

TO: PLANNING COMMISSION
FROM: GLENN W. GROSS, 
URBAN PLANNING ADMINISTRATOR

SUBJECT: FORMAL INTERPRETATION TO DETERMINE THE USE CLASSIFICATION FOR
A PROPOSED POST-ACUTE REHABILITATION CARE CENTER WITHIN THE
SOUTH WATERFRONT MIXED-USE (SWMU) ZONE (CI 13-01)

ISSUE:

A request to determine whether a post-acute rehabilitation care center is an activity that falls within the scope of the following uses that are permitted within the South Waterfront Mixed-Use (SWMU) zone under SRC 162.040: Retail Sales and Service, Office, Residential, Institutional, Commercial Parking, Manufacturing and Production, Industrial Service, Parks and Open Space, and Public Utilities.

RECOMMENDATION:

Staff recommends that the Planning Commission adopt the facts and findings of this staff report and determine that a post-acute rehabilitation care center does not fall within the scope of the following uses that are permitted within the South Waterfront Mixed-Use (SWMU) zone under SRC 162.040: Retail Sales and Service, Office, Residential, Institutional, Commercial Parking, Manufacturing and Production, Industrial Service, Parks and Open Space, and Public Utilities.

BACKGROUND:

On December 4, 2012, a pre-application conference request was submitted to the Planning Division on behalf of the applicant, Marquis Companies, which currently operates 26 facilities in the western United States specializing in assisted living and post-acute rehabilitation care, to develop a proposed 38,000 square-foot, two-story, skilled nursing facility on a portion of the former Boise-Cascade property located north of Pringle Creek and east of the railroad line (Attachment 1).

On December 20, 2012, the pre-application conference was held and concern was raised that skilled nursing may not be an allowed use within the SWMU Zone. In response to this concern, the applicant's representative conducted a review of Marquis' functional program and the requirements of the SWMU zone and concluded that the proposed activity does qualify as a permitted use in the zone (Attachment 2).

On January 9, 2013, after consideration of the analysis of uses conducted by the applicant's representative and the legislative intent of the zone, a summary letter of the pre-application conference was issued explaining that skilled nursing was not a permitted activity within the zone and that the applicant has the option of requesting a formal interpretation regarding the proposed use by the Planning Commission.

On February 7, 2013, a request for a formal interpretation was submitted by Mark Shipman, of Saalfeld Griggs, on behalf of the property owner, Pringle Square North LLC (Attachment 3). The formal interpretation seeks a determination of the use classification for a post-acute rehabilitation care center within the SWMU zone.

In the formal interpretation request, several individual activities are identified as comprising the proposed use. Because of the various individual activities that have been identified as comprising

the proposed use, the Planning Administrator subsequently determined that the proposed use was not readily classifiable and, pursuant to SRC 162.030(c), the use would be referred to the Planning Commission for formal interpretation.

On February 27, 2013, notice of the use classification proceeding was mailed pursuant to Salem Revised Code requirements. Public hearing notice was also published in the Statesman Journal on March 8, 2013 and March 14, 2013.

The public hearing before the Planning Commission on this matter is scheduled for March 19, 2013, at 5:30 p.m. in the City Council Chambers.

FACTS AND FINDINGS:

1. Classification of Uses within the South Waterfront Mixed-Use Zone (SRC 162.030(a)).

The system used to classify permitted uses within the SWMU zone is different from the system used to classify uses in other zones within the Salem Revised Code (SRC). Instead of classifying uses based on the Standard Industrial Classification (SIC), the SWMU zone classifies permitted uses by general categories of land use (e.g. residential, office, institutional, etc.) which are described in a brief narrative fashion.

To provide more specific guidance on what is and is not a permitted use, each narrative description of use is followed by one or more lists of specific activities that "illustrate the scope" of that use. These lists of activities are not intended to be an exhaustive list of all the activities that comprise the "use," but instead are intended to give guidance to staff and the public in determining whether a specific activity is allowed by one of the uses in the SWMU zone.

The use classification system for the SWMU zone is specifically set forth in SRC 162.030(a), and provides:

"For the purposes of this Chapter, each use includes a grouping of specific activities that illustrate the scope of the use. The examples are provided to illustrate the scope of the use; however, the list is not intended to be exclusive. A specific activity not identified in such a grouping shall be considered part of the grouping if the activity is similar to the other specific activities that illustrate the scope of the use and if the activity has impacts to surrounding properties and city infrastructure that are similar in type and magnitude to the other specific activities that illustrate the scope of the use."

Under this classification system, if a proposed activity is included in the list of activities that illustrate the scope of a permitted use, the activity is permitted.

If a proposed activity is not included in the list of activities illustrating the scope of a permitted use, the activity is considered part of the use, and therefore permitted, if the activity is:

- (1) Similar to the other specific activities identified in the list; and
- (2) The activity has similar impacts in type and magnitude to surrounding properties and city infrastructure as the other specific activities identified in the list.

Examples:

- (1) A surveyor's office would be permitted, though it is not listed, because it is similar to the other activities included in the list illustrating the scope of Office use, and because it has similar impacts to those activities. The activity is conducted in an office setting and provides a professional service.

- (2) A night club would be permitted, though it is not listed, because it is similar to the other activities included in the list illustrating the scope of an entertainment oriented Retail Sales and Service use, and because it has similar impacts to those activities. The activities identified in the list involve the provision of varying forms of entertainment, the number of people attending can range from a small number to a large number, and they can occur at different times throughout the day and night.

To aid the Planning Commission in their classification of the proposed activity, a memorandum from the City Attorney (Attachment 4) has been prepared describing the procedure for classification of uses in SRC Chapter 162.

