BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON

In the Matter of the Appeal of	)	Case No. BP10-00059
	)	
	)	
Tony Sandefur	)	
	)	FINDINGS, CONCLUSIONS
Of a Land Use Zoning Decision	)	AND DECISION

SUMMARY OF DECISION

The appeal from the City of Bremerton's denial of a building permit application is **DENIED.** The Hearing Examiner finds that the City was not clearly erroneous in its interpretation of the City Zoning Code when it concluded that the Appellant intends to construct an Accessory Dwelling Unit and an Accessory Use larger than the square footage allowed by the City Council when it adopted size restrictions for those uses. The Appellant may construct an Accessory Dwelling Unit and an Accessory Use at the location proposed, but must do so in compliance with the development regulations adopted by the City when implementing its Comprehensive Plan as required by the Growth Management Act, Chapter 36.70A of the Revised Code of Washington.

SUMMARY OF RECORD

Hearing Date:
The Hearing Examiner held an open record hearing on the appeal on January 24, 2011.

Testimony:
The following witnesses provided testimony under oath at the hearing:

Appellant Witnesses:
Tony Sandefur
Richard Flake

City Witnesses:
Nicole Floyd
JoAnn Vidinhar
Jeannie Vaughn

Attorney William T. Lynn represented the Appellant at the hearing; Attorney Mark Koontz represented the City at the hearing.

Exhibits:
The following exhibits were admitted into the record:

Appellant Exhibits
A-1. Revised site plan, dated November 29, 2010
A-2. Revised main floor plan, dated November 29, 2010

A-3. Revised upper level plan, dated November 29, 2010
A-4. Revised elevation plan, dated November 29, 2010
A-5. Revised building sections dated November 29, 2010
A-6. Revised mechanical plumbing checklist, dated November 18, 2010\

City Exhibits

C-1. Building permit application, received June 30, 2010
C-2. Mechanical plumbing checklist, received June 30, 2010
C-3. Site Plan, pages A-1.1 (Site Plan & Section), A-2.1 (Main Floor Plan), A-3.1 (Upper Floor Plan)
C-4. Revised Site Plan, pages A-1.1 (Site Plan & Section), A-2.1 (Main Flr/Bsmt Plan), A-3.1 (Upper Floor Plan); A-4.1 (Elevations), dated July 20, 2010
C-5. Notice of Incomplete Application, dated August 31, 2010
C-6. Schematic Drawings (Illustrative)

Pleadings:

Administrative Appeal, dated October 26, 2010
Hearing Examiner, Pre-Hearing Order, dated November 2, 2010
Stipulation and order to continue hearing to January 24, 2011
Hearing Examiner, Pre-Hearing Order, revised November 23, 2010
Brief of Appellant, dated November 10, 2010
Brief of Respondent, dated November 17, 2010
Appellant's Supplemental Brief, dated January 5, 2011
City of Bremerton's Supplemental [Response] Brief of Respondent, dated January 12, 2011
Appellant's Supplemental Reply Brief, dated January 19, 2011

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

1. Tony Sandefur (Appellant) lives in a house with his wife and two children at 6023 Osprey Circle, Bremerton, WA. Mr. Sandefur would like additional living space and garage space to meet the needs of his family, including a space separate from the principal living space where he can enjoy late night exercise and entertainment. He works long hours and often comes home late and does not want to disturb his family with late night activities when others may be trying to sleep. *Testimony of Mr. Sandefur.* To move forward with this vision, Mr. Sandefur submitted a residential building permit application to the City of Bremerton (City) on June 30, 2010, for a "proposed addition to existing 3 car garage w/ new access, dwelling unit above including two car garage." The Mechanical and Plumbing Permit application submitted with the residential building permit application includes references to a cook stove and dishwasher. *Exhibits C-1 to C-3.* The City noted that the inclusion of a kitchen would mean the application would be

treated as an application for an Accessory Dwelling Unit (ADU). As a consequence of the initial City review, Mr. Sandefur revised his plans by removing any reference to a cook stove, and designating the proposed addition as a "Rec Rm. & Exercise Rm." rather than a "Proposed Accessory Dwelling". He also removed a proposed garage as part of his application for an accessory use, and designated it as a "basement addition". He re-submitted his plans on August 10, 2010. *Exhibit C-4; Testimony of Mr. Sandefur.* The City met with a representative of the Applicant on September 27 to discuss the plans. That meeting was summarized in a letter dated October 5, 2010, from Mr. Halsan, the Appellant's Consultant on the proposal, to the City. *Administrative Appeal, Attachment A, Exhibit B.* It apparently is this letter and Exhibit C-4 that was formally reviewed by the City as the proposal and specific plans submitted in conjunction with the application for a building permit. This review resulted in a denial by the City of the proposed use and the building permit request. This denial was timely appealed to this Hearing Examiner for review in open record hearing.

