

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON**

In the Matter of the Appeal of)	No. BP17-00087
)	
Donna Haj)	
)	FINDINGS, CONCLUSION,
)	AND DECISION
<u>Of a Land Use Decision</u>)	<i>(Revised November 5, 2018)</i>

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner held an open record hearing on the appeal on September 24, 2018. Initially, the Hearing Examiner denied the appeal but remanded the matter to the City for further analysis. The City timely requested reconsideration of the Hearing Examiner’s decision. The Hearing Examiner granted the request for reconsideration and now issues this revised decision following reconsideration.

Testimony:

The following individuals presented testimony under oath at the open record appeal hearing:

Appellant’s Witness:

Donna Haj
Issam Haj

City Witnesses:

Kelli Lambert, City Planner

Attorney Kylie Purves represented the City.

Exhibits:

The following exhibits were admitted into the record:

Appellant Exhibits:

- A-1. Administrative Appeal, received March 12, 2018
- A-2. Commercial Site Plan Review Application, received December 5, 2017; Email from Kelli Lambert to Donna Haj, dated November 2, 2017, with email string; Email from Eric Roberson to Donna Haj, dated March 12, 2018; Email from Matthew Coyne to Donna Haj, dated May 12, 2015, with email string
- A-3. Staff Analysis, undated
- A-4. 102 State Ave Parking Plan, undated, with City Staff Annotations

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- A-5. 102 State Ave Revised Parking Plan, dated June 30, 2018
- A-6. 102 State Ave Revised Parking Plan, dated August 15, 2018
- A-7. Email from Kelli Lambert to Donna Haj, dated August 24, 2018, with email string
- A-8. Invoice from Attorney Jane Koler, dated April 30, 2018
- A-9. Annotated Vicinity Map, undated
- A-10. Eleven (11) photos, undated

City Exhibits:

- C-1. Administrative Appeal, received March 12, 2018
- C-2. Staff Analysis, undated
- C-3. Commercial Site Plan Review Application, received December 5, 2017
- C-4. 102 State Ave Parking Plan, undated
- C-5. 102 State Ave Parking Plan, undated, with City Staff Annotations
- C-6. Eight (8) photos, undated
- C-7. City Decision, Staff Analysis, & Findings, dated February 28, 2018

Orders and Pleadings:

- Hearing Examiner’s Pre-Hearing Order, April 6, 2018
- Hearing Examiner’s Revised Pre-Hearing Order, dated April 13, 2018
- Hearing Examiner’s Revised Pre-Hearing Order, dated May 14, 2018
- Hearing Examiner’s Revised Pre-Hearing Order, dated June 11, 2018
- Appellant Witness List and Exhibit List
- Notice of Withdrawal of Counsel, Attorney Jane Koler, dated August 13, 2018, with Declaration of Service
- Notice of Appearance (Donna Haj), dated August 21, 2018
- City of Bremerton Witness List and Exhibit List
- City’s Request for Reconsideration, dated October 22, 2018
- Hearing Examiner’s Decision and Order on Request for Reconsideration, dated November 5, 2018

The Hearing Examiner makes the following findings and conclusions based upon the admitted testimony and exhibits:

FINDINGS

Background

1. On May 12, 2015, Donna Haj notified Impark, the private contractor that handles residential parking permits in the City of Bremerton (City), that she had just purchased a 10-unit apartment building at 102 State Avenue. She requested 10 residential parking passes at that time and asked about the associated process to obtain permits and any necessary fees. In response, Impark informed Ms. Haj that the City does not issue residential parking permits for “apartment complexes of that size” but informed her that

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the City “might be able to make an exception to allow for a limited number of residential permits based on the street parking availability.” *Exhibit A-2*.