2. Classification of Accessory, Ancillary or Subordinate Activities (SRC 162.030(b)).

The definition chapter of the Salem Revised Code (SRC Chapter 111) establishes definitions for terms used throughout the zoning code. Under SRC Chapter 111.020(b), "accessory building, structure, or use" means a building, structure, or use which is incidental and subordinate to and dependent upon the main use on the same premises.

The SWMU zone, like other zones in the SRC, recognizes that a specific activity may incorporate one or more accessory activities that are necessary for the function of the primary activity, but standing on their own could be classified as separate primary activities. The method of classifying accessory activities within the SWMU zone is set forth in SRC 162.030(b), and provides:

"Accessory, ancillary, or subordinate activities that are necessary for the successful operation of a specific economic or residential activity are considered part of that activity, and not considered separate uses for the purposes of this Chapter, even though the accessory, ancillary or subordinate activity might have characteristics that could result in its being considered part of a grouping of specific economic or residential activities illustrating the scope of another use."

When analyzing a proposed activity to determine if it is within the scope of a permitted use, it is necessary to determine what the primary activity is, and what activities, if any, are accessory, ancillary, or subordinate to the primary activity and if such accessory activities are necessary for the primary activity to be successful.

When determining if the primary activity is within the scope of a permitted use, the presence of accessory, ancillary, or subordinate activities does not disqualify the activity from being considered within the scope of the permitted use, but the impacts of the proposed activity, including all accessory, ancillary, or subordinate activities, must be considered when making the determination.

3. Classification of Uses not Readily Classified (SRC 162.030(c)).

When a specific proposed activity within the SWMU zone cannot be readily classified by the Planning Administrator, the Chapter provides for a method for such classification to be made. SRC 162.030(c) provides that when a proposed activity cannot be readily classified, the classification of the activity shall be referred to the Planning Commission for a formal interpretation pursuant to SRC 113.090(d).

SRC 113.090(d) states:

"Uses which the administrator determines cannot be readily classified with reference to SIC or a particular description in this zoning code shall be referred to the commission for a formal interpretation as provided in SRC 110.050 as the need arises. Where such a use is so similar in character and intensity to another use described in this zoning code that it is clear that the same intent in classifying

and conditioning the already described use is equally applicable to the use in question, the commission may determine that the use in question shall be deemed equivalent to such similar use, and in all respects governed by the same provisions of this zoning code applicable to such similar use.”

The Planning Administrator has determined that the proposed post acute rehabilitation activity is not readily classifiable. Pursuant to SRC 162.030(c), the classification of the proposed activity has been referred to the Planning Commission for determination.

4. Classification of Proposed Use.

Primary and Accessory Activities

In order to determine whether the proposed post acute rehabilitation facility falls within the scope of a permitted use in the SWMU zone, the use, which is defined under SRC 162.020 as the primary, general type of economic or residential activity that may be carried out on the property, and any accessory activities must be identified.

In the request submitted by the applicant, it is explained that the proposed facility is for rehabilitation purposes, the rehabilitation is not only for residents, but also for outpatient services as well, and that while the majority of the clients will be seniors, the services offered are not limited to any age.

The proposed use of the property is further described by the applicant as being comprised of several individual activities that are similar to other activities illustrating the scope of uses permitted in the SWMU zone, including:

- 52 living units which will provide for a mix of acute rehabilitation residents and long term residents.
- A variety of therapy spaces such as physical therapy, occupational therapy, speech therapy.
- Related administration areas suitable for both on-site and visiting physicians.
- A variety of personal service spaces and office/administrative areas related to supporting the care of the sub-acute rehabilitation residents and long term residents.

In order to better understand the types of activities associated with post acute rehabilitation, the Marquis Company website was reviewed. On the website, post acute rehabilitation facilities are described as follows:

“Post Acute Rehab Facilities – also known as nursing homes – are the most comprehensive option for residents who need continual care. They provide 24-hour medical care by Registered Nurses (RNs), Licensed Practical Nurses (LPNs or LVNs), and Certified Nurses’ Aides under physician supervision. A Post Acute Rehab facility usually offers two levels of care: Long Term and Rehabilitation.”

Long Term Care is described as follows:

“This level of care offers services required to maintain a resident’s Daily Living Activities (bathing, dressing, grooming, eating, etc.). Other services typically include laundry, housekeeping, scheduled activities, meals and snacks.

A team of nursing, social services, activities and dietary personnel meet regularly with the resident and family members to determine how to provide individualized medical and personal care. Long Term Care makes sense for those with long-term disabilities or chronic illnesses.”

Post Acute Rehabilitation is described as follows:

“Sometimes people who are otherwise healthy, have an acute episode or illness (fracture, stroke, surgical recovery, etc.) that causes them to require more help.

That’s where Skilled Care comes in. Services may include continuous intravenous (IV) therapy or daily rehabilitation like physical, occupational or speech therapy. The goal of Skilled Care is to enable people to return to the most independent setting possible, as soon as possible.”

In reviewing the description of the proposed activity provided in the formal interpretation request, and the descriptions contained on the Marquis Companies website, it appears that the primary activity to be carried out on the property is post acute rehabilitation, which is characterized by individuals living within a facility on either a short term or long term basis and receiving varying degrees of medical care and therapy administered by nurses under physician supervision.

The other associated activities that have been identified as components of the use are accessory activities that are incidental and subordinate to, dependent upon, and necessary for the successful operation of the primary use. Pursuant to SRC 162.030(b), such accessory activities, while separately classifiable unto themselves if standing on their own, are considered a part of the primary use and not separate uses for the purposes of the zone.

Classification of the Primary Use

To determine which use post acute rehabilitation falls within, it is helpful to first eliminate from the analysis the permitted uses that post acute rehabilitation is clearly not within, because the characteristics of the proposed activity are clearly not contemplated by the descriptions of the permitted uses.