2. In a letter to the Appellant dated October 18, 2010, City Planner Nicole Floyd stated that "as the proposed use is designed it does not comply with City codes and thus the application is denied".[1] In her letter of denial, Ms. Floyd determined that the proposal meets the definition of an ADU as defined in Bremerton Municipal Code (BMC) 20.42.040 and exceeds the size limitation for an ADU of 1,000 square feet; and that the proposed garage/storage addition exceeds the maximum 1,200 square foot area allowed for accessory structures in BMC 20.60.060. *Administrative Appeal, Attachment A, Exhibit A.* It is the content and determination of this letter that was appealed to the hearing examiner.

3. Mr. Sandefur filed his Administrative Appeal on October 26, 2010. The issues identified in the appeal statement are:

    1. Did the City err in denying the Appellant's application because the proposal meets the definition of an Accessory Dwelling Unit and exceeds the size requirements pursuant to Bremerton Municipal Code (BMC) 20.42.040 and BMC 20.46.010?

    2. Did the City err in denying the Appellant's application because the proposed garage/storage addition exceeds the maximum 1,200 square foot allowed area for accessory structures pursuant to BMC 20.60.060?

In response to a Pre-Hearing Order, the Appellant and City both filed witness/document lists and submitted briefs detailing the legal arguments involved in the appeal. *See, Pleadings list, above.*

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[1] The application referenced is presumably the June 30, 2010, building permit application as described in detail in Exhibit C-4, and as further explained by Mr. Halsan in the letter of October 5, 2010, although the City letter does not reference a specific application date or plan reviewed.

4. At the open record hearing, the Appellant presented witnesses in support of his appeal. The Appellant's witnesses included Mr. Flake, a professional architect involved in designing the proposed buildings for the Appellant. Mr. Flake testified that the existing garage is 878 square feet, and that the total square footage of the proposed accessory use is 1,178 square feet. There is also an additional 300 square feet proposed as a "basement addition" or a "media room". The total proposed size of the upper floor is 1,068 square feet. Mr. Flake testified that there is no separate bedroom or sleeping space in the design, and that the principal intended use is for exercise as well as some entertainment. He testified that in his experience as an architect one needs a cook stove in order to have a kitchen or eating area, even though one can prepare food using a microwave. He noted that one would have to walk outside of the proposed structure to get to the house. He also testified that no construction has taken place for the proposed structure. *Testimony of Mr. Flake.*

5. At the open record hearing, the City presented three witnesses in response to the appeal. Ms. Jeannie Vaughn is the Building Plans Examiner and a Building Inspector who has worked for the City for three years. She inspected the Appellant's original house design and approved it for construction. She testified that she had reviewed both sets of proposed building design plans, and agreed that the plans do not depict an acceptable structure. She noted that, although both an ADU and an accessory use can occupy the same structure, the sizes of the proposed uses are greater than that allowed under the City code. She noted that the room depicted as a basement area or media room does not have heat or light and no emergency exit so it could not be occupied as a living space. *Testimony of Ms. Vaughn.*

   Ms. Nicole Floyd is a City Planner who has worked for the City for about five years. She testified that, as part of her responsibilities, she reviews proposed building designs for compliance with the City zoning code. She reviewed the revised plans submitted by the Appellant on August 10 and determined that the proposed building exceeds the square footage limitations for both an ADU and an accessory use. She testified that the proposed ADU exceeds the allowed square footage by 68 square feet, and the proposed accessory use by over 300 square feet.[2] She stated that, in her opinion as a planner, a sleeping area means any room that meets the building code that can be slept in, provided it meets requirements for square footage and egress. She also stated that if a room has an electrical outlet, it could qualify as a kitchen. She testified that she considers all factors involved in a proposal prior to making a determination as whether a proposal qualifies as an ADU. In this matter, she determined that the proposal does meet the definition of an ADU as it contains areas for sleeping, eating and sanitation. She testified that it is also an independent structure subordinate to the main house, citing to the definition of ADU in

