BEFORE THE HEARING EXAMINER FOR THE CITY OF DUPONT

RE: Save Our City Interpretation Appeal No. PLNG2018-034	FININDGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Save Our City ("SOC") has appealed a Director's Interpretation responding to a list of eight hypotheticals exploring application of the City's prohibition of warehouse/distribution uses in the Mixed Use Village ("MUV") zoning district. The parties to the appeal prepared a stipulated order that focused upon their areas of disagreement. The City and Appellant agreed upon the language of the stipulation but the property owner did not. Consistent with the arguments presented by the parties, the scope of this appeal is limited to the language proposed in the stipulated order. With one notable exception, the stipulated order language as presented by the City and Appellant is sustained.

Warehouse/distribution use is expressly prohibited in the MUV zone. The hypotheticals subject to the Director's Interpretation posit uses that include a combination of authorized commercial activity with storage space that potentially could be characterized as prohibited warehouse/distribution space. Oversimplifying, the Director's Interpretation generally found that so long as the primary use of a proposed development was authorized, any accessory use devoted to storage and distribution for that authorized use was authorized as well.

The primary focus of disagreement amongst the parties was whether accessory storage could be used for goods subject to off-premises sales, such items generally mailed or delivered in response to orders from a website or catalogue. The Appellants were significantly concerned that the authorization of such uses would open the door to huge ware house facilities such as Amazon fulfillment centers. Of particular concern to the Appellants is the truck traffic generated by such uses, which is not compatible with the neighborhood character of the MUV zone. To address these concerns, the proposed stipulation required that storage for off-premises retail sales would be authorized "*so long as these are secondary modes of retail sales and the primary use is the sale of goods at the physical facility*."

This decision modifies the quoted language of the stipulation by replacing it with "*so long as the storage of goods for these off-premises sales qualifies as an accessory use as defined by DMC 25.10.010(A).*" Accessory uses as defined by DMC 25.10.010(A) are required to be subordinate to a primary use and located on the same property as the primary use. To this end the restriction adopted by this decision is very similar to the language proposed in the stipulated order. The reason for the replaced language is that it is based directly upon application of the City's zoning code. As correctly argued by NW Landing LLC, the City and Appellant did not provide any direct code based justification for the language they proposed.

In more concrete terms, the Director's Interpretation as modified by this decision does not permit massive warehouses primarily engaged in off-site retail sales. At the same time, brick and

mortar retail establishments wishing to supplement their revenues with on-line or catalogue sales for goods stored within on-premises and subordinate storage facilities will likely be permitted. For business models in-between, the planning director will still likely have to make some decision that requires the exercise of discretion. Given the unavoidable subjective nature of the applicable zoning code standards of this case, it is not possible or within the scope of the examiner's authority to formulate more precise guidelines. To the extent that more specific guidelines can be crafted, that is more appropriately assigned to the City Council[1].

TESTIMONY

See Appendix A, a summary of hearing testimony.

EXHIBITS

The following exhibits have been admitted into the administrative record:

1. City Exhibits (identified in City witness/exhibit list)
2. Appellant Exhibits (identified in Appellant witness/exhibit list)[2]
3. Pre-Hearing Order
4. Email correspondence between hearing parties and examiner
5. Prehearing briefs – Appellant and City
6. NW Landing pre-hearing brief
7. Stipulation and Order (agreed upon by City and Appellant)
8. NW Landing proposed supplemental guideline
9. NW Landing witness/exhibit list
10. NW Landing proposed revision to City/Appellant stipulation (Ex. 7).
11. Post-hearing briefs of City, Appellant and NW Landing.

[1] No one has raised the issue of whether the issues presented in this appeal are subject to the judicial ripeness doctrine. Advisory opinions such as that requested in this case have been ruled unconstitutional for federal court consideration because it violates the case or controversy requirement of Article III of the federal constitution. *See Muskrat v. United States*, 219 U.S. 346 (1911). State courts differ on the case or controversy requirement and it doesn't appear that ripeness has ever been addressed by a Washington appeals court in the context of a land use proceeding. There arguably is no case or controversy involved in this appeal since there is no specific project application under consideration. Granted, formal interpretations are a common tool relied upon by developers before submitting an application to ascertain whether attempting an application would be worthwhile. However, the multiple and broad based hypotheticals addressed by the Director's Interpretation arguably take this tool too far by proposing multiple hypotheticals sparse on project detail that can only be addressed by broadly worded guidelines that are more suitable for legislative as opposed to quasi-judicial adoption.

[2] The Appellant's exhibit list identifies unspecified records pending a records a records request and transcripts of hearings. As determined during the appeal hearing, those records are only admitted to the extent they were separately presented and admitted into evidence, e.g. the transcript appended to the Appellant's prehearing brief.