Post acute rehabilitation does not fall within the following permitted uses:

- Retail Sales and Service – Retail Sales Oriented;
- Retail Sales and Service – Entertainment Oriented;
- Retail Sales and Service – Product Repair or Service Oriented;
- Commercial Parking;
- Manufacturing and Production;
- Industrial Service;
- Parks and Open Space; and
- Public Utilities.

The remaining permitted uses must be more closely analyzed to determine whether post acute rehabilitation falls within their scope. These uses include:

- Retail Sales and Service – Personal Services Oriented;
- Office;
- Residential; and
- Institutional.

Analysis of Retail Sales and Service – Personal Service Oriented Use

Retail Sales and Service use is described in SRC 162.040(a) as follows:

“Retail Sales and Service means the sale, lease or rent of new or used products to the general public, the provision of personal services, the provision of entertainment, or the provision of product repair or services for consumer and business goods.”

Examples of personal service oriented Retail Sales and Service uses include: banks; urgent medical care; laundromats; photographic studios; photocopy and blueprint services; hair, tanning, and personal care services; business, martial arts, and other trade schools; dance or music studios; veterinarians; and animal grooming.

Because post acute rehabilitation is not specifically identified as an activity that illustrates the scope of the personal service oriented Retail Sales and Service use, it must be determined whether the activity is similar to the other identified activities illustrating the scope of the use and whether the activity has similar impacts in type and magnitude to surrounding properties and city infrastructure as the other identified activities illustrating the scope of the use.

The example activities provided for personal service oriented Retail Sales and Service use illustrate the following characteristics for purposes of comparing similarity between the proposed activity and example activities:

- Individuals seeking to have a service provided to them personally; and
- Business activity that is limited in time to when the service is being provided (e.g. no overnight or long-term stays by the individual).

Of the activities listed as examples of personal service oriented Retail Sales and Service use, urgent medical care and personal care services are the closest to being similar to post acute rehabilitation because these activities, and the other activities identified as examples, share the characteristic that some sort of personal service, such as medical care, personal care, or other, is being provided to individuals. Though these activities share the provision of a personal service in common, they do not, however, share another characteristic of the proposed activity, individuals living at the facility and receiving care for extended periods of time.

Because post acute rehabilitation has characteristics that are not similar to the characteristics of the listed example activities for personal service oriented Retail Sales and Service use, the proposed activity does not fall within the scope of this use.

Analysis of Office Use

Office Use is described in SRC 162.040(b) as follows:

“Office Use means uses conducted in an office setting and generally focuses on business, professional, medical, or financial services.”

Examples of Office Use include: professional services such as lawyers, accountants, engineers, or architects; financial businesses such as lenders, brokerage houses, bank headquarters, or real estate agents; data processing; sales offices; TV and radio studios; medical and dental clinics, medical and dental laboratories; blood collection facilities.

Because post acute rehabilitation is not specifically identified as an activity that illustrates the scope of Office Use, it must be determined whether the activity is similar to the other identified activities illustrating the scope of the use and whether the activity has similar impacts in type and magnitude to surrounding properties and city infrastructure as the other identified activities illustrating the scope of the use.

The example activities provided for Office Use illustrate the following characteristics for purposes of comparing similarity between the proposed activity and example activities:

- Work must be conducted in an office setting;
- The provision of business, professional, medical, or financial services; and
- Business activity that is limited in time to when the service is being provided (e.g. no overnight or long-term stays by the individual).

Of the activities listed as examples of Office Use, medical and dental clinics are the closest to being similar to post acute rehabilitation because these activities share the characteristic of a medical service being provided to individuals. Though these activities share the provision of a medical service in common, they do not, however, share other characteristics in common, such as the activity being conducted in an office setting and individuals living at the facility and receiving care for extended periods of time.

Because post acute rehabilitation has characteristics that are not similar to the characteristics of the listed example activities for Office Use, the proposed activity does not fall within the scope of this use.

Analysis of Residential Use

Residential Use is described in SRC 162.040(c) as follows:

“Residential Use means the residential occupancy of a dwelling unit by a household. Occupancy may be through a landlord/tenant relationship, or through fee title ownership. Occupancy for periods of time shorter than thirty days are not considered Residential Use, but are considered temporary lodging under Retail Sales and Service. Residential Homes and Residential Facilities as defined by Oregon law are considered Residential Use.”

Examples of Residential Use include: apartments and retirement center apartments (including those with accessory services such as food service, dining rooms, and housekeeping); duplexes; residential condominiums; townhouses.

The following uses are not permitted under Residential Use, pursuant to SRC 162.040(c)(2):

- (a) Detached single-family dwellings.
- (b) Manufactured housing.

Because post acute rehabilitation is not specifically identified as an activity that illustrates the scope of Residential Use, it must be determined whether the activity is similar to the other identified activities illustrating the scope of the use and whether the activity has similar impacts in type and magnitude to surrounding properties and city infrastructure as the other identified activities illustrating the scope of the use.

The example activities provided for Residential Use illustrate the following characteristics for purposes of comparing similarity between the proposed activity and example activities:

- Long-term occupancy (30 days or more) of independent dwelling units by individuals of any age;
- Attached housing;
- Dwelling units that are owned or rented;
- Residential Homes serving 5 or few individuals and Residential Facilities serving 6 to 15 individuals; and
- Single family dwellings and manufactured housing not allowed.

Of the activities listed as examples of Residential Use, “retirement center apartments (including those with accessory services such as food service, dining rooms, and housekeeping)” are most similar to a post acute rehabilitation facility, because these activities share the characteristic that some of the individuals may live at the facility for more than 30 days and food service and other living accommodations are provided. However, a post acute rehabilitation facility is substantially different from a retirement center apartment in two substantive elements:

- (1) Retirement center apartments must provide complete stand alone “dwelling unit” apartments, while the proposed activity does not, and;

- (2) The scope and level of medical care at a retirement center apartment is substantially less than what may be offered at a post acute rehabilitation facility.

