

Request for Reconsideration of Post Hearing Examiner Approval of the Winslow Hotel

March 13, 2020

Hearing Examiner

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City of Bainbridge Island

RE: Request for Reconsideration of the Hearing Examiner Decision on the Winslow Hotel PLN50880-SPR/CUP which was decided February 28, 2020

1

In my career, I worked for five years as an urban planner in the city of Kirkland and five years as the community development director in the city of Tukwila. My primary job in Kirkland was to implement and enforce the zoning and subdivision codes. In Tukwila it was to enforce the zoning and subdivision codes as well as write a new zoning, subdivision code, and comprehensive plan. I thought I knew how to interpret and enforce a zoning code.

2

I have seen how the city staff on Bainbridge Island implemented one aspect of this city's zoning code, and it leaves me confused! Either I am completely outdated, or a significant error has been made in applying a particular section of the zoning code. This comment is related to how the city's planning director has decided that a hotel is not what the current zoning code says it is. She says it is a hotel, plus more! This is not an interpretation issue, but a black and white issue that is not subject to interpretation.

3

So, here is the thing. The city's zoning code defines hotel as: 'a hotel can have guest rooms and one or more restaurants.' The city staff has determined that if other uses are permitted in the zone, that they are also permitted inside of a hotel. Therefore, the city staff has effectively changed the definition of a hotel to be 'a hotel can have guest rooms, one or more restaurants, a banquet facility, a spa, a small retail store, and has an additional condition requiring six workforce apartment units.' These additional uses are not included as allowed in the definition of hotel.

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As can be seen in the following section, the planning director has the authority to interpret the zoning code, however, note two things. These interpretations must be made available to the public and "...The director shall provide the interpretation taking into account consistency with ... the nature of the definition..." (Refer to the underlined portions of the following paragraph quoting BIMC 18.03.090). The interpretation that a hotel could contain more than guest rooms and one or more restaurants, as stated in the definition of 'hotel,' was not made available to the public in a clear and understandable manner. It was presented as though it was a part of the zoning code and not subject to review. The director's interpretation not did not take into account the consistency with the nature of the definition hotel. The definition is clear and the guidance in BIMC 18.03.090 appears to be clear. Should this hotel be built as approved, it would technically be classified as a non-conforming use upon completion. The conditional use permit application for this hotel, with the additional uses, should not have been accepted by the planning staff because the use is not a listed use in BIMC Table 18.09.020 Use Table since it is not a hotel by definition. A new definition (like convention hotel) has not been added to the use

table with a related new definition which might include these additional uses. Adding this would be the role of the city council.

5

BIMC 18.03.090 Interpretation by the Director, states that: 'The director has the authority to provide interpretations of provisions, uses, or definitions in BIMC Titles 16, 17 and 18 and related provisions in BIMC Title 2, and will make these interpretations available to the public. Any person may apply to the director for an interpretation of any provision in these titles. The director shall provide the interpretation taking into account consistency with the comprehensive plan, the nature of the definition or use, and its relationship to the code and its potential impacts, such as:

- A. Whether it involves dwelling units; sales; processing; type of product, storage and amount;
- B. Enclosed or open storage;
- C. Anticipated employment;
- D. Transportation requirements;
- E. Excessive noise, odor, fumes, dust, toxic material, light, glare, and vibration likely to be generated; and
- F. The general requirements for public utilities such as water and sanitary sewer.

The authority to provide an interpretation does not include the authority to add a new permitted ("P") or conditional ("C") use to the use table in BIMC 18.09.020. The director's interpretation is subject to appeal pursuant to BIMC 2.16.020.R.1. (Ord. 2011-02 § 2 (Exh. A), 2011)"

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Just because many hotels contain these additional uses doesn't mean that the definition in our zoning code can be revised through an implied interpretation in the staff report to some perceived industry norm. Perhaps the city council that adopted the definition years ago knew that if the uses in a hotel were limited to guest rooms and one or more restaurants, that it would result in a smaller hotel. Maybe that is what they intended. The definition of hotel is unique to Bainbridge Island's zoning

ordinance and if the planning director felt it needed to be changed, she should have gone to the city council and recommended that the definition be revised. Had the city council chosen to do that, it would have gone through a public process and been approved by ordinance. They didn't do that.

7

In effect, what the planning director has done is taken the legislative authority of the city council and re-written the definition of 'hotel' by implied interpretation so the application for the Winslow Hotel could be determined to be in compliance with the zoning code and the permit application accepted as complete for processing. Now the city attorney has supported the planning director's decision in his communication to the hearing examiner. This error has been exacerbated by the hearing examiner's approval of the conditional use permit, with all the additional uses allowed in the hotel. This has effectively changed the definition of a 'hotel' in the city's zoning code because it has set a precedence for future similar applications! Anyone coming to the city in the future and applying for a conditional use permit for a hotel must be allowed to have, at a minimum, banquet facilities, spa, retail, and apartments within the hotel in the zoning district where the hotel is located if they want these uses. It doesn't seem reasonable that this was the intent of the city council members who approved this zoning ordinance. I don't know if it was the intent planning director, city attorney, or hearing examiner.