FINDINGS OF FACT

Procedural:

1. Hearing Parties. The Appellant is SOC, represented by David Bricklin of Bricklin and Newman, 1424 Fourth Avenue, Suite 500, Seattle, WA 98101. The property owner, FR/CAL 3 NW Landing ("NW Landing"), Inc. is represented by Bill Lynn of Gordon Thomas Honeywell LLP, 1201 Pacific Avenue, Suite 2100, PO Box 1157, Tacoma, WA 98401-1157. Copper Leaf LLC is a contract purchaser of the subject property owned by NW Landing. Copper Leaf requested the Director's Interpretation under appeal, but did not make an appearance or participate in the appeal.

2. Hearing. A hearing was held on the appeal on July 11, 2018, at 2:00 p.m. in the Mason County Commissioners Meeting Room. The record was left open through July 19, 2018 for post-hearing briefing.

Substantive:

3. Appeal. SOC filed the subject appeal on May 25, 2018. The appeal challenges Code Interpretation 2018-001 ("Director's Interpretation"), which was issued on May 11, 2018. The Director's Interpretation addresses a code interpretation requested by Copper Leaf LLC on April 25, 2018. The Copper Leaf LLC request involved application of DMC 25.41.020(2)(g), which prohibits "warehouse/distribution" in the Mixed Use Village ("MUV") zoning district. The MUV district was first adopted by the Dupont City Council in early 2018. Copper Leaf's request for interpretation consisted of applying the warehouse/distribution to eight hypothetical types of businesses that relied upon varying amounts of in-house storage space. In its interpretation request, Copper Leaf LLC asked Dupont to identify whether DMC 25.41.020(2)(g) would prohibit any of the eight hypothetical businesses in the MUV district due to their associated storage space. In Code Interpretation 2018-001, the City's planning director concluded that seven of the eight businesses would be authorized.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. As outlined in the two tables of DMC 25.75.010(4), Director's Interpretations are Type I decisions subject to appeal to the hearing examiner.

2. Scope of Appeal. The scope of this appeal is limited to the language proposed in the Ex. 7 stipulated order.

The Appellants' Notice of Appeal and subsequent conduct could certainly be construed as very confusing to anyone trying to ascertain scope. As asserted by the City in its closing brief, the hearing parties have a due process right to having some direction as to the scope of appeal so that they have a fair opportunity to prepare a response. The Notice of Appeal was ambiguous as to scope and could be reasonably interpreted as either limiting its scope to two hypotheticals are as applying to all eight hypotheticals. The Notice of Appeal asserts that "*portions of the challenged interpretation*" improperly authorize warehouse/distribution in the MUV zone, goes on to specifically address only two of the eight hypotheticals and then requests that the entire Director's Interpretation be vacated or modified. In their prehearing brief submitted a week in advance of the hearing, the Appellants expressly noted that they were challenging all of the hypotheticals except for Hypotheticals No. 4 and 5. Then the day before the hearing, the Appellants agreed to a proposed stipulated order that stated they were only challenging Hypotheticals No. 1 and 8. At the hearing the Appellants stated that they were still challenging all hypotheticals (presumably still excluding Hypotheticals 4 and 5), but also stated that they considered the Ex. 7 stipulation language to resolve all their disagreements with the Director's Interpretation, a position they re-affirmed in their closing brief.

As noted by the examiner during the appeal hearing, the procedural rules pertaining to local land use hearings should be applied in a flexible manner to ensure that such proceedings are accessible to the general public. So long as measures are taken to protect due process rights, notices of appeal should be read in a manner that was intended by the Appellant. The due process rights of the parties were protected in this appeal when the examiner advised the parties at the hearing that he considered the appeal to cover the entire Director's Interpretation and offered the parties an opportunity to address any uncovered issues in post-hearing briefing. No party took advantage of that opportunity. However, it also must be recognized that the Appellants' representative was strong in his conviction that the Ex. 7 stipulation resolved all of the Appellants concerns. This decision adopts most of the Ex. 7 stipulation with only modest revisions. The stipulation language and the issues associated with it were heavily litigated by all parties, while issues outside the stipulation were for the most part ignored. If the examiner addresses issues in the Director's Interpretation that weren't addressed by the stipulation, he would be addressing issues that the parties, in particular the Appellants, didn't find necessary to address. At the least, the issues outside the scope of the stipulation should e considered abandoned as argued in the NW Landing closing brief. For these reasons, the scope of appeal is limited to the language proposed in the Ex. 7 stipulated order.

