

**CITY OF SALEM
BEFORE THE HEARINGS OFFICER**

A REQUEST TO IDENTIFY THE APPROPRIATE USE CLASSIFICATION FOR A BUSINESS THAT SELLS AND RENTS SHIPPING CONTAINERS AND PROVIDES TEMPORARY ON-SITE STORAGE OF CUSTOMER PROPERTY WITHIN THESE CONTAINERS ON PROPERTY ZONED CG (GENERAL COMMERCIAL) AND LOCATED AT 5191 PORTLAND ROAD NE-97305	}	SUD19-02
(MARION COUNTY ASSESSOR'S MAP AND TAX LOT NUMBER: 062W31D01503).	}	FINDINGS OF FACT, CONCLUSIONS, AND DECISION

PROCESS:

This application does not require a public hearing.

SUMMARY OF THE APPLICATION AND DECISION

SUMMARY OF RECORD

The following items were received into the record:

All materials submitted by the Applicant, including the May 11, 2020 "Request for Review by Hearings Officer of SUD19-02" from Margaret Y. Gander-Vo; and the May 22, 2020 memorandum from Margaret Y. Gander-Vo to Aaron Panko objecting to the consideration of the May 21, 2020 staff report.

The May 1, 2020 Similar Use Determination decision by the Planning Director, including attachments and the May 21, 2020 Staff Report.

On May 22, 2020, the Applicant objected to the May 21, 2020 staff report, citing SRC 400.015(d)(3)(A), which on its face limits the Hearings Officer's review to "the application, the written explanation provided by the Applicant, and any other material submitted by the Applicant to the Planning Administrator." In reply to this objection, City staff filed a memorandum asserting a need to support the Planning Administrator's decision, and asking to limit the Hearings Officer's consideration to materials that were available to the Planning Administrator. The Hearings Officer notes that in this case there is no factual information summarized in the May 21, 2020 staff report that the Hearings Officer had not already gleaned from the Applicant's May 11 materials. The Hearings Officer notes that the staff report

contains arguments and explanations as well. Consideration of those arguments and explanations does not seem to be consistent with the express code language, so the Hearings Officer will not consider them. The Hearings Officer must point out, however, that both the analysis and the conclusions that staff suggests in the May 21, 2020 staff report may not be particularly novel or unlikely for the Hearings Officer to also arrive at, based on the facts and explanations provided by the Applicant and the discussion in the Planning Administrator's decision. Accordingly, nothing in this decision should be interpreted as precluding a particular conclusion by the Hearings Officer for the reason that the staff report includes it.

Based on the findings of fact, analysis and conclusions that follow, the Hearings Officer determines that the primary activities on the site are similar to those allowed as

FACTS AND FINDINGS

1. The following facts and finding are taken from the SRC, the Planning Administrator's Staff Report and decision dated May 1, 2020, and the Applicant's Request for Review by Hearings Officer dated May 11, 2020:

a. Background

The Hearings Officer notes that the Applicant has located a business selling and leasing large cargo containers on a 1.85 acre property located at 5191 Portland Road. The Subject Property is zoned Commercial General (CG) under the Code. A component of this activity is the use of one of the Containers as a model office, which the Applicant plans to use for potential customers to preview one potential use of the Containers prior to purchase or lease. Another component is the storing of the large cargo containers. The Applicant stores some containers as inventory for sale or lease, and also stores some containers that have already been sold or leased and that are used by the customers to hold goods, tools or other personal property. The Applicant sees the primary use for the property as advertising, sale, and lease of the containers, permitted in the CG Zone as Retail Sales or Heavy Vehicle and Trailer Sales; City staff visited the property and assert that the primary use is "Self-service storage," which is not permitted in the CG Zone.

To address this dispute, Applicant submitted a bifurcated application for a Similar Use Determination. First, Applicant seeks a determination that the advertising, sale and leasing of containers is a permitted principal activity. Second, Applicant seeks a determination that the leased Containers may be temporarily stored on-site as a permitted accessory use, provided that Applicant agrees, as a condition of approval,

that there shall be no onsite loading, unloading, or access to stored goods by any of Applicant's customers.

b. Proposed Use

The Hearings Officer notes that the Applicant's request describes the following activities involved in the proposed use:

"The Principal Use will be open to the general public with an on-site sales person available to show potential customers the existing inventory and to facilitate the purchase and rental of the containers. While there is standardization across the inventory of the type and size of container, there is some variability within the inventory due to the availability of both new and used containers available for purchase. As a result, the vast majority of purchasing customers visit the site and select between the existing inventory. During the month of April, there were eleven (11) container sales, of those sales, nine (9) of the customers visited the Subject Property. Three (3) of those customers retrieved their shipping container from the Subject Property.