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At this point, there are two options for challenging the approval of this permit. One is to ask the Hearing Examiner to reconsider his decision, which is what this request represents. If that is denied, the only remedy to reverse this hotel proposal would be to appeal the hearing examiner's decision to court. This community has voiced strong objections to this proposed hotel. It seems like the process has not served the public well. As proposed, this hotel permit application should not have been accepted by the city planning staff because improper interpretations were made and it did not meet the definition of a hotel as written!

9

The permit process on the Winslow Hotel demonstrates that there should be some revisions to the city's zoning ordinance, particularly in the authority the planning director has to make code interpretations with minimal scrutiny. At a minimum, any zoning code interpretation should be placed on the planning commission agenda for their review and recommendation, with some process defined if the planning commission and planning director don't agree.

10

Based on the above information and comments, as well as the Supplemental Information and Comments offered below, I am submitting this Request for Reconsideration of the Hearing Examiner Decision on the Winslow Hotel PLN50880-SPR/CUP which was decided February 28, 2020.

In addition, I am asking that you recognize that the city zoning ordinance was not properly implemented, and reverse the decision to approve the conditional use permit for the hotel.

11

I have included Supplemental Information and Comments after the signature block below that provides additional support under for reconsideration of the hearing examiner's decision to approve the Winslow Hotel CUP.

Respectfully submitted,


Kjell Stoknes
168 Wood Avenue SW
Bainbridge Island, WA 98110

Supplemental Information and Comments:

S-1

City's Post Hearing Brief Before the Hearing Examiner for the City of Bainbridge Island regarding PLN50880-SPR/CUP prepared by city attorney James E. Haney and stamped received January 31, 2020. The following are quotes from pages 11 and 12 in this Post Hearing Brief.

S-2

G." The spa, retail shop, and banquet facilities proposed for the hotel are permitted uses in the Core District and only the hotel requires a conditional use permit."

S-3

"All uses proposed in the Winslow Hotel project are outright permitted uses, except the hotel, which is a conditional use. Declaration of David Greetham ("Greetham Declaraton") at p. 5, paragraph 12. *See, also*, BIMC 18.09.020 and definitions in BIMC 18.36.030. There is nothing in the Bainbridge Island Municipal Code which suggests that permitted uses cannot be in the same building as a conditional use, or that permitted uses cannot be considered accessory uses to a conditional use. *See*, BIMC 18.36.030(12) ("Accessory use" means a use customarily incidental and related to the principal use on the same lot." The spa, retail shop, banquet facilities are either permitted uses in their own right or are accessory uses to the conditional hotel use and are allowed on the Winslow Hotel property under either scenario. Greetham Declaration at p. 5, paragraph 12. Location of the other uses in the Winslow Hotel building does not change the nature of the hotel as a conditional use. *Id.*" (underlining by Kjell)

Comments by Kjell Stoknes regarding the post hearing brief:

S-4

The city attorney and planning staff seem to have circumvented the clear language of section 18.36.030.130, which reads: "Hotel means a building or group of buildings containing guest rooms, where, for compensation, lodging is provided for transient visitors. A hotel or motel may contain one or more restaurants. A hotel or motel is not a bed and breakfast lodging or inn as defined and regulated elsewhere in this code. Short-term rental (less than 30 days at a time) of a single-family residence does not constitute a hotel." (underlining by Kjell)

S-5

The position of planner Greetham and the city attorney that banquet facility, spa, and retail space are considered allowed uses should not be the final word on this issue! The definition limits the uses in a hotel to one or more restaurants! Definitions are an enforceable part of the zoning code, and in this city, what can be in a hotel is clearly defined. What the industry standard is for hotels is irrelevant!

S-6

In the second paragraph above in the city's Post Hearing Brief,(See S-3) the city attorney states that: "There is nothing in the Bainbridge Island Municipal Code which suggests that permitted uses cannot be in the same building as a conditional use." This statement does not appear to be relevant since the comment is not directly related to the issue at hand. The statement seems to imply that definitions in the city's zoning code are not enforceable. This seems inaccurate! If definitions cannot be an enforceable part of the zoning code, what is the point of including definitions?