Substantive:

3. Issue Presented**.** As noted in Finding of Fact No. 3, the Notice of Appeal generally contests the issue of what type of business qualifies as prohibited "warehouse/distribution" use in the MUV zone. From the extensive briefing submitted by the hearing participants, this primary issue is whether and to what extent the MUV "warehouse/distribution" prohibition restricts off-premises retail sales (e.g. storage of goods that are sold via purchase made by internet or mail order catalogue). This conclusion is readily evident from the difference of opinion between the

parties on the wording of Paragraph 9 of the Ex. 7 stipulated order. The City and Appellant proposed the following language for Paragraph 9:

> The Planning Director intended to authorize warehouse space for products sold in a traditional brick and mortar retail store on site. The use could include digital sales from that location, in store ordering, shipping of items in stock directly to a customer, and similar **so long as these are secondary modes of retail sales and the primary use is the sale of goods at the physical facility.**
>
> (emphasis added).

In contrast, NW Landing proposes the following language for Paragraph 9:

> The Planning Director intended to authorize warehouse space for products that are sold at and from that location. The use could include digital sales from that location, in store ordering, shipping of items in stock directly to a consumer, and similar so long as there is a showroom on site and products may be purchased from the company at that location.

As is evident when comparing the two paragraphs above, the primary difference between the two is the bolded language in the City/Appellant paragraph, which requires that goods stored on premises must be primarily sold on-site. The importance of this distinction is further highlighted in the arguments presented in the NW Landing closing brief, which is entirely focused on disputing the City/Appellant position that goods must be primarily sold on-site.

4. <u>"Warehouse/Distribution" is Authorized in the MUV Zone to the extent Necessary to Support Authorized Uses as an Accessory Use</u>. DMC 25.41.020(2)(g) prohibits the broadly defined "warehouse/distribution" use in the MUV zone. At the same time "warehouse/distribution" use is a necessary component to numerous uses that are authorized in the MUV zone. To reconcile this conflict, it is concluded that "warehouse/distribution" is authorized to the extent it qualifies as a necessary accessory use to authorized uses. As defined by DMC 25.10.010(A), an accessory use is one that "…*is subordinate to and the use of which is incidental to that of the main building, structure or use on the same lot*…"

There are several judicially adopted interpretive guidelines that assist in reconciling the conflict identified above. The goal in construing zoning ordinances is to determine legislative purpose and intent. 8 E. McQuillin, The Law of Municipal Corporations, § 25.77 at 244-46 (Revised 3d ed.2010); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 472 (2003). When the meaning of an ordinance is plain on its face, the plain language of that provision must be given effect. *Dept. of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1 (2002). The plain meaning of a provision in an ordinance may be discerned from the language in the ordinance itself as well as the ordinance in its entirety and related ordinances which disclose legislative intent. *See* 146 Wn.2d at 11-12 (2002). If, after this inquiry, the ordinance remains susceptible to more than one reasonable

meaning, the ordinance is ambiguous and it is appropriate to resort to aids to construction, including legislative history. Id. at 12.

"Warehouse/distribution is defined by DMC 25.10.230 to mean "*a building or land use in which goods, merchandise or equipment are stored for eventual distribution*." Black's Law Dictionary[3] defines "*distribution*" as "*the act or process of apportioning or giving out*." Under the Black's Law definition, therefore, prohibited warehouse/distribution would include the storage of goods sold both on and off premises, since distribution is widely defined to include delivery of goods to several or many regardless of location.

Although the "warehouse/distribution" definition by itself prohibits storage for off-premises retail sales, this restriction conflicts with other zoning provisions that authorize such use. Specifically, the MUV prohibition on warehouse/distribution use conflicts with authorized primary uses for which warehouse/distribution is a necessary accessory use. Such accessory uses are necessarily implied as authorized uses and hence conflict with the prohibition imposed by the "warehouse/distribution" definition. Any cursory review of the uses authorized in the City's zoning code or any other typical zoning codes reveals that authorized uses, if defined, rarely include definitions that include all the accessory uses authorized along with the permitted primary use. Retail uses, for example, typically need parking lots, managerial offices and public restrooms to operate. These accessory uses are rarely separately identified as authorized, even though stand-alone parking lots, offices and public restrooms may be prohibited within the same zoning district. The accessory uses impliedly or expressly authorized for a permitted primary use supersede the warehouse/distribution prohibition because the accessory use authorization is more specific. *See, e.g. O.S.T. v. Blueshield*, 181 Wn.2d 691, 701 (2014) (with conflicting statues that can't be harmonized, the more specific statute prevails). The more specific authorized accessory use would be allowed even if it involved distribution to other businesses. For example, a light manufacturing operation could engage in storage of the materials it manufactures, even for ultimate wholesale use, if the storage is a necessary part of authorized light manufacturing. Similarly, an authorized flower shop would be allowed to sell most of its stored flowers for off-site sales if the storage is necessary for a viable flower shop.