There are four (4) employees, one off-site sales and administrative professional, one on-site sales professional, and two (2) drivers. The drivers perform loading and unloading of the containers, and delivery of the containers to customers as well as any maintenance needed for the shipping containers. The unloading and loading of the shipping containers with customer belongings is the responsibility of the drivers; . . ."

The majority of trips to and from the Subject Property are related to the delivery and return of leased shipping containers. During the month of April approximately 23 shipping containers were delivered to local customers, while there were eight deliveries of purchased shipping containers, nine site visits by customers seeking to purchase a shipping container, and three shipping containers were retrieved by the customer purchasing the container.

The Hearings Officer notes the "Concept Plan" attached to the Applicant's November 19, 2019 written narrative, illustrating the discussion in the narrative of the proposed activities on the property and the relative amount of the property devoted to each activity.

The Hearings Officer notes the arguments and explanations from the Applicant's November 19, 2019 written narrative attached to the Planning Administrator's May 1, 2020 decision and from the Applicant's May 11, 2020 request. The Hearings Officer notes, without

agreement except as expressly set out in this decision, the various responses raised by the Applicant following a summary from the Planning Administrator's decision. Similarly, the Hearings Officer notes, without agreement except as expressly set out in this decision, the analysis provided by the Planning Administrator.

c. Classification of Uses

The Hearings Officer notes that the various land uses allowed within the City are classified under SRC Chapter 400 (Use Classifications). SRC Chapter 400 establishes a hierarchical framework for the organization of land uses, beginning with general classifications of land uses (e.g. Residential, Commercial, Public Service, Industrial, etc.), which are then further divided into categories of land uses (e.g. Household Living, Business and Professional Services, Retail Sales and Service, Manufacturing, etc.), which in turn are further described as uses (e.g. Single Family Residential, Office, Retail Service, Manufacturing), based on the common functional, product, or physical characteristics of the use and its related impacts.

The Hearings Officer notes that the use categories identified under SRC Chapter 400 include a narrative description of the general characteristics of the use, examples of the types of activities that possess the characteristics of (and therefore fall within) the use, and a list of activities that possess some of the characteristics of the use but which more appropriately are classified under another use.

While SRC Chapter 400 is intended to provide a comprehensive framework for the classification of land uses, the SRC provides for instances when a particular use may not be readily classified under the specific use categories included within the chapter. SRC 400.015(d) establishes a similar use determination process, so specific uses which cannot be readily classified as falling within a particular use, or specific uses that possess the characteristics of two or more uses, can be classified. SRC 400.015(a) directs how to classify a use: "[t]he principal activity, or principal activities, that occur upon a property establish the use. A principal activity falls within a specific use when the principal activity possesses the characteristics of the use, and the broader use category the use falls within."

Relevant SRC provisions:

Sec. 400.015. - Classification of uses.