S-7

Another statement is also made in the second paragraph (See S-3) where the city attorney says: "Accessory use means a use customarily incidental and related to the principal use on the same lot. The spa, retail shop, banquet facilities are either permitted uses in their own right or are accessory uses to the conditional hotel use and are allowed on the Winslow Hotel property..." I take no exception to the city attorney's statement that a permitted use or an accessory use can be "on the same lot." However, these uses cannot be inside the hotel building because of the definition of hotel.

S-8

In the last sentence in the second paragraph (See S-3) the city attorney states that: "Location of the other uses in the Winslow Hotel building does not change the nature of the hotel as a conditional use." I can only guess what is meant here. It either means that: 1) 'locating the other uses in the hotel does not change the nature of the hotel,' or it means that: 2) 'locating the other uses in the hotel does not change the nature of the hotel enough to deny it the right to apply for a conditional use permit,' or both 1 and 2. Speaking to the first part #1, adding a banquet facility, spa, and retail to a hotel significantly increases the size and cost of the building and requires more rooms to make it feasible making it even bigger. The natural consequence is that the hotel becomes significantly larger, which does change the nature of the hotel. This has been the case with this hotel that started as a 60-room proposal, but has been increased to 87 rooms because of feasibility issues due to the additional costs of the other uses proposed in the building. This more complicated hotel, with the additional uses, significantly changes the nature of the hotel and the changed nature of the hotel should have been adequate grounds for the planning department to deny it the right to apply for a conditional use permit. At this point, the only remedy is to reverse the current approved status. Item #2 cannot be true if the actual definition of 'hotel' is enforced. The city attorney's position on both arguments are not supported.

S-9

My last comment on this second paragraph (See S-3) is related to the city attorney's statement that: "The spa, retail shop, banquet facilities are either permitted uses in their own right or are accessory uses..." I can accept that 'retail' is a permitted use since it is shown in the permitted use table in BIMC section 18.09.020. However, that a 'banquet facility' and a 'spa' are permitted uses requires some additional

explanation. Neither of these uses are listed in the use table. They have been inferred to be allowed because the planning director has determined that a 'banquet facility' is like an 'entertainment facility' which is an allowed use; and a 'spa' is like a 'personal service,' which is also an allowed use. To conclude that a 'banquet facility' that will be primarily used for conventions and weddings is like an entertainment facility is quite a stretch and should have more open to public review through a defined process. That a 'spa' is like a 'personal service' and allowed seems more reasonable, but it still should have included a more public interpretation process. (See the Use Regulations table later in this document) The issue still remains that these uses cannot be located within the hotel, by definition.

S-10

And lastly, the six apartment units to be located in the hotel, which was one of the conditions imposed by the city, is not only not allowed by definition, but also must be used for 'transient visitors,' which is a requirement in the definition of hotel. This means that hotel rooms (or any accommodations) in a hotel cannot be used for long term rentals! Therefore, apartments are also not allowed in a hotel under the definition in the zoning code.

S-11

Planning Director's Report & Recommendation to the Hearing Examiner regarding the [Winslow Hotel PLN50880-SPR/CUP dated January 15, 2020 (the following is taken from the Director's report)

c. BIMC 18.09 Use Regulations

Proposed Use	Definition
Hotel (Conditional Use)	"Hotel" means a building or group of buildings containing guest rooms, where, for compensation, lodging is provided for transient visitors. A hotel or motel may contain one or more restaurants. A hotel or motel is not a bed and breakfast lodging or inn as defined and regulated elsewhere in this code.
Restaurant (Permitted Use)	"Restaurant" means a restaurant or cafe (excluding formula take-out food restaurants) that sells prepared food or beverages and also offers accommodations for consuming the food or beverage on premises.
Entertainment Facility (Permitted Use)	"Entertainment facility" means a performing arts theater, or cinema, concert venue, or circus/festival; venue not included in the definition of "Recreation activities, outdoor," and "Recreation activities, indoor." "Entertainment facility" does not include adult-oriented entertainment facilities.
Personal Service (Permitted Use)	"Personal service" means an establishment that provides on-site service(s) in a nonoffice environment including, but not limited to, beauty shops, shoe repair, laundry, dry cleaning services, animal grooming parlor and tanning salons. Auto repair and body shops are not included under this definition.
Accessory Solar Panel (Accessory Use)	"Accessory structure" means a subordinate building or structure that is incidental to the principal structure on the same lot, or an abutting lot if it meets the requirements in

	BIMC 18.09.030.I.13. Accessory structures include, but are not limited to, solar panels, small wind devices, barns, sheds, and confined feed lots holding less than five chickens (roosters are only allowed on parcels outside of the Mixed Use Town Center districts).
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All of the uses are allowed as right, with the exception of the hotel which requires a conditional use, as well as the solar panels, which are accessory.