[2] Ms. Floyd testified that the Kitsap County Assessor's Office provided square footage for the existing garage larger than what is depicted on Exhibit C-4, Page 1. That Exhibit shows the existing garage to be 878 square feet, the proposed garage to be 300 square feet, and the proposed 'basement addition' to be 323 square feet. This is a total of 1,501 square feet. *Testimony of Ms. Floyd.*

BMC 20.42.040. She testified that the proposed use attached to the existing garage qualifies as an accessory use, in part because it is proposed to be attached to an existing accessory use, citing to the definition of accessory use in BMC 20.42.040. *Testimony of Ms. Floyd.*

Ms. JoAnn Vidinhar is the Director of the Department of Community Development. She testified about the evolution of the City zoning code and how it is intended to implement the City Comprehensive Plan. She noted that an ADU is defined separately from a "Dwelling Unit" in the city code and that, when read together, it becomes clear that an ADU is for a secondary living space. She stated that the size limit is to help ensure that all structures on a residential lot are compatible with the character of a residential neighborhood. She noted that in her opinion the City Council felt that a size limit based on square footage would be one way to keep buildings within an appropriate scale for a residential neighborhood. *Testimony of Ms. Vidinhar.*

6. At the open record hearing, Attorney William Lynn argued that the proposed use is an addition to the principal structure and not an accessory dwelling unit. He argued that an ADU must contain all four functions listed in BMC 20.42.040[3]; including cooking, eating sanitation and sleeping facilities. He noted there are no bedrooms or closets proposed, no kitchen and no separate eating area. Attorney Lynn also argued that the fact there is a separate entrance as part of the proposal does not mean it is an ADU. He stated that his client would sign a declaration stating that he intended to use the proposed addition as an extension of his principal living space. As to the issues involved with the accessory use portion of the proposal, Attorney Lynn argued that the proposed facility includes both accessory uses (the additional garage space) and principal uses (the media room or basement area). Thus, he argues the proposed accessory use is within the square footage allowed by the code.[4] *Argument of Attorney Lynn; Appellant Briefs.*

At the open record hearing, the City argued that the proposed plans of the Applicant include both the architect's drawings and a mechanical/plumbing checklist. The City argues that -- because the checklist shows a clothes washer and dryer, a sink, a dishwasher, a stove, a toilet and a shower – the proposed use meets the definition of an

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[3] BMC 20.42.040 provides: "Accessory dwelling unit (ADU)" means a second dwelling unit on a lot with an existing principal unit added to or created for use as a complete, independent or semi-independent living unit with provisions for cooking, eating, sanitation and sleeping, and which complies with the development and design standards contained in this code for ADUs (BMC 20.46.010).

[4] BMC 20.60.060 (c) establishes development regulations for accessory structures as follows:

(c) Accessory Structures. The following standards shall apply but are not limited to: garages, carports, shops, barns, covered patios, cabanas, gazebos, and incidental household storage buildings, excluding accessory dwelling units per BMC 20.46.010 and structures not requiring a building permit: (1) The maximum area for all accessory structures shall be eighty (80) percent of the principal residential use not to exceed one thousand two hundred (1,200) square feet.

ADU as it has 'provisions' for cooking, eating, sanitation and sleeping. The City also notes that an ADU does not depend upon a separate entrance, but must be independent or semi-independent under the definition. The City also states that the existing garage is an accessory structure, as it is not part of the principal structure, and that any additional accessory space would be added to the square footage calculation of the existing space to obtain the maximum allowed. The City argues that the proposed garage space and basement space (or media room) are both accessory uses because neither space can be used as living space. *Argument of Attorney Koontz; City Briefs.*

CONCLUSIONS

Jurisdiction

The Administrative Hearing Examiner has jurisdiction over this matter and parties, pursuant to BMC 20.02.140.

Review Authority

The responsibility of the Hearing Examiner is to review the interpretation of the City Planner to determine if an error was made. The Appellant has the burden of proof to show that the City Planner erred in her decision on the Code Interpretation of BMC 20.42.040; 20.46.010, and 20.60.060 and that the permit requested should be granted. *See, Buechel v. State Dept. of Ecology*, 125 Wn.2d 196 (1994); *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387 (1999); *RCW 36.70C.130(1)(b).* The Hearing Examiner's duty is to review the entire record before him to determine whether the Appellant has met this burden. To properly review the City's interpretation, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County,* 124 Wn.2d 26 (1994).