To qualify as a "dwelling unit" complete independent living facilities must be provided for each unit, including separate kitchen and bathroom facilities.

Retirement center apartments also have a more limited level of medical care than a post acute rehabilitation facility provides.

The SWMU zone also identifies Residential Homes and Residential Facilities as falling within Residential Use. Under State law (ORS 197.660), Residential Homes are defined as serving 5 or fewer individuals and Residential Facilities are defined as serving 6 to 15 individuals. Residential Homes and Facilities can have separate or common bathrooms and kitchen facilities, and involve varying degrees of residential care, training, or treatment depending on the need of individuals being served.

Residential Homes were included as permitted "Residential" uses within the SWMU Zone because State law requires them to be permitted in any residential or commercial zone that allows a single-family dwelling (ORS 196.665). Because the SWMU zone permits "townhouses" (attached single family dwellings), Residential Homes are required to be permitted.

Residential Facilities were included as permitted "Residential" uses within the SWMU Zone because State law requires them to be permitted in any zone where multifamily residential uses are a permitted use (ORS 197.667). Because the SWMU zone permits multiple family activities, Residential Facilities were also required to be permitted.

Residential Homes and Facilities provide "residential care," rehabilitative training, or treatment related to mental retardation, developmental disabilities, or recovery from dependency, but typically do not provide medical care or treatment (ORS 443.400). Post acute rehabilitation is similar to residential homes or facilities in terms of residency, but the level of medical care associated with post acute rehabilitation exceeds the level of care associated with Residential Homes and Facilities. In addition, the number of individuals receiving care within a Residential Home or Facility is limited within the SWMU zone to less than the proposed 52 beds included with the post acute rehabilitation facility.

Because post acute rehabilitation has characteristics that are not similar to the characteristics of the listed example activities for Residential Use, the proposed activity does not fall within the scope of this use.

Analysis of Institutional Use

Institutional Use is described in SRC 162.040(d) as follows:

"Institutional Use means activities of a public, nonprofit, or charitable nature which are generally providing a local service to the community. Generally, Institutional Uses provide services onsite or have employees onsite on a daily, weekly, or monthly basis. The provision of service is ongoing, not only provided for special events."

Examples of Institutional use include: daycare, preschools, and nursery schools; adult daycare; public and private schools and colleges; senior centers; community centers; nature/interpretive centers; religious institutions; libraries; transit shelters and park-and-ride facilities; fire stations, police stations and other structures providing necessary municipal services.

Because post acute rehabilitation is not specifically identified as an activity that illustrates the scope of Institutional Use, it must be determined whether the activity is similar to the other

identified activities illustrating the scope of the use and whether the activity has similar impacts in type and magnitude to surrounding properties and city infrastructure as the other identified activities illustrating the scope of the use.

The example activities provided for Institutional Use illustrate the following characteristics for purposes of comparing similarity between the proposed activity and example activities:

- Must be of a public, non-profit, or charitable nature;
- Provide a local service to the community; and
- Provision of service is ongoing and not only for special events.

Of the activities listed as examples of Institutional Use, there are none that appear to be similar to post acute rehabilitation. The activity is not public, non-profit, or charitable in nature and the types of services provided with post acute rehabilitation are different than those provided with an Institutional use.

Because post acute rehabilitation has characteristics that are not similar to the characteristics of the listed example activities for Institutional Use, the proposed activity does not fall within the scope of this use.

5. Conclusion

Because post acute rehabilitation does not fall within the scope of any of the permitted uses within the SWMU zone, the proposed activity is not a permitted use within the zone. In order for this use to be allowed, the zone would need to identify a type of use that is residential in nature that also includes the provision of long-term nursing, rehabilitation, and medical related care. Currently the SWMU zone does not identify such use.

