discussion at all in the Permit Decision explaining why marijuana processing and production should be treated differently than the hundreds of other Light Industrial uses that might be put into the first floor of this Building." *Statement of Appeal, page 3.*

8. The City's response to the Appellant states that the "law related to recreational marijuana is evolving and may be confusing to people seeking to establish such a business in the City," *Respondent's Brief at 2*. The City also noted that, in analyzing the ACUP application and memorandum, the "City did not find that *any* light industrial use fit the criteria, only those uses that previously existed at the site [including] auto service repair, light manufacturing comparable to the extent of the former business (i.e., furniture manufacturing), and warehousing" and that "[i]mportantly, the City did not analyze the impacts of any possible light industrial use at the site, only the uses that previously existed at the site." *Respondent's Brief at 4.*

9. After Mr. Simon filed Symbal's appeal, Ms. Spencer issued a formal director's interpretation of BMC 20.54.090(a) on February 11, 2015. The interpretation states that:

> This code section has been narrowly construed and evidence of the previous use is required to be demonstrated before the use can be re-established through a Conditional Use Permit. The city utilizes occupancy permit records, business licenses, and archived permit files to demonstrate what uses were previously legitimately established in structures . . .
>
> Only uses that have been documented by permits and official records are eligible for reestablishment under these conditional use provisions. Under no circumstance shall this code section be interpreted to extend to uses other than those that were previously located within a structure.

Exhibit C-4. This interpretation, to date, has not been appealed.

Appeal Hearing

10. Mr. Simon, representing the Appellant, argued at the open record appeal hearing that the City does not prohibit the production or processing of recreational marijuana and, accordingly, the focus of the ACUP conditions should be on mitigating impacts of proposed uses, not on limiting the types of uses allowed. Mr. Simon stressed that the term "use" is not used consistently throughout Bremerton's code and that any light industrial use allowed in the city should be allowed under the ACUP granted to Symbal—including the production or processing of marijuana. *Argument of Mr. Simon.*

11. Mr. Simon testified that City staff told him that the production and processing of recreational marijuana would be considered a light industrial use. In anticipation of receiving an ACUP allowing for *any* light industrial use on the property, Mr. Simon testified that he signed a lease with a marijuana producer/processor in October 2014.[3] Although not specifically mentioned at the appeal hearing, this timeline suggests that Mr. Simon signed a lease with a marijuana producer/processor before submitting his ACUP application. *Exhibit C-1; Testimony of Mr. Simon.* Mr. Simon noted that the tenant has the necessary recreational marijuana license from the Washington State Liquor Control Board, but is awaiting DCD approval before occupying and improving the space. *Testimony of Mr. Simon.*

12. Ms. Spencer, DCD Director since 2006, testified that BMC 20.54.090 is highly unusual among land use ordinances in Washington State because it allows for the reestablishment

[3] Mr. Simon testified that these business owners are paying a monthly rental on the property but have not yet occupied it as they await the City's decision concerning the validity of the ACUP. *Testimony of Mr. Simon.*

of a non-conforming use that has terminated.[4] She explained that, typically, an applicant would utilize BMC 20.54.090 to apply for an ACUP allowing for a *specific* proposed use for a site, rather than a broad category of uses as the Appellant has done here. Ms. Spencer acknowledged that she may have erred in granting the ACUP without requesting sufficient information about Symbal's intended specific use. She testified that she did not review the application specifically for a recreational marijuana production or processing proposal—she only reviewed it for previous uses that actually occurred on-site—but that City staff became aware that Symbal had an interest in marijuana production/processing prior to the issuance of the ACUP. Ms. Spencer testified that, although her code interpretation of BMC 20.54.090 occurred after Symbal filed its appeal, she has authority to issue such an interpretation at any time, and that her interpretation of the provision at issue accurately captures DCD's long-standing interpretation of BMC 20.54.090. *Testimony of Ms. Spencer.*

13. City Planner Garrett Jackson testified that he reviewed Mr. Simon's request for an ACUP. During the application review process, Mr. Jackson learned that the site had previously been used for furniture manufacturing, auto service, and a video rental store (Blockbuster Video). *Testimony of Mr. Jackson.*