Comments by Kjell Stoknes regarding the Planning Director's Report & Recommendation to the Hearing Examiner dated January 15, 2020:

S-12

The source of the above definitions and the code interpretation under the table come from the Director's Report to the Hearing Examiner on the Winslow Hotel dated January 15, 2020. What I want to point out is the effect of handling code interpretations this way. It treats the interpretations in a subtle manner that makes it unclear to the public that they are even interpretations that can be appealed.

18.36.030.130 : Hotel definition

S-13

The Director states that the Hotel requires a conditional use permit, but does not analyze whether or not the proposed hotel is in conformance to that definition. The definition of 'hotel' does not include banquet facility, spa, retail, or apartments as uses that can be located within a hotel. This was a clear oversight when this permit application was received and processed! It should not have been accepted since a proposed hotel project with hotel rooms, restaurant, banquet facility, spa, retail, and apartments is clearly inconsistent with the definition of a Hotel, and therefore, not allowed uses within the hotel with or without a conditional use permit. However, since they are permitted uses, it seems logical that they could be located on the same property in separate buildings.

S-14

The director's decision sets a precedence that a 'hotel' can include uses other than that specified in the BIMC definition of hotel. BIMC 18.03.090 clearly states that: "The director has the authority to provide interpretations of provisions, uses, or definitions in BMIC Titles 16, 17, and 18 and related provisions in BIMC Title 2..." But later in this same section of the code is states: "The authority to provide an interpretation does not include the authority to add a new permitted ("P") or conditional ("C") use to the use table of 18.09.020. The director's interpretation is subject to appeal pursuant to BIMC 2.16.020." The director did not use an appropriate interpretation process which should have been made in a manner that is accessible to the public and made clear that it was appealable. What the director did, however, was not really an interpretation, but is a change to the definition. This is creating new legislation and that is a legislative function, not an administrative function. Had the director handled this appropriately, it is likely that her overstepping her authority would have been discovered.

18.36.030.202: Personal Services definition. (spa)

S-15

The director states that: "All of the uses are allowed as right, with the exception of the Hotel which requires a conditional use,....." A spa is not listed as a use within the definition of Personal Services, which should have triggered an interpretation by the director per 18.03.090, which is shown later in this letter. The applicant did not need to request an interpretation because the director determined that the use was allowed and processed it with the CUP application for the Hotel. The director's decision sets a precedence that a 'spa' is a permitted use within the MUTC CC zone without the benefit of a clear interpretation process and without a definition of a spa. Adding the definition of spa would require a code amendment. (BIMC 18.03.090) This interpretation should have been made in a manner that was accessible to the public. This decision was shown in the director's staff report as a predetermined decision. (reference the chart in S-11 above). The director did state that 'personal services' are a permitted use, however, she did not state that since a spa is similar, it is also a permitted use. This makes the interpretation blind to the public and makes it seem like there is nothing to appeal. In any case, a spa is not a use that is allowed within a hotel, per the definition of hotel.

18.36.020.226: Restaurant definition.

S-16

This definition of a 'hotel' states the one or more restaurants are allowed. Therefore, the right of a restaurant to be located within the hotel is reasonable. The right to have additional kitchen facilities to exclusively service the banquet facilities may not be allowed. But this is a new issue and a complicated one that I will not pursue.

S-17

18.36.020.217: Recreational facilities, indoor definition. (banquet facilities)

The director states that: "All of the uses are allowed as right, with the exception of the hotel which requires a conditional use,....." The implication of this statement is that a banquet facility is similar to 'entertainment facility' and, therefore, is also an allowed use. (See S-11) A banquet facility, however, is not listed as a use within the definition of 'entertainment facility' and is quite different from the uses listed as permitted which should have triggered a formal interpretation by the director per 18.03.090. The applicant did not need to request an interpretation regarding whether or not a banquet facility was an allowed use and ok in the hotel because the director was accommodating and determined that the use was allowed and processed it with the CUP application for the hotel. Since the conditional use permit has been approved, the director's administrative action sets a precedence that a banquet facility is a permitted use within the MUTC CC zone without the benefit of a clear interpretation process and without any public awareness that it was handled as an interpretation that could have been appealed. (See 18.03.090) This is inappropriate process! Because of this administrative action, a banquet facility has become an allowed use in this zoning category without a definition, which also means no size limit. Interpreting that banquet facilities is an allowed use within the land use category of 'entertainment facility' is quite a stretch. Adding banquet facilities as an allowed use, and informally creating a new definition, is creating new legislation which should have been handled by a code amendment through the city council. This interpretation was handled poorly. It did not provide a means for the

public to comment so that there was an option to appeal. Instead it was shown in the director's staff report as a predetermined decision. This action of the planning director should be reversed. To not reverse it would be an invitation for other large hotels with similar uses to locate in Winslow under any of the zoning categories that allow a hotel as a permitted use or conditional use.