5 Uses in Hypotheticals 1 and 3 Properly Recharacterized as Primary Uses. Hypothetical No. 1 and 3 were properly and necessarily recharacterized by the Director's Interpretation to limit authorized warehouse/distribution use only for primary on-site uses.

As concluded in Conclusion of Law No. 4, "warehouse/distribution" is authorized in the MUV zoning district when it serves as a necessary accessory use. "Accessory use" is further defined in Conclusion of Law No. 4 to be uses that are subordinate to the "main" use of the property. As set by the accessory use definition, therefore, there must be a "main" use on the same lot to which the warehouse/distribution use is subordinate. The Director's Interpretation use of the term "primary use" is construed as synonymous with "main use."

[3] DMC 25.10.210 requires use of Black's Law Dictionary when a term is not defined by the DMC or applicable statutes or regulations. The DMC and applicable state statutes/regulations do not define "distribution."

The Director's Interpretation recharacterization of Hypotheticals 1 and 3 was consistent and necessary to conform to the limitations set by the accessory use definition. In Hypothetical No. 1, the Director's Interpretation recharacterized the referenced retail/commercial use as a primary use. Without the limitation, the storage space identified in the hypothetical could instead serve as the primary use of the building or lot, which would fail to conform to the accessory use limitation. Similarly, in Hypothetical No. 3, the Director's Interpretation recharacterized the referenced showroom/display area as a primary retail use[4]. The Director's Interpretation reference to primary use is necessary for consistency with the accessory use limitation. The Director's Interpretation reference to retail use is necessary to conform to the primary uses authorized in the MUV zoning district.

6. Par. 10 of the Ex. 7 Stipulation Properly Requires On-Site Food Processing for Hypothetical No. 8. As determined in Conclusion of Law No. 5, there must be a primary use on the same lot to which the warehouse/distribution use is subordinate. Hypothetical No. 8 can be read as authorizing warehouse/distribution of food without any authorized primary use located on the same lot. Par. 10 of Ex. 7 properly requires an authorized primary use (food processing) to be located on-site as required by the limitations of warehouse/distribution as an accessory use.

7. Par. 6, 8, 9 and 11 of the Ex. 7 Stipulation Properly Requires All Warehouse/Distribution Use to be for Goods Manufactured, Processed or Sold On-Site. As determined in Conclusion of Law No. 5, there must be a primary use on the same lot to which the warehouse/distribution use is subordinate. With this limitation, Par. 8, 9 and 11 of the Ex. 7 stipulation properly and necessarily requires that warehouse/distribution of goods be limited to the goods that are manufactured, processed or sold on-site; provided that accessory warehouse/distribution use that meets the standards of Conclusion of Law No. 8 is also authorized.

8. Primary Uses that Qualify as Both "Retail Trade" and "Warehouse/Distribution" are Prohibited in the MUV Zone. The MUV district is internally inconsistent in that storage of goods for off premises sales could arguably qualify as both a primary authorized retail trade and a prohibited primary warehouse/distribution use. Primary uses that qualify as both retail trade and warehouse distribution are construed as prohibited in the MUV zone. However, storage of goods for off-premises sales is authorized as an accessory use to an authorized primary use. Further, as discussed below, unlike the accessory uses authorized by Conclusion of Law No. 5, storage of goods for off premises retail sales does not have to be "necessary" to the operations of the primary use to qualify as an authorized accessory use.

The MUV zone authorizes "retail trade" as either permitted outright or subject to a conditional use permit. See DMC Table 25.41.020(a). The term "retail trade" is not defined in the City's zoning

[4] The planning director didn't directly state that the sales had to be resale, but did require that the sales be to customers and that such sales qualified as "retail trade." Although sales to "customers" could arguably include wholesale transactions if the "customers" are middlemen involved in wholesale distribution, the planning director's linkage to "retail trade" reveals that his intent was to limit the showroom/display areas to retail transactions.

ordinance. As identified in Footnote No. 3, DMC 25.10.210 requires use of Black's Law Dictionary when a term is not defined by the DMC or applicable statutes or regulations. DMC 25.10.210 further provides that if there is no case law or law dictionary definition, resort can be made to the Webster's Third New International Dictionary of the English Language. Although the Director's Interpretation and NW Landing in its briefing both address the meaning of "retail trade," neither party identified any case law defining the term and no Washington State case law appears to define the term. Unfortunately, none of the dictionaries authorized by DMC 25.10.210 define "retail trade." The closest Black's Law definition is for "retail sales," which defines that term as *"[t]he sale of goods or commodities to ultimate consumers, as opposed to the sale for further distribution or processing*."