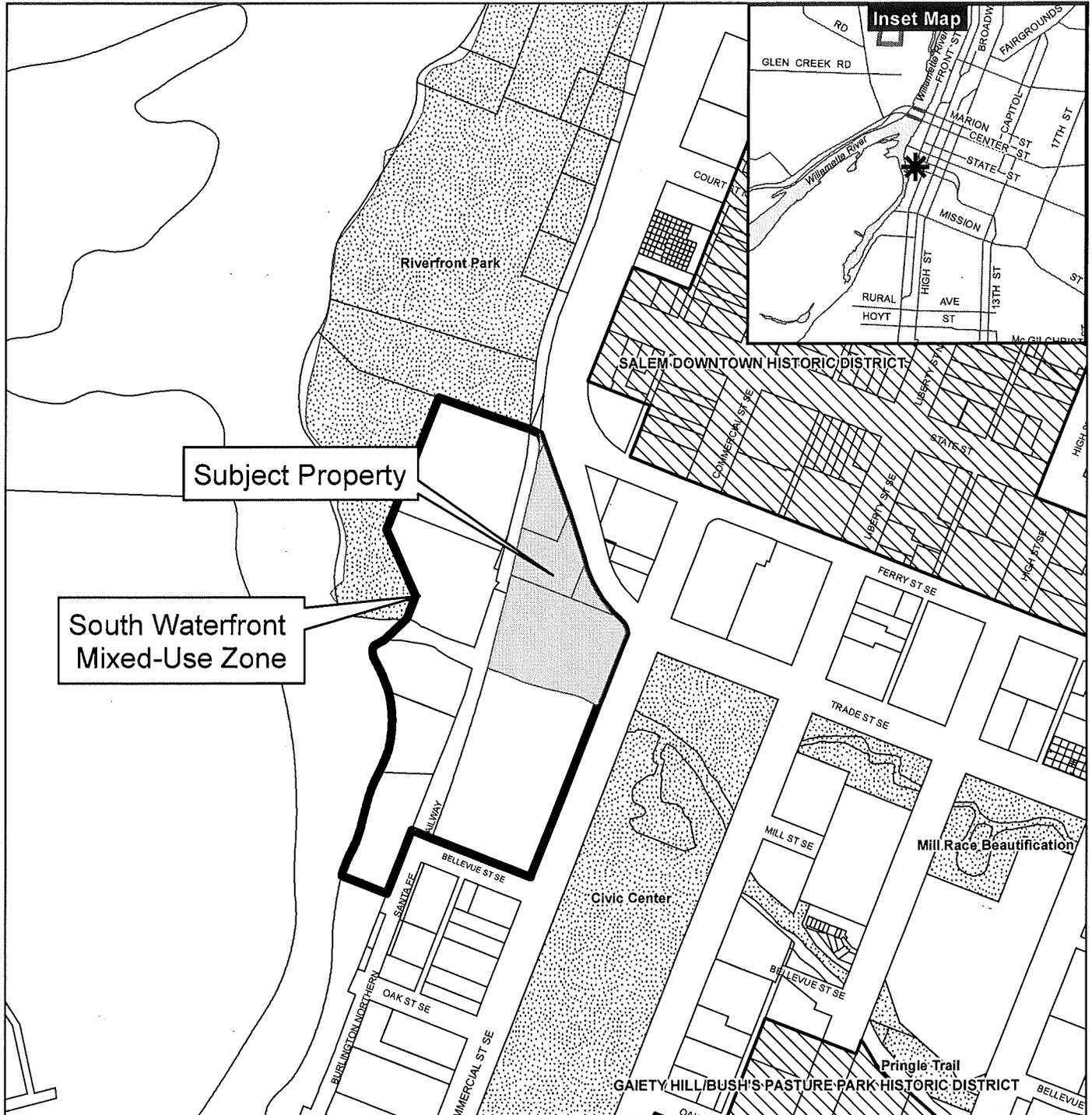
- Attachments:
1. Vicinity Map
 2. Use Classification Analysis Letter from CBTwo Architects (dated: January 3, 2012)
 3. Formal Interpretation Request from Saalfeld Griggs (dated: February 7, 2013)
 4. Memorandum on Procedure for Classifying Uses in SRC Chapter 162

Prepared by Bryce Bishop, Planner II

BEB

Vicinity Map

230 Front Street SE & 315 Commercial Street SE



Legend

-  Taxlots
-  Urban Growth Boundary
-  City Limits
-  Outside Salem City Limits
-  Historic District
-  Schools
-  Parks



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ATTACHMENT 1

Date: January 3, 2012

City of Salem
Community Development Department
555 Liberty Street SE, Room 305
Salem, OR 97301-3513

RE: Pre-App Follow-Up for: Marquis Salem SNF
Pringle North Block, Salem, Oregon

Per the City's request, the following is intended to provide further description of Marquis' anticipated use as it relates to the requirements of Chapter 162 with the Salem Revised Code (SRC).

ATTN: Amy Dixon, Case Planner

CLASSIFICATION OF USE PER SRC CHAPTER 162:

During the Pre-App conference on December 20, 2012, the City shared concerns that Marquis' proposed Skilled Nursing Facility may not qualify as an allowed use per SRC Chapter 162 (SWMU – South Waterfront Mixed-Use). After an extensive review of both Marquis' Functional Program and the requirements within the City's zoning ordinances, we are of the professional opinion that Marquis' facility qualifies as a permitted use.

SRC 162.030.a offers a 'Classification of Uses' stating:

"For the purposes of this Chapter, each use includes a grouping of specific activities that illustrate the scope of the use. The examples are provided to illustrate the scope of the use; however, the list is not intended to be exclusive. A specific activity not identified in such a grouping shall be considered part of the grouping if the activity is similar to the other specific activities that illustrate the scope of the use and if the activity has impacts to surrounding properties and city infrastructure that are similar in type and magnitude to the other specific activities that illustrate the scope of use."

This section clearly highlights two key components: the list is not exclusive, and therefore, similar but unlisted uses shall be permitted. Additionally, where specific uses are not allowed, they are indicated as such (see SRC sections 162.040.a.3 and 162.040.c.2). The intent of SRC Chapter 162 is not to list every allowed use, but rather to provide examples of desired activities.

INTERPRETATION OF USES PER SRC CHAPTER 113:

SRC 113.090.a provides clarification and interpretation of uses stating:

"Within each zoning district, uses are classified....by generic category with reference to the 'Standard Industrial Classification Manual'....In many cases, uses are listed under convenient categories, often the divisions of the SIC, which appear in capital letters or boldface type."

The permitted uses listed in SRC section 162.040 include boldface type and are assumed to be in reference to the SIC Manual descriptions. For the purpose of evaluating Marquis' facility, the Personal Service Oriented use (162.040.a.1.ii) was reviewed. Per the SIC Manual, 'Personal Services' are classified as type '72' and include activities such as '721 Laundry', '723 Beauty Shops', and '724 Barber Shops' which is alignment with SRC.162.040.a.1.ii which includes similar activities 'Laundromats', 'Hair', 'Tanning', and 'Personal Care Service'. Other examples within the SRC include 'Urgent Medical Care'

and 'Business'. Per the SIC Manual, these types of activities are classified as type '80 Health Services' meeting the definition of '801 Offices and Clinics', '806 Hospitals', and '8093 Specialty Outpatient Clinics'. Based on comparison of the SIC Manual to SRC Chapter 162, it is clear that some of the desired examples for Personal Service Oriented uses are based upon the classifications of SIC '72 Personal Services' and '80 Health Services'.