- (a) *Use.* The principal activity, or principal activities, that occur upon a property establish the use. A principal activity falls within a specific use when the principal activity possesses the characteristics of the use, and the broader use category the use falls within.
- (b) *Accessory uses.* Accessory activities that are clearly incidental, subordinate to, dependent upon, and conducted in support of one or more principal activities on a property are accessory uses. Accessory uses must be located on the same lot, and must be operated under the same ownership, as the principle activity. To determine whether an activity is clearly incidental, subordinate to, dependent upon, and conducted in support of another activity, the following factors shall be considered:
 - (1) The location and arrangement of the activity on the site, and/or its arrangement within a building, in comparison to other activities on the property;
 - (2) The relative amount of site or floor space and equipment devoted to the activity in comparison to other activities on the site and/or in the building;
 - (3) The relative amounts of sales from the activity in comparison to other activities on the property;
 - (4) The relative number of employees for the activity in comparison to other activities on the property;
 - (5) Whether the activity would likely be found independent of the other activities on the property;
 - (6) Whether the activity aids or contributes to other activities on the property or carries on the function of other activities on the property;
 - (7) The relative number of vehicle trips generated by the activity in comparison to other activities on the property;
 - (8) Whether the activity will have its own signage;
 - (9) How the activity advertises itself in comparison to other activities on the property; and
 - (10) The hours of operation of the activity in comparison to other activities on the property.
- (c) *Application of regulations.* When there are multiple uses on a property, each use must comply with the regulations that are specific to that use. Unless otherwise provided under the UDC, accessory uses are considered part of the use and are subject to the same regulations as the use.
- (d) *Similar use determination.*
 - (1) *Purpose.* The purpose of a similar use determination is to provide a process to classify an activity as falling within a particular use when that activity cannot be readily classified as falling within a particular use, or when that activity possesses characteristics of two or more uses.
 - (2) *Procedure.* In-lieu of the procedures set forth in SRC chapter 300, similar use determinations shall follow the procedures set forth in this subsection.
 - (3) *The Planning Administrator may make similar use determinations.* Requests for similar use determinations shall be submitted on a form provided by the Planning Administrator. The applicant for a similar use determination shall provide a written explanation why the applicant believes the activity falls within a particular use.
 - (A) The Planning Administrator shall issue a written determination identifying the use the proposed activity falls within. Within ten business days after the Planning Administrator has provided notice to the applicant of the adoption of the similar use determination, the applicant may submit a request for review of the Planning Administrator's decision. The review shall be by the Hearings Officer. The Hearings Officer's review shall be based on the application, the written explanation provided by the applicant, and any other material submitted by the applicant to the Planning Administrator. The Hearings Officer may endorse or refute the Planning Administrator's decision. If the Hearings Officer refutes the Planning Administrator's decision, the Hearings Officer shall identify which use the activity falls under. The Hearings Officer's decision shall be issued no later than 15 business days after the request for review

Sec. 400.045. - Retail sales and service.

Retail sales and service consists of the sale, lease, or rental of products or services to the general public for personal or household use. Customers typically come to the site to obtain goods or services. Some delivery or shipping may also be included.

(b) *Retail sales.*

- (1) *Characteristics.* Retail sales is characterized by the sale, lease, or rental of products directly to final consumers, but may include the sale, lease, or rental of products to contractors. Visits by customers are generally not scheduled. Stores are typically open to the general public.
- (2) *Examples.* Appliance stores; auto supply stores; bicycle shops; book stores; candy stores; catering establishments; clothing, footwear, and apparel stores; commercial art galleries; consignment shops; convenience stores; copy shops; costume or formal wear rental; department stores; drug stores; electronics stores; fruit and vegetable markets; furniture, lighting, and home furnishing stores; furniture rental; grocery stores; hardware stores; health and beauty stores; lawn and garden supply stores; liquor stores; lumber and building materials stores; meat and seafood markets; paint stores; pawn shops; pet stores and pet supply stores; retail bakeries; retail nurseries; photocopying and blueprinting; sporting goods stores; tobacco stores; video rental.
- (3) *Exceptions.*
 - (A) Gasoline stations are included in motor vehicle, trailer, and manufactured dwelling sales and services: motor vehicle services.
 - (B) Truck stops are included in motor vehicle, trailer, and manufactured dwelling sales and services: heavy vehicle and trailer service and storage.
 - (C) Sales, leasing, and rental of new and used vehicles, including, but not limited to, automobiles, trucks, motorcycles, boats, and recreational vehicles, are included in motor vehicle, trailer, and manufactured dwelling sales and services: motor vehicle and manufactured dwelling and trailers sales.
 - (D) Lumber yards and other building material businesses that sell only to contractors are included in wholesale sales, storage, and distribution.
 - (E) Sales, rental, and leasing of heavy trucks and trailers are included in motor vehicle, trailer, and manufactured dwelling sales and services: heavy vehicle and trailer sales.

Sec. 400.055. - Motor vehicle, trailer, and manufactured dwelling sales and services.

Motor vehicle, trailer, and manufactured dwelling sales and services consists of the sale, rental, and leasing of motor vehicles, trailers, and manufactured dwellings; the servicing and non-accessory storage of motor vehicles; and vehicles for hire with drivers. Motor vehicles include automobiles, trucks, motorcycles, boats, recreational vehicles, other personal transportation vehicles, buses, motorized non-road vehicles, and heavy vehicles.