The Hearing Examiner must accord substantial deference to the City's interpretation of its own ordinances, especially here where the City Planner is the individual charged by the City Council with interpreting City Code. *RCW 36.70C.130(1)(b); Cockle v. Department of Labor and Industries,* 142 Wn.2d 801, 829 (2001); *Doe v. Boeing Co.*, 121 Wn.2d 8, 15 (1993); *Superior Asphalt & Concrete v. Dep't of Labor & Indus.*, 84 Wn. App. 401, 405 (1996); *McTavish v. City of Bellevue*, 89 Wn. App 561, 564 (1988).

The Hearing Examiner reviews the City Planner's decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of a law by the agency with expertise. Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that the City made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002); s*ee Buttnick v. Seattle,* 105 Wn.2d 857, 860 (1986). When applying the clearly erroneous standard, the Hearing Examiner must not substitute his own judgment for the judgment of the City. *See Buechel v. Department of Ecology,* 125 Wn.2d 196, 202 (1994).

Conclusions Based on Findings

1. The City did not act in a clearly erroneous manner when it denied the Appellant's application because the proposal meets the definition of an Accessory Dwelling Unit in BMC 20.42.040 and exceeds the 1,000 square footage allowed in BMC 20.46.010. The City Planner determined that 1,068 square feet of the proposed use meets the definition of an ADU within the City code, and therefore exceeds the maximum square footage allowed by 68 square feet. The disagreement between the City and the Appellant focuses on whether the proposed use has facilities for eating and sleeping. The Appellant argues that there is no separate bedroom or kitchen; the City argues that one could eat and sleep in the space so it is equivalent to having a kitchen and a bedroom. The City and the Appellant agree that a separate entrance does not make it an ADU and they agree that the proposed use must include space for cooking, eating, sanitation and sleeping.

There is a key phrase in the definition of an ADU that precedes the words "cooking, eating, sanitation and sleeping". The phrase is "with provisions for". The proposed use is not an ADU unless there are provisions for cooking, eating, sanitation and sleeping. According to commonly used dictionaries, the word "provisions" means "a measure taken beforehand to deal with a need or contingency"[5] or "something provided; a measure or other means for meeting a need".[6] The proposed facility includes many measures for meeting the needs of cooking, eating, sanitation and sleeping. There will be electricity which can power a microwave or hotplate; there will be a refrigerator to keep food and beverages chilled; there will be heat for comfort; and television for entertainment. It is agreed that the proposed use is for living space, so it will undoubtedly contain a couch or a chair to allow one to comfortably watch TV or to sleep. The proposed structure will include means for meeting the needs of cooking, eating, sanitation and sleeping. The Hearing Examiner must give substantial deference to the City Planner's application of the City zoning code. The City Planner determined the proposed use qualifies as an ADU. This determination cannot be said to be clearly erroneous. One thousand sixty eight square feet of the proposed structure is an ADU. The maximum square footage is 1,000; therefore the proposed ADU structure must be re-designed to reduce it by 68 square feet. *Findings 1 – 6.*

2. The City did not act in a clearly erroneous manner when it denied the Appellant's application because the proposed garage/storage addition exceeds the 1,200 square footage allowed for accessory structures in BMC 20.60.060. The City Building Plans Examiner determined that the area shown on the architect plans designated first as a 'shop addition', then as a 'basement addition', then in testimony as a 'media room' could not qualify as living space. There is no heat, no window and no separate egress for emergencies. She testified that this space must be viewed as an additional accessory use space. The City Planner agreed and determined that, as proposed, it is in excess of the maximum square footage allowed for an accessory use by 301 square feet. An accessory use may not exceed 1,200 square feet. The proposed accessory use structure must be re-designed to reduce it by 301 square feet. *Findings 1 – 6.*

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[5] www.merriam-webster.com/dictionary/provisions

[6] www.dictionary.reference.com/browse/provisions

DECISION

The appeal of the City Planner's determination that the proposed use includes both an Accessory Dwelling Unit and an accessory use, and exceeds the maximum square footage allowed for those uses is **DENIED.** The proposal includes 1,068 square feet to be used as an Accessory Dwelling Unit, and 1,501 square feet of accessory use space. The size of the proposal must be reduced to be in compliance with City development regulations, restricting the maximum size of an ADU to 1,000 square feet and an accessory use to 1,200 square feet. Because the Appellant clearly is mindful of his responsibility to comply with the law, he has not started building any structure but looked first to the City for approval of his proposal. That proposal needs to be modified to be in compliance with City development regulations.[7]

Decided this 1st day of February 2011.

THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center

[7] Fortunately, the Appellant has an opportunity to do this without removing any structure; as often noted by Land Use Attorney Joel Haggard (deceased), it is far easier to use an eraser than a wrecking ball.