

## City Staff Response to Holland & Hart Hypothetical Scenario Questions in December 13 Letter to the City Council

### Hypotheticals:

- a. Tenant has 30,000 square feet of R&D space (software programming) in Building 1 on Lot A. Tenant wants to move its 20,000 square feet of corporate headquarters offices from a different state to be near its Building 1 operations:
  - i. Can the 20,000 feet of corporate office be on the first floor of Building 1, Lot A? **Yes, it would be considered part of the R&D space and therefore not a principal office use.**
  - ii. What if there is another tenant with 40,000 square feet of non-R&D office in Building 1, Lot A? **Yes, because the 20,000 sf of corporate office would be considered part of the R&D space, not a separate principal office use.**
  - iii. Would your answer be different if the 30,000 sf R&D tenant was moving 50,000 square feet of corporate headquarters to Building 1, Lot A, and the R&D space use stayed at 30,000 square feet? **No, the definition of R&D includes “accessory office” space , so as long as the corporate headquarters were able to meet the definition of accessory office, this would be considered part of the R&D space. The definition of accessory office is “Office, accessory means an office subordinate to, a necessary part of, and on the same lot as the principal business, commercial, or industrial use, including, without limitation, administrative, record-keeping, drafting, and research and development offices. An accessory office is considered an accessory use.”**
  - iv. What if there is no room in Building 1 Lot A for the corporate offices and so the tenant leases space on the adjoining Lot B owned by a different owner?
    1. Would the 20,000 sf of corporate headquarters office still be considered “accessory”? **No, the office must be on the same lot to be considered part of the R&D use per the definition of “accessory office”.**
    2. Would the 20,000 sf count against Lot B’s 50,000 sf cap on office space? **Yes, because this 20,000 sf corporate headquarters, we assume based on the facts presented, would not be engaging in the product or process design, development, prototyping, or testing required to classify as an R&D use, and would be located on a different lot than the R&D use.**
    3. Would the answer be different if it was 50,000 sf of corporate office of the Building 1 Lot A tenant that went into Lot B’s building? **The answer would not be different, the corporate office must be on the same lot to meet the definition of “accessory office” and would count towards Lot B’s 50,000 sf cap on office space.**
    4. Would it matter if Lot B’s building was only one story? **The corporate office would not be permitted on the ground floor because it would be considered a principal use as it is located on a separate lot.**

- v. What if Building 1 Lot A is full and tenant desires to move its office space onto Building 2 Lot B
1. If they lease space on a nearby building on the same lot, is that still an “accessory” use<sup>1</sup> that can be greater than 50,000 square feet? **It is assumed this hypothetical is intended to reference a Building 2 on Lot A since the questions refer to “same lot.” Yes, if it is on the same lot because an “accessory office” would be considered part of the R&D use. Module One of the Use Table project that was recently adopted expanded the definition of “accessory office” to include office use on the same lot rather than requiring it to be in the same building.**
  2. Can the office space be located on the ground level of Building 2? **Yes, if it is an accessory office per the definition, but not a principal office use.**
- b. Life Science Tenant has 10,000 sf of lab space and 3,000 sf of accessory office support space. Part way through the lease term, tenant outsources all lab work to a different country and uses the rest of the space as admin support for its national operations. The business is still an “R&D” business, but none of the lab operations are located in Boulder anymore.
- i. Is the office use still “accessory”? **The office use is no longer accessory because there is not a principal use on the lot that is engaging in product design, development, testing, etc. The 13,000 sf use becomes a principal “office” use.**
  - ii. Is the space now legally non-conforming or illegally non-conforming? **It depends on whether the lot exceeds 50,000 square feet of principal office space due to the now 13,000 square feet of additional office, or if it is located on the ground floor. If the use results in more than 50,000 square feet of principal office space on the lot or the use is located on the ground floor, then it would be illegally non-conforming as the non-conformity results from a change in the use.**
- c. Existing R&D tenant has a lease of all of second floor (lab use) and all of first floor (office) in Building 1, Lot A, (both 50,000 sf floors for a total of 100,000 sf). The tenant also occupies second floor (office) of Building 2 on Lot A (another 50,000 sf), and has an option in its lease to take over the first floor five years later (another 50,000 sf), when the first floor tenant’s lease expires. If it exercises the option to take the 50,000 sf of ground floor space for office in the Building 2, it will have 50,000 square feet of Lab and 150,000 square feet of office.
- i. Would the office use still be considered accessory? **Yes, if it meets the definition of “accessory office.” If accessory office, it is considered part of the principal use of R&D – the existing office space on Floor 1, Building 1 of Lot A, and the potential future office space on Floor 1 of Building 2, Lot A.**
  - ii. Would the use in Building 2 be in violation then of the 50,000 sf limit on office on a single parcel? **No, provided the office meets the definition of “accessory office” as noted above, which includes being located on the same lot.**
  - iii. Would the office be permitted on the first floor of Building 2? **Yes, as long as the office meets the definition of “accessory office” including location of the same Lot A.**