(a) *Motor vehicle and manufactured dwelling and trailer sales.*

- (1) *Characteristics.* Motor vehicle and manufactured dwelling and trailer sales is characterized by the sales, leasing, and rental of new and used motor vehicles, other than heavy vehicles and heavy equipment, and the sales, leasing, and rental of manufactured dwellings and trailers. Motor vehicle and manufactured dwelling and trailer sales typically requires extensive indoor and/or outdoor display or storage areas. Customers typically come to the site to view, select, purchase, and/or pick up the vehicles, manufactured dwellings, or trailers.
- (2) *Examples.* Sales, leasing, and rental of new and used motor vehicles including automobiles, trucks, motorcycles, motorized boats, recreational vehicles, and other personal transportation vehicles; car rental agencies; manufactured dwelling and pre-fabricated structure sales and display sites; sales, leasing, or rental of trailers.
- (3) *Exceptions.*
 - (A) Heavy vehicle and heavy equipment sales, leasing, and rental are included in motor vehicle, trailer, and manufactured dwelling sales and services: heavy vehicle and trailer sales.
 - (B) Auto supply stores are included in retail sales and services: retail sales.
 - (C) Sales of used motor vehicle parts is included in wholesale sales, storage, and distribution: heavy wholesaling.
 - (D) Wholesale sales of motor vehicles, manufactured dwellings, and trailers is included in wholesale sales, storage, and distribution: heavy wholesaling or general wholesaling, dependent upon whether the activity occurs entirely within an enclosed building.
 - (E) Temporary motor vehicle and recreational vehicle sales are included in temporary uses.

(b) *Motor vehicle services.*

- (1) *Characteristics.* Motor vehicle services are characterized by establishments providing repair, service, testing, maintenance, cleaning, and other services for motor vehicles, other than heavy vehicles and heavy equipment. Vehicles may be brought to the site by customers or by a towing service. If motor vehicle parts are sold, they are typically installed on-site.
- (2) *Examples.* Auto body shops; auto glass repair; automotive paint shops; automotive repair shops; car washes; gasoline stations and unattended card-key stations; motorcycle repair shops; quick lubrication services; testing of cars and trucks, including pollution and safety testing; tire sales and installation shops; towing services; vehicle engine, transmission and muffler repair shops; vehicle upholstery and detailing shops.
- (3) *Exceptions.*
 - (A) Truck stops are included in motor vehicle, trailer, and manufactured dwelling sales and services: heavy vehicle and trailer service and storage.

Sec. 400.095. - Wholesale sales, storage, and distribution.

Wholesale sales, storage, and distribution consists of facilities for the storage, transfer, distribution, repackaging, or wholesale sales of physical goods or personal property other than live animals.

(a) *General wholesaling.*

- (1) *Characteristics.* General wholesaling is characterized by sales of physical products primarily to customers other than the general public, including retailers, other wholesalers, and industrial, commercial, institutional, farm, or business users. The general public rarely comes to the site. Products are generally stored on-site, and may also be assembled, sorted, graded and/or re-packaged on-site. For establishments primarily engaged in sales to industrial, commercial, institutional, farm, or business users, activities on the site may also include on-site sales or order taking display areas. Products may be picked up on-site or delivered to the purchaser. General wholesaling takes place primarily within an enclosed building, and does not include the sale of dangerous, toxic, or potentially contaminating products.
- (2) *Examples.* Wholesale sales of supplies, light-duty equipment, and store fixtures; wholesale sales of products that are not dangerous, toxic, or potentially contaminating; wholesale sales of automobiles and other motor vehicles, manufactured dwellings, and trailers, when stored inside.
- (3) *Exceptions.*
 - (A) Wholesale sales of dangerous, toxic, or potentially contaminating products, and those requiring outdoor storage, are included in wholesale sales, storage, and distribution: heavy wholesaling.
 - (B) Establishments primarily storing and distributing goods with little on-site business activity are included in wholesale sales, storage, and distribution: warehousing and distribution.