The Black's Law dictionary is highly problematical because as applied without modification it creates irreconcilable conflicts in the City's zoning ordinance. As argued in the NW Landing post-hearing brief, the Black's Law definition doesn't distinguish between modes of retail sale, such that off-premises retail sales are authorized by the definition. Taken to extremes, the NW Landing position means that Amazon fulfillment centers qualify as "retail trade" and therefore should be authorized in the MUV zone. However, such a use also unequivocally qualifies as a prohibited warehouse/distribution use. Both the "retail trade" use and the "warehouse/distribution" use qualify as primary uses, because neither use is subordinate to the other.

As previously noted, when conflicting statutes can't be harmonized, the more specific statute prevails. *See, e.g. O.S.T. v. Blueshield,* 181 Wn.2d 691, 701 (2014). For facilities that qualify as primary uses for both authorized "retail trade" and prohibited "warehouse/distribution," there is no reasonable means of reconciliation. The most specific regulation prevails. In this situation, the more specific regulation is the MUV district prohibition on warehouse/manufacturing. "Retail trade" encompasses a broad class of commercial enterprises whereas "warehouse/manufacturing" is narrowly focused to a very specific type of business enterprise. Further, the priority on prohibiting warehouse/distribution is most consistent with legislative intent. As demonstrated in the Appellant's prehearing brief on legislative history, the City Council adopted its prohibition on warehouse/distribution in response to strong public concern over truck traffic impacts generated by warehouse/distribution use. It is fairly clear from this legislative history that the City Council did not intend its concerns over warehouse/distribution use to be subverted by the more generalized uses authorized by the retail trade classification.

Although it is not possible to entirely harmonize the MUV provisions that both authorize and prohibit primary uses that qualify as both retail trade and warehouse/distribution, it is possible to provide for partial harmonization of the provisions by authorizing storage of goods used for off-premises sales as an accessory use. This is slightly distinguishable from the accessory use authorized by Conclusion of Law No. 4, where the accessory use has to be "necessary" to the functions of the primary use in order to qualify as an impliedly authorized component of an expressly authorized use. Given that that the authorization of the accessory use is part of a harmonization effort and also given the strong economic development comprehensive plan

policies identified in the Appellant's post-hearing briefing, the storage of goods for off-premises sales does not need to be "necessary" to the functions of the authorized primary use. However, as previously identified, all accessory uses must be subordinate to the primary use. Within this context, the accessory use should not be construed as subordinate if it generates adverse truck impacts of similar severity to those generated by the warehouse/distribution use that was intended to be prohibited by the City Council.

9. Par. 9 of Ex. 7 Stipulation Must be Modified to Require that Storage of Goods Must be Accessory Use in Lieu of Requiring Off-Premises Sales to be Secondary to On-Premises Sales. Par. 9 of the Ex. 7 stipulation requires that off-premises sales be secondary to on-premises sales. The Appellant correctly notes in its post-hearing briefing that there is no code basis for this requirement. The objectives of Par. 9, however, are largely met by restricting storage of the goods for off-premises sales to an accessory use as authorized in Conclusion of Law No. 8. Par. 9 is revised to meet the requirements of Conclusion of Law No. 8.

All parties have presented proposed language addressing the off-premises sale of retail goods. The proposed language of the parties is quoted in Conclusion of Law No. 3 above. There are problems with both sets of proposed language. The Appellant's language would authorize an off-premises warehouse/distribution operation of any magnitude, regardless of scale and impacts, so long as a showroom of any size and significance is appended to the building. This directly enables the "lipstick on a warehouse" stratagem feared by the public. Under the NW Landing language, a 500,000 square foot Amazon sized fulfillment center could be authorized so long as a 200 square foot showroom exclusively selling Captain and Tennille eight track tapes is appended to it. Such a scenario was clearly not intended by the City Council as evidenced by the legislative history recited in the Appellant's prehearing brief.

The City/Appellant Ex. 7 language quoted in Conclusion of Law No. 3 limits the size and intensity of such facilities by requiring off-premises sales to be secondary to on-site sales. These limitations do certainly limit impacts to an extent that is consistent with City Council intent. Unfortunately, there is no path defined by the City code that leads to the City/Appellant distinctions made between on-premises and off-premises retail sales. The City/Appellant provided no such path and none is evident from the City's zoning code. The accessory/primary use distinction formulated in Conclusion of Law No. 8 is more closely tied to the City's code because the standards for what qualifies as an accessory use are specified in the accessory use definition and authorized accessory uses are routinely implied in zoning code tables as outlined in Conclusion of Law No. 4. Further, in harmonizing the warehouse/distribution conflict with retail trade as outlined in Conclusion of Law No. 8, the judicial policy of harmonizing conflicts as much as possible is more directly served by demoting warehouse/distribution use from primary to accessory use as opposed to creating distinctions between on and off-premises retail sales. For these reasons, Par. 9 of Ex. 7 will be modified to replace references to off-premises sales with the accessory use principles formulated in Conclusion of Law No. 8.