14. City Senior Planner Nicole Floyd, who supervises Mr. Jackson, testified that BMC 20.54.090 differs from a request for a site-specific rezone because it focuses on singular, specific uses for a property.[5] She noted that this particular ACUP application was unique because it focused on general approval for a use within the site (though unspecified) rather than a site-specific use, as is normal with permit applications. Ms. Floyd testified that a building permit would still be required for the site and that such permits are rejected for a variety of reasons, including when a specified proposed use violates Bremerton's code. In responding to Condition 1 of the ACUP, which states that "light manufacturing comparable to the extent of the former business" is allowed, Ms. Floyd testified that DCD did not analyze the permit request for "hypothetical" uses, but only those former uses indicated by the Symbal application. *Testimony of Ms. Floyd.*

15. In closing arguments at the appeal hearing, Mr. Simon argued that the City's resistance to recreational marijuana caused it to "twist" its interpretation of its own code and that, contrary to the City's assertions, no valid grounds exist to specifically exclude

[4] As our supreme court has noted, "[c]ommentators agree that nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values" and, as such, "nonconforming uses are uniformly disfavored and [Washington courts have] repeatedly acknowledged the desirability of eliminating such uses." *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 8 (1998).

[5] Although site-specific rezoning is highly disfavored under long-standing Washington law (*see, e.g., Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280 (1984)), BMC 20.58.040 does provide a mechanism to apply for such a rezone.

recreational marijuana production or processing as a valid use on-site at 1110 Wycoff Avenue. *Argument of Mr. Simon.*

16. Attorney Mark Koontz, representing the City, argued that DCD should probably have proceeded with this application differently, especially in light of its knowledge that Mr. Simon potentially sought to lease the building to a marijuana processor/producer. Nevertheless, the plain reading of BMC 20.54.090 is clear: this code section only allows for the revival of specific nonconforming uses that have previously operated on the site. *Argument of Mr. Koontz.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction over this matter, under Chapter 2.13 BMC.

Review Authority

The Appellant has the burden of proof to show that the City erred when it conditioned the ACUP to prohibit the production and processing of marijuana. *See, Buechel v. State Dept. of Ecology*, 125 Wn.2d 196 (1994); *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 117 (1999); *RCW 36.70C.130(1)(b).* The Hearing Examiner's duty is to review the entire record before him to determine whether the Appellant has met this burden. To properly review the City's action, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County,* 124 Wn.2d 26 (1994).

The Hearing Examiner must accord substantial deference to the City's interpretation of its own ordinances. *RCW 36.70C.130(1)(b); Cockle v. Department of Labor and Industries,* 142 Wn.2d 801, 829 (2001); *Doe v. Boeing Co*., 121 Wn.2d 8, 15 (1993); *Superior Asphalt & Concrete v. Dep't of Labor & Indus.*, 84 Wn. App. 401, 405 (1996); *McTavish v. City of Bellevue,* 89 Wn. App 561, 564 (1998). The Hearing Examiner reviews the DCD's decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of a law by the agency with expertise. Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that the City made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas,* 146 Wn.2d 740, 751 (2002); s*ee Buttnick v. Seattle,* 105 Wn.2d 857, 860 (1986). When applying the clearly erroneous standard, the Hearing Examiner may not substitute his own judgment for the judgment of the City. *See Buechel v. Department of Ecology,* 125 Wn.2d 196, 202 (1994).

Conclusion Based on Findings

The Director erred in attaching Condition 7 to the ACUP, which prohibits the production or processing of recreational marijuana on-site. Nothing in the record establishes that the condition is reasonably calculated to achieve a legitimate objective of the City's zoning

ordinances, or that the condition is intended to mitigate impacts caused by the proposed development.

Cities have the "inherent power to impose reasonable conditions and restrictions" on land use permits, "even though the imposition of such conditions is not guided by specific standards." *Gerla v. Tacoma*, 12 Wn. App. 883, 889 (1975); *see also State ex rel. Standard Mining & Dev. Corp. v. Auburn*, 82 Wn.2d 321 (1973). Nevertheless, such conditions must not be imposed in an arbitrary or capricious manner.[6] To be valid, such conditions must (1) "not offend any provision of the zoning ordinance, (2) not require illegal conduct on the part of the permittee, (3) be in the public interest, (4) be reasonably calculated to achieve some legitimate objective of the zoning ordinance, and (5) not be unnecessarily burdensome or onerous to the landowner." *Gerla*, 12 Wn. App. at 889; *see also Woodinville Water District v. King County*, 105 Wn. App. 897 (2001).