(b) *Heavy wholesaling.*

- (1) *Characteristics.* Heavy wholesaling is characterized by sales of physical products that are dangerous, toxic, or potentially contaminating, or that require outdoor storage, primarily to customers, other than the general public, including retailers, other wholesalers, and industrial, commercial, institutional, farm, or business users. The general public rarely comes to the site. Products are generally stored on-site, and may also be assembled, sorted, graded and/or re-packaged on-site. Activities on the site may also include on-site sales or display areas. Products may be picked up on-site or delivered to the purchaser.
- (2) *Examples.* Wholesale sales of automobiles and other motor vehicles, manufactured dwellings, and trailers, where stored outside; wholesale sales of monuments and grave markers; wholesale sales of metals, coal, and other minerals and ores; wholesale sales of ammunition and firearms; wholesale sales of petroleum and petroleum products; wholesale sales of chemicals; wholesale sales of logs, timber products, wood, wood chips, nursery stock, and lumber and construction materials requiring outdoor storage; grain elevators for the wholesale sale of agricultural products; recovery and wholesale sales of used motor vehicle parts, including junkyards and vehicle salvage; processing and wholesale sales of scrap and waste materials, including wrecking yards and scrap dealers; industrial equipment.
- (3) *Exceptions.*
 - (A) Establishments primarily storing and distributing goods with little on-site business activity are included in wholesale sales, storage, and distribution: warehousing and distribution.

(c) *Warehousing and distribution.*

- (1) *Characteristics.* Warehousing and distribution is characterized by the storage and/or distribution of goods or personal property. Goods are generally delivered to other firms or the final consumer. Except for some will-call pickups, there is little on-site sales.
- (2) *Examples.* Catalog and mail order houses; cold storage plants and frozen food lockers; distribution centers; distribution facilities for internet retailers; free standing warehouses associated with retail stores such as furniture or appliance stores; grain terminals; major post offices and postal distribution centers; repossession service; stockpiling of sand, gravel, bark dust, or other aggregate and landscaping materials; truck or rail freight terminals.
- (3) *Exceptions.*
 - (A) Uses that involve the transfer or storage of solid or liquid wastes are included in utilities: waste-related facilities.
 - (B) Oil and gasoline storage caverns and petroleum and chemical bulk stations and terminals are included in wholesale sales, storage, and distribution: heavy wholesaling.

d. Analysis

1. Similar Use Determination process.

The Hearings Officer notes the Applicant's argument that the Planning Administrator incorrectly viewed the process for a similar use determination, leading to an unlawful decision. As the Hearings Officer understands the argument, the Applicant asserts that the similar use determination process should not identify which particular use a primary activity is most similar to, but should instead confirm only whether a primary activity is similar to a use proposed by the Applicant. Assuming there is any similarity, then the primary activity would be allowed in any zone where any somewhat similar use would be permitted. Because the Planning Administrator first eliminated some uses that the primary activity was not similar to, then identified uses that did share common characteristics, and finally determined with which use the primary activity had the most common characteristics, the Applicant asserts that the Planning Administrator has read a restriction into the code that is not express. The Hearings Officer notes that SRC 400.015(d)(1) provides the purpose for a similar use determination:

Purpose. The purpose of a similar use determination is to provide a process to classify an activity as falling within a particular use when that activity cannot be readily classified as falling within a particular use, or when that activity possesses characteristics of two or more uses.

The Hearings Officer disagrees with the Applicant that the Planning Administrator did not follow the correct determination process. The Applicant

overstates the Planning Administrator's analysis of the primary activity. The Hearings Officer does not view the language in the SRC as requiring a determination that if **any** characteristic of the primary activity is somewhat similar to **any** particular use, then the activity must be classified as falling within that use and allowed in any zone where that use is allowed. The Hearings Officer notes that the SRC uses the terms "an activity" and "a particular use." The SRC language clearly describes classifying a single activity within a single use. More relevant to the decision at hand, the Hearings Officer sees the analysis by the Planning Administrator as concerned first with the need to determine exactly which proposed use would be the actual primary activity, and then with classifying the primary activity within a particular use. The Applicant disagrees with the Planning Administrator's determination of the principal activity, which then leads to disagreement regarding the use classification. Regardless, the Hearings Officer finds that the Planning Administrator correctly reviewed the request to determine which single use classification the primary activity on the site was similar to.

The Hearings Officer understands the Applicant's argument to begin with the conclusion that the primary activity is retail sales and leasing of the containers, which leads to the characterization of the storage of the containers (whether packed or not) on the site as merely a related subordinate activity, inventory, advertising, or demonstration of the product for sale, dependent and subordinate to the primary activity of sales and rentals. Because, in the Applicant's view, the primary activity is retail sales of a product, the use must be allowed in the zone.

2. Retail sales and service.

The Hearings Officer notes that HRC 400.045 provides the following:

Sec. 400.045. - Retail sales and service.

Retail sales and service consists of the sale, lease, or rental of products or services to the general public for personal or household use. Customers typically come to the site to obtain goods or services. Some delivery or shipping may also be included.

(b) Retail sales.