DESCRIPTION OF MARQUIS' ANTICIPATED USE:

The proposed facility is an approximate 38,000sf two-story Skilled Nursing building with a total of 52 beds serving both sub-acute and long term residents. If taken holistically at face value, the project falls within SIC '80 Health Services' as either '805 Nursing and Personal Care', '8051 Skilled Nursing Care', or '8059 Nursing and Personal Care'.

Although the building as a whole can be classified as Skilled Nursing, it is perhaps more appropriate to evaluate specific facility components which have distinctive uses. Examples are as follows:

- Per Marquis' Functional Program, the facility will contain a variety of therapy spaces. The current design features Physical Therapy, Occupational Therapy, Speech Therapy, and related admin areas suitable for both on-site and visiting physicians. The therapy spaces, although primarily for inpatient residents, is intended for outpatient use as well. These types of activities fall within SIC '80 Health Services' as either '801 Offices and Clinics' or '8093 Specialty Outpatient Clinics'.
- Per State Licensing requirements, the facility will contain a variety of personal service spaces. The design will be required to feature a commercial laundry station, a central bather for staff-assisted washing, and a salon for beauty and barber services. These types of activities fall within SIC '72 Personal Services' as '721 Laundry', '723 Beauty Shops', and '724 Barber Shops'.
- Per operational requirements, the facility will contain a variety of administration spaces. The current design features offices for accounting, human resources, social services, IT, support staff, etc. The administration spaces will function similarly to typical businesses with 8am-5pm office hours, Monday-Friday. These types of activities fall within SRC 162.040.b as 'Professional Services'.
- The facility will contain 52 beds with a mix of sub-acute and long term residents. Although more characteristic of Skilled Nursing, sub-acute or short term residents typically remain at the facility for less than 30 days and could therefore fall within SRC 162.040.a.2.iv as 'Retail Sales and Service – Temporary Lodging'. Similarly, long term residents who remain at the facility for over 30 days could fall within SRC 162.040.c.1 as 'Residential Use'.

CONCLUSION:

SRC 162.010 describes the intent of the SWMU – South Waterfront Mixed-Use zone, stating:

"....Development within the SWMU zone should contribute to a visually stimulating public realm and an active and lively pedestrian environment by locating uses which attract pedestrians and by creating visual interest along key intersections. The SWMU zone is intended to strike an appropriate balance between certainty and flexibility, and to promote a mix of land uses to link with and support existing downtown and waterfront uses."

Beyond the strict classification of uses, this section does an excellent job illustrating the intent of the

South Waterfront zone with two simple concepts: the creation of an active environment and the promotion of links to other downtown and waterfront uses. Although the concept of Skilled Nursing is rooted in institutional design, the newer model of care revolves around social healing and places of gathering. Marquis' proposed facility exhibits several qualities that meet the intent of SRC 162.010. Examples are as follows:

Visual Interest and Active Environment

- The facility will feature a variety of outdoors spaces as part of the healing by gathering concept that will provide visual interest and activity. There are typically six types of exterior areas within the Marquis model: the internal Therapy Courtyard space which includes a water feature and connectivity to the Entry and Reception area; the Covered Entry which is visible from Front Street and includes site benches for families and residents; the Outdoor Patio which is directly adjacent to the Dining Room; the Exterior Courtyard which is directly adjacent to the Activity Room; the Roof Top Terrace which can hold special events and abuts Front Street; and a more private exterior area for use by staff and visiting families.
- The Physical Therapy area will act as a design feature and reside in a prime location along Front Street. The room will feature a double volume space with an abundance of windows and act as the hub of the facility.

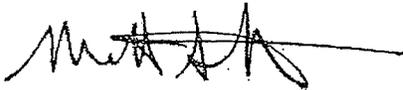
Links to other Downtown Uses

- The facility will work directly with Salem Hospital and other local clinics by both complimenting and augmenting existing service lines.
- Visiting family members from out of town will likely stay in nearby hotels and frequent local shops.
- Employees of the facility, especially those working within the administration department, are apt to eat lunch at local eateries and coffee shops.

Based on our review of the requirements and intent of SRC Chapter 162, we feel that Marquis' proposed use qualifies as an allowed use.

If you have any questions or need further clarification please contact me.

Thank you,

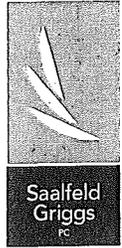


Matthew Stoffregen, AIA

February 7, 2013

Via Hand Delivery

Jim Lewis
Salem Planning Commission
c/o City of Salem
Community Development Department
555 Liberty Street SE, Room 305
Salem, OR 97301



RE: Pringle Square North, LLC
Our File No: 23001

Dear Commissioner Lewis:

This office represents Pringle Square North, LLC, the owner of property located at 230 Front St. SE, Salem, Oregon 97301 (Marion County Assessor's Map Nos. 073W27BA02000 and 073W27BA02100) which is located in the South Waterfront Mixed Use (SWMU) zone. Pringle Square North, LLC has contracted to sell a portion of its property to Marquis Companies, a group which currently operates 26 facilities in the western United States specializing in assisted living and post-acute rehabilitation care. On January 9, 2013, the City of Salem issued a pre-application report (Case Number: Pre-Ap 12-55, attached to this request) which indicated that the Planning Administrator had determined that a skilled nursing facility is not a permitted use in the zone. Our client is requesting a formal interpretation by the Planning Commission under Salem Revised Code (SRC) 110.050 that the use proposed by Marquis Companies is permitted in the SWMU zone.

The SWMU zone is unique in the City of Salem in that the permitted uses in this zone are described by reference to general use categories, with specific illustrative uses listed to help define ultimate what is to be permitted. The SWMU is structured identical to how the new Unified Development Code is structured. Unlike other zones in the City, identification of a specific use within a particular zone code provision is not required for a particular use to be permitted in the SWMU zone. As SRC 162.030(a) provides, "A specific activity not identified in such a grouping shall be considered part of the grouping if the activity is similar to the other specific activities that illustrate the scope of the use and if the activity has impacts to surrounding properties and city infrastructure that are similar in type and magnitude to the other specific activities that illustrate the scope of the use."