- d. Tenant entered into lease on November 1, 2022 to lease 50,000 square feet of R&D space on second floor for its research division and 20,000 sf on the first floor for office that supports other operations of the company. Occupancy of the space (and the commencement date of the lease) doesn't begin until June 1, 2023 when space is built out.
- i. Does the lease constitute "legal possession" of the space even though physical occupancy doesn't occur until after the new ordinance is enacted? **An agreement by itself does not create a use. In this scenario, it seems that if the office space is "accessory office" to an R&D use in the IG zone or IM zone, the use anticipated under the lease could be established consistent with the standards of Ordinance 8556. If it is not an accessory office then the office would be a principal office use on the ground floor, and whether it could be established would be a more complex analysis. If the space was previously a legally established principal office use, the proposed standards of 9-6-5(k)(4)(i)(c) would apply for nonconforming uses. If not previously a principal office use, whether the new principal office use could be established would depend on whether a complete building permit application has been submitted to the city on the effective date of Ordinance 8556 (March 15, 2023) for build out of the space designating the type of use, or if a Site Review or Use Review is approved. See Section 28 of the ordinance which addresses projects for which certain applications have been filed and approvals have been obtained for the use. The pre-existing lease may be evidence that can be considered in determining whether a particular building permit is for work to establish a previously allowed office use.**
- ii. What if it is a non-binding Letter of Intent to lease the space that has been signed by landlord and tenant? Is that a different answer? **This is the same answer.**
- e. Professional Office user moves into 40,000 sf of space on second floor in Building 1 after Ordinance is adopted. The lease contains an option to expand another 10,000 sf of office. Lab user occupies 15,000 square feet in same building on first floor.
- i. Lab user sells its company and the buyer takes over space and converts it to pure office in support of operations overseas.
1. Is the 50,000 sf limit of office exceeded? **Yes, at this point there is 55,000 square feet of office space, AND the new office space would not be permitted as it would be on the ground floor.**
  2. If so, which tenant is in violation? **The new buyer on the ground floor would not be able to obtain a building permit or business license as the use would exceed 50,000 square feet on the lot, and the use would be on the ground floor.**
  3. Is the professional office tenant barred from exercising its option to expand the additional 10,000 square feet. **The additional 10,000 square feet would not be permitted on the ground floor, but the tenant could expand by 10,000 square feet if there is space on the second floor or above, assuming there is no additional office space in the building.**
  4. How would the City, the landlord, or the Professional Office user know that the conversion of the lab space may have created this problem? **A building permit to convert the lab into**

office space or a new business license would not be able to be approved by the City as the proposed use would be located on the ground floor, and because the building would exceed the 50,000 square foot threshold.

5. Would the City claim that the Professional Office tenant has no ability to enforce its expansion right? **The office tenant could expand by up to 10,000 square feet, assuming there are no other existing office uses in the building, but not on the ground floor.**
  6. What would the City's enforcement action be? **The city would not be able to grant any approvals (building permit or business license) related to the new 15,000 square foot office space. The city's general enforcement tools under Chapter 9-15, B.R.C. 1981, would be applicable if the use was actually established in conflict with the law. The city's philosophy in zoning enforcement is that the primary goal is achieving code compliance. In zoning cases, the city tries to work with persons who are not in compliance before taking more traditional enforcement actions. Approaches are evaluated on a case-by-case basis.**
- f. Single story building designed and approved as office – i.e., no docks or garages, and set back from roadway so no curbside appeal.
- i. Tenant on other property wants to use the space for administrative office. Can the landlord lease it for that purpose? **If the building has been used as office space within the last year, the use would be considered to be nonconforming and could be leased to another office without any additional process per the proposed ordinance. If not, this would be considered a principal office use and would not be permitted on the ground floor.**
  - ii. What if the only demand for the space is a Professional Office user – no demand for R&D, retail or manufacturing. Must the landlord keep the space vacant, or can the landlord seek an exemption? **If the space was previously used for office within the last year, the property would have the option to change to another office use without any additional city process using the flexibility for nonconforming uses in proposed (k)(4)(A)c. If the property does not have nonconforming rights to office space, the proposed ordinance would not provide a mechanism that would otherwise allow office space in this circumstance. Many other uses would however be permitted in the zoning district.**
- g. A tenant executes a lease for 50,000 sf intending to use 35,000 sf for lab and 15,000 sf for office, but then subleases the lab space to an office user, which use is considered the principal use? The 50k lab use (35k lab and 15k office) is a principal R&D use prior to the sublease. After the space is subleased, the 15k office use is a principal use and the new 35k office use, presumably a different company, is also a principal office use.
- i. What if there is already a tenant leasing 50,000 sf of office as principal use on the lot? **Then neither of the new principal offices would be permitted. Presumably the new office uses would need to apply for a business license or building permit, at which point the city would be aware of the new use.**