Here, there is no substantial evidence in the record supporting the determination that Condition 7 is reasonably calculated to achieve a legitimate objective of the City's zoning ordinances or that the City assessed the potential impacts of marijuana production or processing on-site before including this condition. DCD Director Andrea Spencer testified, to the contrary, that she did not analyze the potential impacts of marijuana production or processing for the site but, instead, limited her analysis to uses that previously occurred on-site (i.e., auto service and repair, light manufacturing comparable to furniture manufacturing, and/or warehousing). Moreover, while the record clearly establishes that Mr. Simon intends to lease the space to a recreational marijuana producer/manufacturer, this information was not indicated in his ACUP application or supporting memorandum. Rather uniquely, the application did not specify any particular use for the property but, instead, merely requested that BMC 20.54.090(a) be used to reestablish the potential for nonconforming uses on-site. DCD processed this request and, in granting the ACUP, specifically noted that "mitigation for the specific future use shall be reassessed when occupancy is sought for the lower unit." *Exhibit C-2, page 2*. Condition 7, however, arbitrarily foreclosed a specific potential use without benefit of this assessment. Therefore, this condition must be deleted from the ACUP.

The Hearing Examiner notes, however, that all other conditions of the ACUP remain in force. When a specific use of the building is identified through the building permit and occupancy process, the City must determine whether the proposed use is consistent with the remaining conditions of the ACUP, applicable City ordinances, any interpretations of such ordinances by the DCD director, and applicable state and federal laws.[7] Should Symbal propose a use not

[6] As the *Gerla* court noted, "It is axiomatic that administrative actions, if properly authorized under zoning ordinances, may be interfered with . . . only if they are conducted in an arbitrary and capricious manner." 12 Wn. App. at 887.

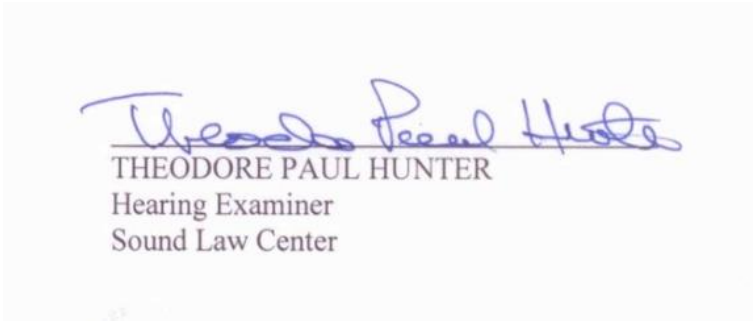
[7] BMC 20.40.160(a), for instance, specifically prohibits any "use that is illegal under local, state, or federal law . . . in any zone within the City."

specifically allowed by the Bremerton code (as would appear to be the case with production and processing of recreational marijuana), BMC 20.40.150 provides the appropriate mechanism to receive a similar use determination.[8] A request for this determination is not currently before the City or the Hearing Examiner. *Findings 1 – 16.*

DECISION

Because there is no substantial evidence in the record supporting Condition 7, which prohibits the production or processing of recreational marijuana, the appeal is **GRANTED**. A condition of approval of a land use permit, to be valid, must be reasonably calculated to achieve a legitimate objective of the City's zoning ordinances, or to mitigate City assessed impacts of a specific use for the site. Condition 7 shall be deleted from the ACUP, and any approval of a specific use must comply with the dictates of this decision.

DATED this 17th day of March 2015.



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

[8] BMC 20.40.150 states:

> Whenever a proposal is not listed as a permitted, conditional or accessory use in the zone, it may be permitted in that zone if the Director determines it is a use similar to a listed use for that zone.
>
> (a) The applicant shall make in writing requests for a similar use determination. The determination shall be processed as a Type I Director's decision as set forth in the procedures for a Type I decision in Chapter 20.02 BMC.
>
> (b) The Director shall issue a decision in writing and shall consider the scale, visual impacts, traffic generation, relationship to surroundings, and other factors which influence and/or define the nature of the proposal.
>
> (c) If the proposal is found to be similar to a listed use, the proposal shall be subject to all standards, requirements and permitting processes to which the listed use is subject.