Characteristics. Retail sales is characterized by the sale, lease, or rental of products directly to final consumers, but may include the sale, lease, or rental of

products to contractors. Visits by customers are generally not scheduled. Stores are typically open to the general public.

Analysis:

The Hearings Officer notes the size of the property, the proportion of the property devoted to outdoor storage of the containers, and the relatively small size of the proposed office (and is left to speculate without evidence in the record as to how much of the identified parking lot will be used for customer parking and how much will be used for staging the loading, unloading, transportation, and moving of containers within the site). The Hearings Officer notes the relatively small number of employees, with half of the employees devoted to moving and transporting containers on and off the site, one employee devoted solely to on-site sales and leases, and one devoted to off-site sales and administration. The Hearings Officer notes that the containers themselves function both as a final product and as a raw material for conversion into structures. The Hearings Officer notes the storage of containers packed with customer's belongings.

The Hearings Officer notes that the Applicant states that the majority of trips to and from the Subject Property are related to the delivery and return of leased shipping containers. During the month of April, approximately 23 shipping containers were delivered to local customers, while there were eight deliveries of purchased shipping containers, nine site visits by customers seeking to purchase a shipping container, and three shipping containers were retrieved by the customer purchasing the container. The Applicant acknowledges that the proportion of trips made by customers does not necessarily support the Principal Use as a retail use, but asserts that the breakdown of numbers doesn't necessarily support a finding against retail use.

The Hearings Officer notes and agrees with the Applicant's explanation that although the sale and lease of containers serves a small population, that fact alone would not affect the use classification of an activity (or be a particularly determinative factor in concluding that the sales and lease of containers was not the primary activity), as there are many retail sales uses that are open to the general public that are not frequented by the majority of the general public. The Hearings Officer agrees that the proportion of the general population visiting the site is not particularly relevant to the use determination. However, the Hearings Officer does not agree that the relevant question is whether the business is open to the general public or whether scheduled appointments are required. Instead, the Hearings Officer sees the relevant question as whether the primary activity on the site is the sale of the products, with some related incidental activity related to transportation and

storage, or if the activity on the site is primarily something else, with some incidental retail sales activity.

The Hearings Officer finds that the nature of the trips to and from the site and the nature of the assigned work for employees is informative in answering this question, and focuses on the general description in SRC 400.045 of Retail sales and service: *“Retail sales and service consists of the sale, lease, or rental of products or services to the general public for personal or household use. Customers typically come to the site to obtain goods or services. Some delivery or shipping may also be included.”*

The Hearings Officer reads *“some delivery or shipping”* as an important distinction in the SRC between activities where selling products or providing services are the primary activities on a site, and those uses where delivery and shipping is the primary activity. The Applicant argues that the proportion of trips made by customers does not necessarily support the Principal Use being something other than a retail use, asserting that the majority of retail uses are experiencing a shift from in-person purchases to online purchases.

Although the Applicant provided no evidence to support this assertion, the Hearings Officer might generally agree with the Applicant’s anecdotal explanation of a shift in retail business models. But this is not particularly helpful to the Applicant, as however accurate that explanation might be, the language in the SRC describing the characteristics of various uses is the regulation that applies to this case, even if changing circumstances means it does not reflect the most recent business models. The SRC language is clear that the primary activity in a retail sales and service use cannot be shipping and delivery. In this case, the Hearings Officer finds that the number of on-site employees devoted to shipping and delivery tasks, the number of vehicle trips to and from the site devoted to delivery and retrieval, and the amount of space on the site devoted to storage, delivery and retrieval of the containers, all provides clear evidence that the primary activity on the site is outdoor storage, delivery and shipping of containers, not sales or services.

The Hearings Officer notes that the Applicant asserts that the loading and unloading of the containers would happen on the site whether the containers are full or empty, demonstrating that the storage of personal property within already leased or sold containers is properly classified as an accessory use. The Hearings Officer tends to agree (although the Hearings Officer notes that because containers can be stacked, a proposal with a condition limiting the maximum number of packed containers allowed on the site would be more persuasive), but nonetheless, the Hearings Officer finds that the primary

activity is outdoor storage, delivery and retrieval of the containers, with the sales and service activity as a subordinate and incidental activity on the site.