- ii. Is the 50,000 sf limit on office exceeded? **Does this relate to the i. situation? If the 35k office space and 15k principal office space are the only offices on the lot, the limit is not exceeded. If there is any additional office space, it is exceeded.**
  - iii. If so, which tenant is in violation? **Whatever the new principal offices are that exceed 50k in the building.**
  - iv. Note that it is a common practice in leases to allow tenants to assign or sublease without landlord consent in certain situations so the landlord might not have the right to just say no. These types of subleases could result in changes without landlord control, and we will not be able to lease space to any sophisticated company without agreeing to this standard lease language which is found across the US . **In these circumstances, a building permit or business license application for the new tenant would alert the city about this change of use.**
- h. Architectural and engineering firm executes lease in 2020 for 15,000 square feet on second floor of 30,000 square foot building. The tenant wants to ultimately grow into the 15,000 sf first floor space, but it is occupied at time of the lease, so tenant’s lease also contains an option to take the 15,000 square feet of space on the first floor when the first floor tenant’s lease expires in 2025. Tenant has invested over \$1 million in finishing out its space and did so because it knew it could take over the space on the first floor for expansion.
- i. Is the tenant permitted to expand its use to the first floor per the terms of the 2020 lease? (Tenant is not an R&D user, but was a lawful Technical Office user in 2020). **No, the use would not be permitted to expand onto the ground floor due to the proposed ground floor limitation on office.**
  - ii. As in hypothetical e, what if the Architectural tenant had just signed a lease with all the above terms and the landlord had applied for a permit to build out the space, but the tenant hadn’t yet occupied? **Per Section 28 of the proposed ordinance, the changes only apply to building permits applied for after the effective date of the ordinance (March 15, 2023). If the permit identifies the use, the city would consider that legally established prior to the effective date and permit the expansion on the ground floor.**

**Process:**

- a. How does a landlord or a tenant determine in advance whether a use is accessory or principal? **By using the definition of “accessory use” and “accessory office”.**
  - i. Is it a square footage calculation? **No, it would not necessarily be based on square footage. An accessory office use to R&D could potentially encompass more floor area than the lab space.**
  - ii. Is it an income calculation? **No, it would not be based on income.**
  - iii. Is it something else? **Yes to the question in the footnote, provided the office remains on the same lot and thus meets the accessory office definition.**
  - iv. How fast can a tenant or landlord get a commitment from the City as to whether the use is principal or accessory? Ideally, the statute is written so that it is very rare that a tenant or a landlord would

need to go to the City to ask if the use is permitted. **The definitions of “accessory office” and “accessory use” determine what is an accessory use.**

- v. Can it morph over time and remain in compliance if the R&D use becomes more office (i.e., is that then a legal non-conforming use, or now an illegal non-conforming use?) **As long as the office is on the same lot as the R&D use and is an “accessory office” it remains an R&D use. This was the intent when including office space within the definition of R&D.**
- b. What constitutes “legal possession”? E.g., what vests a party’s rights prior to the Ordinance going into effect? **Legal possession is not a term used in the Land Use Code. The proposed ordinance uses the term “legally established” in the subparagraph related to nonconforming office uses, so the answers below relate to that.**
  - i. Actual occupancy? **Provided that occupancy has been officially recognized by the city through a building permit or business license.**
  - ii. Building under construction(consider some properties are owner occupied) **As noted in Section 28 of the ordinance, the ordinance applies to any building permit, conditional use, use review, or site review applied for on or after March 15. Any project with a complete building permit, site review, use review, or conditional use application or approval before March 15 is still able to establish the use under the previous regulations.**
  - iii. Application for building permit? **If it can be determined that the building permit was for the proposed use, the use would be considered legally established per the ordinance.**
  - iv. Site or Use Review approval? Application? **Note that Section 28 of the proposed ordinance specifies the applicability of previous site or use review approvals. Any use for which a complete site or use review application is submitted prior to March 15 or for which a site or use review is approved prior to March 15 can be established under the standards in effect for such use at the time of the filing of such application.**
  - v. Signed lease creating binding obligations between landlord and tenant? **The city does not consider private leases as legally establishing the use.**
  - vi. Signed letter of intent (non-binding?) **Same answer as above.**