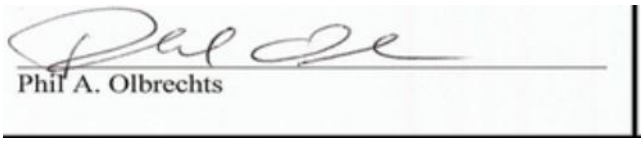
It is acknowledged that the standards proposed by the parties and those set by this decision still leaves considerable discretion to the planning director in assessing whether a proposed storage use qualifies as prohibited warehouse/distribution use. This is unavoidable given the huge variety of storage arrangements that are possible for businesses authorized in the MUV zone Even if formulating a precise and ministerial set of standards were possible, such an undertaking would at a minimum involve several pages of standards that could be construed as an illegal intrusion into the legislative branch of city governance as identified in Footnote No. 1. All zoning code standards are perpetual works in progress. As advocated during appeal public testimony, the "warehouse/distribution" restrictions of the City's zoning ordinance may very well benefit from more precise standards, but that is a task ultimately left to the City Council and beyond the examiner's place and authority.

DECISION

Paragraphs 5 (as applied to all eight hypotheticals), 6, 8, 10 and 11 of the Ex. 7 stipulation are sustained as outlined in this decision. Those paragraphs are adopted as addendums and modifications to the Director's Interpretation. Paragraph 9 of the Ex. 7 stipulation is modified as follows and is also adopted as an addendum and modification to the Director's Interpretation:

> The Planning Director intended to authorize warehouse space for products sold in a traditional brick and mortar retail store on site. The use could include digital sales from that location, in store ordering, shipping of items in stock directly to a customer, and similar so long as ~~these are secondary modes of retail sales and the primary use is the sale of goods at the physical facility.~~ the storage of goods for these off-premises sales qualifies as an accessory use as defined by DMC 25.10.010(A).

Issued this 3rd day of August 2018.



City of Port Dupont Hearing Examiner

Appeal Right and Valuation Notices

DMC 25.175.010(4)(b) provides that this decision, as an appeal of a Type I decision, is final, subject to appeal to Pierce County Superior Court. Appeals are governed by Chapter 36.70C RCW. The DMC does not identify any express right to reconsideration. This examiner will authorize requests for reconsideration if filed with the planning director within five business days of the issuance of this decision.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.

Appendix A
Save Our City Administrative Appeal; File No. No. PLNG2018-034

Summary of July 11, 2018 Appeal Hearing

Note: *This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary to the recommendation issued by the Hearing Examiner and was not prepared by the Examiner. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner or an indication of what the Examiner found significant to his decision.*

Mr. Brickland. Appellants' legal representative, summarized a stipulated disposition agreed upon between the Appellants and the City. He highlighted a stipulation that there was a difference that was subtle yet meaningful in the way the uses were described in the application for the interpretation versus the way they were described in the interpretation itself. Mr. Brickland wanted to highlight specific words in certain paragraphs that were creating complexities in this case.

Mr. Brickland brought up the concerns of the citizens and the city council about truck traffic generated by warehouse use. Mr. Brickland explained that the City Council had focused on prohibiting warehouse use in the MUV zone to avoid the truck traffic impacts, but that care had to be exercised in how the prohibition is applied because it could also be inadvertently construed to prohibit storage space for retail establishments such as Ace Hardware stores. The concern of the Appellants is with uses that are warehouses and distribution facilities that are unconnected to primary use businesses. Mr. Brickland discussed the role of digital sales in the code and how that functions in relation to a warehouse or distribution facility as well as other types of stores that fall under the code. Mr. Brickland expressed concerns with the overall loose language of the interpretation request.

Mr. Brickland noted that the subject property had been previously zoned "business tech park" codified in chapter 25.40 of the Dupont Code and one of the provisions in that chapter of the code was that the variety of uses are allowed except freestanding warehouse/distribution facilities. In responses to neighborhood concerns, when adopting the MUV district earlier this year the City Council strengthened restrictions of warehouse/distribution by removing the qualification that such prohibited uses be "free standing."