3. Motor vehicle, trailer and manufactured dwelling sales and services.

The Hearings Officer notes the Applicant's discussion of SRC 400.055, Motor vehicle, trailer, and manufactured dwelling sales and services, but sees the same clear distinction—SRC 400.055 focuses on sales and services as the primary activities, not delivery and retrieval or outdoor storage. The Hearings Officer understands that the Applicant sees the storage of containers on the site as very similar to motor vehicle or manufactured home sales facilities. The Hearings Officer notes that there is nothing in the record to demonstrate the average or expected proportion of employees devoted to shipping and delivery of motor vehicles, trailers, or manufactured homes, or the proportion of traffic to and from a motor vehicle, trailer or manufactured homes sales facility devoted to delivery and retrieval of the products for sale. The Hearings Officer finds that the Applicant has the burden of proof to demonstrate that a principle activity is similar enough to those in a specific use, and without evidence demonstrating that these factors are similar to what would be expected at a motor vehicle, trailer, or manufactured home sales and service site, the Hearings Officer finds that the proposed principle activity on this site is not similar to the Motor vehicle, trailer and manufactured dwelling sales and services use.

4. Wholesale sales, storage, and distribution.

SRC 400.095 provides the following description of Wholesale sales, storage, and distribution uses:

Sec. 400.095. - Wholesale sales, storage, and distribution.

Wholesale sales, storage, and distribution consists of facilities for the storage, transfer, distribution, repackaging, or wholesale sales of physical goods or personal property other than live animals.

*(a) ****

(3) Exceptions.

(A) Wholesale sales of dangerous, toxic, or potentially contaminating products, and those requiring outdoor storage, are included in wholesale sales, storage, and distribution: heavy wholesaling.

(B) Establishments primarily storing and distributing goods with little on-site business activity are included in wholesale sales, storage, and distribution: warehousing and distribution.

*(b) ****

(c) Warehousing and distribution.

(1) Characteristics. Warehousing and distribution is characterized by the storage and/or distribution of goods or personal property. Goods are generally delivered to other firms or the final consumer. Except for some will-call pickups, there is little on-site sales.

(2) Examples. Catalog and mail order houses; cold storage plants and frozen food lockers; distribution centers; distribution facilities for internet retailers; free standing warehouses associated with retail stores such as furniture or appliance stores; grain terminals; major post offices and postal distribution centers; repossession service; stockpiling of sand, gravel, bark dust, or other aggregate and landscaping materials; truck or rail freight terminals.

The Hearings Officer notes that the characteristics of Warehousing and distribution primary activities in SRC 400.095(c)(1) are the same as the Applicant's description of the characteristics of the activities on this site—containers are stored on the site, containers are delivered to either the final consumer or other firms who use the containers, containers are retrieved and then stored, for future delivery. Traffic to and from the site is mostly generated by the delivery and retrieval of containers; half of the employees do nothing but delivery, retrieval and moving on the site of containers; and the bulk of the site is devoted to the storage of containers. As described by the Applicant, customers do not often pick up and move containers themselves, and most sales are not expected to be on-site. The Hearings Officer finds that the primary activity on the site is a Wholesale sales, storage and distribution: Warehousing and distribution use.

Accordingly, the Hearings Officer endorses the Planning Administrator's decision.

Conclusion and Decision

Based on the application, the written explanation provided by the Applicant, and any other material submitted by the Applicant to the Planning Administrator, the Hearings Officer endorses the Planning Administrator's decision. The Hearings Officer finds that based on the proportion of employees on the site devoted to each activity, the proportion and amount of vehicle trips to and from the site related to those activities, and the proportion of area of the site devoted to each activity, the proposed primary activity is not sufficiently similar to the characteristics of activities commonly classified within the Retail sales and service use or to the characteristics of activities commonly classified within the Motor vehicle, trailer,

and manufactured dwelling sales and services uses to be classified as either use. Based on the description provided by the Applicant, the Hearings Officer finds that the proposed primary activity has the characteristics of the Warehousing and distribution types of uses within the classification of Wholesale sales, storage and distribution uses. The Hearings Officer finds the retail sales and service activities are subordinate, accessory activities.

Therefore, for the reasons stated above, the Hearings Officer has determined that the proposed use is classified as a Warehousing and distribution use under SRC 400.095(c). The Hearings Officer finds that this use is not permitted in the proposed CG zone and is therefore not a permitted use on the subject site.

DATED: June 1, 2020.

A handwritten signature in black ink, appearing to read 'James K. Brewer', with a long horizontal flourish extending to the right.

James K. Brewer, Hearings Officer