Marquis Companies proposed use is similar to other activities illustrating the scope of use in the SWMU zone and the activity has impacts to surrounding properties and city infrastructure that are similar in type and magnitude to other specific activities listed in the SWMU zone provisions. The facility will contain 52 living units which will provide for a mix of acute rehab residents and long term residents. The

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February 7, 2013

Jim Lewis

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facility will contain a variety of therapy spaces such as physical therapy, occupational therapy, speech therapy, and related administration areas suitable for both on-site and visiting physicians. The facility will also contain a variety of personal service spaces and office/administrative areas related to supporting the care of the sub-acute and long term residents.

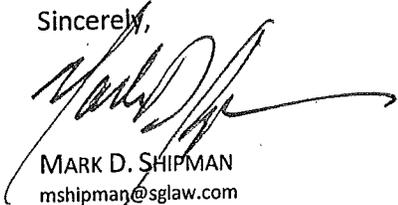
The SWMU zone specifically identifies a number of uses which illustrate the scope of what is to be permitted in the area and which are similar in nature and impact as those uses proposed by Marquis Companies. For example, the SWMU zone provides for residential uses such as apartments and retirement homes [SRC 162.040(c)(1)]; office uses such as medical and dental clinics [SRC 162.040(b)]; institutional uses such as adult daycare, senior centers and community centers [SRC 162.040(d)] and; personal services such as personal care services [SRC 162.040(a)(1)(ii)]. While the uses are proposed by Marquis Company are in line in nature and impact with those uses used to illustrate the scope of what is permitted in the SWMU zone, Marquis Companies uses are not similar in any way to those uses which are expressly prohibited in the zone under SRC 162.040(a)(3).

The intent and purpose of the SWMU zone is "to further economic development and support the creation of a vibrant downtown within the City of Salem." SRC 162.010. The proposed use is an investment of approximately \$12 million into the downtown and brings 50 full-time jobs. The facility is for rehabilitation purposes. Rehabilitation is not only for residents, but also for outpatient services as well. The facility will host evening wellness classes for the community. While the majority of its clients are seniors, the services offered are not limited to any age. The use is synergistic with many downtown uses, particularly Riverfront Park, Salem Hospital, and retail shops and restaurants for its employees. The use is also significantly important as a catalyst for further development of the former Boise Cascade site.

Accordingly, this use substantially advances the intent and purpose of the SWMU zone. This is particularly true when compared to other uses that are expressly permitted in the SWMU zone, such as metal and chemical production and manufacturing, indoor car sales lot, food processing, tool repair, and janitorial services. SRC 162.040(3)(f) & (g). While these uses are permitted in the zone, the zone expressly anticipates that "few customers, especially the general public, come to the site" for these uses. SRC 162.040(3)(f) & (g). Marquis' proposed acute rehabilitation center advances economic development and the creation of a vibrant downtown significantly more than these expressly permitted uses.

Pringle Square North, LLC respectfully requests that the Planning Commission find that the uses proposed by Marquis Companies are permitted under the SWMU zone.

Sincerely,



MARK D. SHIPMAN
mshipman@sglaw.com
Voice Message #310

MDS:jsm

Enclosures

cc: Brian Moore (w/o encl.)

Scott Miller (w/o encl.)

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MEMORANDUM

Legal Department, City of Salem, Rm. 205 City Hall, Phone: (503) 588-6003

To: Vickie Woods

From: Randall Tosh, City Attorney 

Date: February 27, 2013

Subject: Procedure for Classification of Uses in SRC Chapter 162

SRC Chapter 162 establishes the South Waterfront Mixed Use (SWMU) zone. SRC Chapter 162 does not use the SIC classification system for uses; instead, uses in the SWMU are described in a brief narrative fashion. To provide more specific guidance on what is and is not a permitted use, each narrative is followed by one or more lists of specific activities that "illustrate the scope" of that use. These lists of activities are not intended to be an exhaustive list of all the activities that comprise the use. Rather, the list is intended to give guidance to staff and the public in determining whether a specific activity is allowed by one of the uses in the SWMU zone.

The purpose of this "use" system was to eliminate the straightjacket imposed by the SIC classification system used elsewhere in the zoning code. The purpose *was not* to eliminate the concept of "uses," but to allow greater flexibility through a system that describes the characteristics of the use, and then identifies the types of activity that possess those characteristics and therefore fall within the scope of the use.

SRC 162.030, "Classification of Uses" establishes the process to determine whether a specific activity not identified in the illustrative list is within the scope of the use. The proposed activity is analyzed for (1) similarity to the specific listed activities; and (2) similarity of the impacts of the proposed activity to the impacts of the specific activities in the list. (Note that it is possible that an activity could be similar to the other listed activities, but have impacts that are not similar; and, conversely, not be similar to other listed activities, but have similar impacts. Despite this similarity, the activity would not be within the scope of the use, as the activity must be both similar in type *and* similar in impacts.) If a proposed activity is not specifically listed, the analysis must use inductive reasoning to reach a conclusion -- i.e., reasoning from the specific to the general by analyzing the list of activities for common qualities that more accurately define the use.

Under SRC 162.030(c), the Planning Administrator has the primary authority to determine whether a specific activity is within the scope of a use. If the Planning Administrator cannot determine whether the activity does or does not fall within the scope of the permitted use in the SWMU zone -- i.e., "cannot be readily classified" -- the Planning Administrator must refer the question to the Planning Commission for a classification of use, following the process under SRC 113.090(d). However, if the

Planning Administrator determines that the activity can be classified in relation to the permitted uses, the process ends.