Turning to the code interpretation, Mr. Brickland stated that the Appellants were concerned that the interpretation was too loose and would be used to authorize uses not intended by the City Council. Mr. Brickland asserted that the permissive language of the interpretation was not consistent with legislative intent or the plain meaning of MUV district restrictions. He argued that the interpretation should be vacated or modified to be consistent with the plain language of MUV district restrictions.

Mr. Karg, City Attorney, mentioned that the City would like to do its best to get all parties on board with the language usage they had recently come to agree upon. Mr. Karg wanted to emphasize that they were "very close to agreement."
Mr. Karg noted that the city does have "some basic agreement with the appellants' positions." Mr. Karg agrees with the position that distribution is a defined use. Mr. Karg noted that the City agrees that warehousing and distribution centers lacking on-site sales are prohibited. He then emphasized that retail sales and manufacturing are not prohibited and they cannot be prohibited or undercut by the code interpretation. However, he asserted, there are several concerns that the modified language agreed upon by the City and Appellants could help clarify. Mr. Karg noted that the City and the Appellants agree that if you intend to allow someone to have a retail establishment they need to be able to have the kind of storage ability available to actually store the goods being sold there. For Mr. Karg, the language used in the code needs to clear up any concerns and clarify that the "underlying use" needs to have a physical location with some type of show room where products are available for purchase. Mr. Karg believes that if the code is written in this correct manner, it would not exclude prospective businesses [1:02:00] from engaging in the very common retail practices of having someone work in a store or showroom, having materials sold or shipped from a store, or having individuals who can leave a showroom to inspect and set up installations of people's properties. Likewise, Mr. Karg believes that online sales are still viable that can either be picked up from the store or shipped from the store to someone. In short though, there needs to be some sort of access to the business who is making the sales in which products can be viewed or seen in a physical location.

After this, Mr. Karg went on to clarify something about exhibit A, which was discussed earlier in the morning. He clarified discussions about the concerns over Amazon warehouses being set up in the city.

At this point, Mr. Karg began to question Jeff Wilson. Mr. Wilson is the Director of Community Development for the City of DuPont.

Mr. Wilson affirmed that he is responsible for the interpretations of the zoning code including the provisions that were being discussed in this hearing. Mr. Wilson affirmed that his position as Director of Community Development requires professional judgement and insight, he brings nearly 40 years of experience to his position. Mr. Wilson affirmed that discussions like the one happening in this hearing happen from time-to-time and that dramatic changes in the code are not uncommon.

Moving on, Mr. Karg and Mr. Wilson discussed the differences between direct sales and others and how it applied to Mr. Wilson's interpretation of the code. Essentially, if warehouses supported sales functions on a specific-given property they would be permissible under Wilson's interpretation of the code [1:14:50-55]. Wilson continued to clarify that places where individuals have the potential to go and physically look at a product or a prototype before purchasing it should

be permissible even if they are simply purchased online or installed/shipped through an online transactions or indirect sales.

Mr. Wilson and Mr. Karg went on to further mention how there are businesses with varying degrees of falling under various types of sales discussed that could be part of the code interpretation. And these numbers can fluctuate with time. Mr. Wilson added that there would not be some sort of ongoing evaluation of businesses by the city of where the percentages of sales come from. Mr. Wilson suggested to Mr. Karg that as long as businesses are properly following the code and initially set up properly there should not be any concern with businesses and their warehouses.

Mr. Karg wanted Mr. Wilson to elaborate where the definitions he was using were coming from. Mr. Wilson used the Merriam-Webster Dictionary for his definition of 'retail'. Mr. Wilson believes that common definitions like these are best to be used in this case to help in interpreting when there is some sort of ambiguity of a term in the code. Going back to the use of the term 'retail', Mr. Karg pointed out that this definition does not distinguish between indirect sales from direct sales and online sales. Thus, Mr. Karg suggested to Mr. Wilson that 'retail' is broad enough to encompass any of those direct or indirect sales to an individual or business, which is a sentiment that Mr. Wilson affirmed.

Following this, Mr. Karg and Mr. Wilson discussed instances in which the language in the code was seemingly not giving clear enough directions on how to interpret valid and invalid forms of sales, but more specifically they focused on indirect sales.

Bill Lynn, representative of NW Landing, property owner, then questioned Mr. Wilson. In response, Mr. Wilson once again affirmed that the underlying requirement of his interpretation is that there should be a showroom of sorts in which items could be displayed and purchased. The size of the building needed to store and sell products (and the balance between space needed for storage versus sales space) is all relative to the product.

At this point the hearing examiner opened up the hearing for commentary from members of the public.

Michael J. Brown testified has lived in DuPont since 2002 and is a member of Save Our City a Facebook group advocating for the city to prevent zoning changes and dissuade the city from allowing large distribution centers and large warehouses which they believe create more truck traffic and do not meet the city's original intent for being a calm, quiet residential community. In 2006, Mr. Brown retired from a 33-year career in industrial management in which he worked numerous positions. He expressed that his professional background has given him certain insights into these issues that he hoped to share in the meeting.

Mr. Brown stated he and his wife moved to DuPont because they viewed it as a residential community – a place in which the focus of the city provides a priority to the residential living

environment. He affirmed a belief that this is manifested in the layout/construction of the town, which he went on to describe. Mr. Brown expressed that while there is a business industrial presence in the city, thoughtful planning has managed to assure that the businesses are appropriate to residential living and that the industries are physically positioned in order to minimize adverse impacts on the residential environment. He believes that that balance differentiates Dupont from other nearby communities particularly those along the I-5 corridor. However, he is equally worried that steps that have been taken to allow several businesses to begin constructing warehouses and distribution centers threaten his way of life as well as the community experience and living conditions of every citizen in DuPont.

Mr. Brown then described Save Our City, the Facebook group he is a part of, as a broadly based grass roots citizen organization and membership is united in this desire to adhere to a high quality of life and that many of the members of this organization believe that the elected officials of the town have been failing to meet this vision in their response to commercial development. Mr. Brown described that distribution sites like Amazon bring in—and have brought in—trucks which he believes have adversely impacted the quality of life in various areas of the town. Impacts from the I-5 corridor has also been a growing issue. Mr. Brown worries that the codes are not strong enough to prevent big businesses from adversely affecting quality of life. Mr. Brown noted that he and 'Save Our City' were in accord with the stipulated order presented by the City and Appellants.

Dennis Clark stated he lives in Dupont and was tis Community Development Director from 1990-2002. Mr. Clark was responsible for drafting the first land-use plan for the city. He wanted to clarify what his understanding of a planned community was in which business and residential and industrial uses would all support one another, and in retrospect probably one of the shortcomings was adequately providing for truck traffic. It's proven that heavy truck traffic has created problems with neighborhoods particularly servicing Amazon activity.

The analysis that was done while the land use plan was being developed was really that the area which is now designated as a mixed use village could not support industrial development but had incompatible warehousing and distribution as primary uses. During the planning process the public expressed clear dissatisfaction with these incompatible uses.

Bridgette King is a former member of the Dupont City Council and has owned her property in DuPont since 1996. She reflected on the fact that there is a designated industrial park and that the intent for the rest of the city's property to not turn into this. In the last few years, the intent of the city has changed to allow development of any kind. Mrs. King worried that companies will have tiny and fake showrooms just to have a giant warehouse in the back for local distribution to get the warehouse as close to the costumer as possible and then have trucks shipping items to them as fast as possible. Distribution and thinking about getting warehouses in these areas is a serious problem and impacts people's lives. DuPont is not interpreting their comprehensive plan and development regulations correctly. The language in the plan—specifically definitions—are not good enough and need to be revamped and modified to fit the city's original goals and formatting as a plan city.

This needs to be an organized effort and the goal needs to keep our small town feel and small city feel with small business. The language clearly is not concise and clear enough. There needs to be less room for interpretations to always heavily favor a 'pro-business' perspective when compared to a 'pro-public' options. The city could then put a moratorium in place until definitions could be completed. At worst case she would want to accept what Mr. Brickland has posed with his language in a settlement but really, Mrs. King thinks there needs to be time taken to redefine and flesh-out current language used in the codes.

Karen Conrad (she has lived in DuPont for almost 14 years) testified because she felt the need to share a 'fundamental' piece of information during this hearing. She stated that you will not find a group of citizens that is as committed and passionate to the functioning and health of their community as this one. She noted that the mayor and city council of Dupont were elected by the public with the intent of serving the community and she wants there to be a greater consideration for the voice of the citizens in these types of matters. This issue—and several others—lead her to believe there needs to be a moratorium on construction and development until there can be some firm rationale and definitions put in place that configure where the city is to move onto in its future. There needs to be collaboration. There needs to be more public commentary.

Ming Choo testified has been a resident of DuPont since 2003. Mrs. Choo was concerned about how the code was being interpreted. Mrs. Choo bought her property under the belief that this would be a small, residential-focused area. Two years ago, it came to her knowledge that the code might be changed, she recalls being present during council where there were promises made that there would be no warehousing in the area, but then it seems like it was decided to go back on these promises. She worries about how truck traffic will impact the high school especially and how it will impact the safety of the students.

The attorneys then ended the hearing with closing statements.