Theory:

SRC Chapter 162 establishes criteria and an analytical framework for determining whether a proposed activity falls within the scope of a particular use. To determine whether the activity falls within the scope, the first step is *to determine the elements of the use*. An element is simply a characteristic that the activity must possess in order to fall within the scope of the use. The narrative descriptions contain different types of elements which are referred to in this memorandum as "essential qualities" and "attributes." Both must be considered in a use classification.

An "essential quality" is a characteristic that is integral to the scope of the use (in logic, essential quality would be a "necessary condition" to the use). If the activity doesn't possess an essential quality, then the activity does not fall within the scope of the use and the analysis ends. Essential qualities are indicated by mandatory or unconditional words such as "means," "is," and "shall."

An "attribute" is a characteristic identified in the scope of the use as optional or elective. The fact that the activity possesses the attribute makes it more likely that the activity falls within the scope of the use. However, the fact that the activity does not possess the attribute does not mean that it is not within the scope of the use. In contrast to an essential quality, an attribute does not create a "necessary condition" that must be satisfied for an activity to fall within the scope of the use, and an activity may be permitted even if it does not have the attribute, so long as the activity possesses all essential qualities, and is similar to the listed activities, and has similar impacts to the listed activities. Attributes are indicated by permissive or conditional words such as "generally," "may," and "can."

The way these two types of elements work in classifying use may be summarized as follows:

If x-activity does not possess any essential quality, it is not within the scope of the use.

If x-activity possesses all essential qualities, **and** is similar to the listed activities, **and** has impacts that are similar to the listed activities, it is within the scope of the use.

If x-activity possesses all essential qualities, **but** is either dissimilar to the listed activities, **or, even though similar to the listed activities**, has impacts that are dissimilar to the listed activities, it does not fall within the scope of the use.

This list of activities should be analyzed inductively to determine the general principles that define the use. For example, an essential quality of the use "retail sales and service" is that the activity must be "the sale, lease or rent of new or used products to the general

public, the provision of personal services, the provision of entertainment, or the provision of product repair or services for consumer and business goods." "Personal services" is not defined in the narrative description, and there are many types of economic activity that could be considered personal services. The following list of activities identifies certain "personal services" as being within the scope of the use, and must be used to derive the general qualities that establish similarity:

"Banks, urgent medical care, laundromats; photographic studios; photocopy and blueprint services; hair, tanning and personal care services; business, martial arts and other trade schools; dance or music studios; veterinarians; and animal grooming.

Reasoning from the specific to the general, the characteristics that these activities share in common include: an individual seeking to have a service to be provided to them personally; and a business activity that is limited in duration to the time when the service is being provided – e.g., no overnight stays by the person, etc.

Example:

The narrative description of "institutional use" provides:

"Institutional use means activities of a public, nonprofit, or charitable nature which are generally provided as a local service to the community. Generally, institutional uses provide services onsite or have employees onsite on a daily, weekly, or monthly basis. The provision of services is ongoing, not only provided for special events."

The activities in the list are:

" . . . [d]aycare, preschools, and nursery schools; adult daycare; public and private schools and colleges; senior centers; community centers; nature/interpretive centers; religious institutions; libraries; transit shelters and park-and-ride facilities; fire stations, police stations and other structures providing necessary municipal services."

In the description of "institutional use" there are two essential qualities:

- 1) The activity has to be of a public, non-profit, or charitable nature. ("means")
- 2) The services provided have to be ongoing, and not a special event. ("is")

There are three attributes:

- 1) The activity may be a local service to the community. ("generally")
- 2) The services may be provided onsite. ("generally")

3) The activity may have employees onsite on a daily weekly, or monthly basis. ("generally")

If an applicant approached the City and proposed a private, for-profit college, this activity would not be allowed under the "institutional use" category, because it does not possess one of the two essential qualities -- i.e., the for-profit college is not "public, non-profit, or charitable" in nature.

If an applicant approached the City with a proposal for a special one-time summer "music school for disadvantaged adults" that would be put on by a local university with non-profit status, this activity would likewise not be allowed under the "institutional use" category, because even though it is "non-profit," it is not "ongoing" in nature.

In these two examples, the activity does not possess one of the two essential qualities, and the analysis need go no further.

If an applicant approached the City with a proposed "event center" that would be owned and operated by a non-profit entity, where non-profit arts groups could present dance, theatrical and other performances, but which would not have any on-site employees, this activity would be allowed because it possesses both essential qualities, and two of the attributes.

There will obviously be "hard cases" where the answer is not clear. When that is the case, then the Planning Administrator must avail himself or herself of the "classification of use" process established by SRC 162.030(c).

Accessory, Ancillary or Subordinate Activities:

Many activities incorporate several other activities that, standing alone, would fall under different use categories or fall outside of all the use categories. The use is the primary activity that occurs on the property, and must fall within the scope of the narrative description of the use in order to be allowed in the SWMU zone. Accessory, ancillary or subordinate activities are considered part of the primary use, and do not, when considered collectively, constitute a separate use.

SRC 162.030(b) provides that accessory, ancillary or subordinate activities "necessary" for the successful operation of a specific activity are considered part of that activity, and not a "separate" activity. Therefore, when analyzing a proposal that includes several activities, it is necessary to determine what the primary activity is, and whether the other activities proposed by the applicant are subordinate to the primary activity and necessary for the successful operation of the primary activity.

Take, for example, "religious institutions," which is allowed under "institutional use." Religious institutions frequently provide daycare and kindergarten in the religious institution's facility. A religious institution may have a "mixed use facility" that includes

a coffee shop, community meeting rooms, limited retail activity, and an auditorium where services are conducted. Each of these different activities could be a separate activity under another use classification. However, the primary purpose is a place of worship. While a coffee shop might be subordinate and ancillary to a place of worship, it is not "necessary for" the success of the facility as a place of worship.