2. It is unclear what immediate efforts Ms. Haj made to secure parking for her tenants following this exchange. One former tenant, Eric Roberson, provided written comments, however, noting that he resided at the property between August 2016 and August 2017 and that parking was a constant problem. He attempted to contact both the City and Impark about the situation on several occasions but was never able to secure a residential parking pass. Instead, he received several tickets (many of which were thrown out by the municipal court) and, ultimately, moved away before the parking issue was resolved. *Exhibit A-2*.
3. At some point in 2017, Ms. Haj discussed adding a parking lot to the apartment complex with the City. At that time, she envisioned providing 7 parking spaces on vacant land adjacent to the building. Following discussions with the City, Ms. Haj filed a commercial Site Plan Review (SPR) application on December 5, 2017, to add a 5-space parking lot to the apartment complex at 102 State Avenue. In the application, she noted that a “compromise” with the zoning requirements would be necessary because certain setback and landscaping requirements would not be satisfied. *Exhibit A-1; Exhibit A-2; Exhibit C-4*.
4. On February 28, 2018, the City issued a decision denying the SPR. The City’s decision noted:
 - The proposal would include 5 parking spaces, accessible from State Avenue, on pervious pavement and 725 square feet of landscaping.
 - The proposal is exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW).
 - The property is within the Low-Density Residential Zone (R-10), and the current use, a 10-unit apartment complex, may be maintained as an existing, legally non-conforming use even though it does not comply with the current requirements of the zoning code.
 - Legal non-conforming uses may not be expanded under Bremerton Municipal Code (BMC) 20.54.060.
 - It would be possible to permit a parking lot as an accessory use, under BMC 20.60.030(d). The parking lot, however, would have to meet all parking lot requirements under Chapter 20.48 BMC of the currently adopted municipal code.
 - Under BMC 20.48.080(b), the parking lot would require a minimum of 10 feet of visual screening from the side and rear lot lines. The proposal, however, would involve 5-foot setbacks between the parking area and the property line to the northeast, and no setback from the north property line.

- Under BMC 20.48.080(c), the parking lot would require parking spaces to be set back a minimum of 10 feet from the front property line. This requirement would be satisfied.
- BMC 20.48.080(e) dictates certain requirements related to parking stall width, depth, and aisles. The proposal would not satisfy these requirements.
- A lighting plan would be required prior to approval.
- Landscaping requirements of the municipal code would not be satisfied by the proposal. A landscaping plan would be required.

Exhibit C-7.

Appeal

5. On March 12, 2018, Ms. Haj (Appellant) filed an appeal of the City’s decision. *Exhibit A-1*. In the appeal statement, the Appellant argues:
 - Even though the current municipal code requires multi-unit residential properties to provide off-street parking spaces, the subject property does not have to comply because it already exists as a nonconforming use. As an existing nonconforming use, the required setbacks and landscaping requirements should not have to comply with the current code requirements. Moreover, there is a demand for parking and BMC 20.54.060(b)(2)(iv) dictates that a property containing a nonconforming use may be changed to another nonconforming use if the applicant demonstrates that there is a neighborhood demand for the use and that the use provides a public benefit.
 - The proposed parking lot would not be detrimental to the public health, safety, or welfare. It would, in fact, provide relief for a hardship experienced by tenants residing at the property. In addition, allowing a parking lot for 5 residents would reduce the number of cars parked on the street in the area – a public benefit.
 - The proposed parking spaces nearly comply with the minimum design requirements for parking spaces.
 - There is a newly installed street-light adjacent to the property. As such, the lighting requirement should be waved.
 - The Appellant would be willing to install fences for visual screening and comply with landscaping and striping requirements.

Exhibit A-1.

6. After the Appellant filed the appeal, the parties requested several continuances to continue discussing whether agreement could be reached without a hearing. The Appellant, for instance, submitted several additional iterations of the proposal following the appeal. The parties could not reach agreement, however, and the appeal hearing moved forward on September 26, 2018. *Exhibits A-5 through A-7; Hearing Examiner’s Pre-Hearing Orders.*

7. The City provided an analysis in advance of the appeal hearing. The analysis argues:

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- BMC 20.48.030 does not require a nonconforming structure, like the 10-unit apartment complex, to have off-street parking consistent with the current municipal code. If an applicant seeks to add additional parking, however, Site Plan Review is required, and such new development must meet current code requirements under BMC 20.58.080.
- Landscaping requirements must be met with new development.
- The Appellant’s argument about BMC 20.54.060(b)(2)(iv) is inapplicable because the primary proposed use of the property is not being changed from one use (multi-family residential) to another (parking).
- The proposal would be potentially detrimental to the public interest, health, safety, or welfare because the proposal fails to demonstrate how required development standards would be met.

Exhibit C-2.

Testimony at Hearing

8. Ms. Haj testified that she went back and forth with the City over the proposal. After she first filed the appeal, she submitted several proposals (Exhibits A-5 and A-6) that sought to assuage the City’s concerns. The last submitted proposal (Exhibit A-6), for instance, called for only 4 parking spaces and 9.5-foot setbacks (rather than the required 10-foot setbacks). Ms. Haj stressed that parking in the area is a serious problem and there are dozens of examples (Exhibits A-9 and A-10) of properties that do not seem to comply with the City’s parking requirements. She even hired an attorney at one point to try and resolve the issues. Ultimately, however, she determined that the City was unwilling to work with her and that she needed to move forward with the appeal. Ms. Haj reiterated the arguments made in her initial appeal statement. *Testimony of Ms. Haj.*
9. Issam Haj testified that he and Ms. Haj renovated the apartment complex after they purchased it and sought to use the vacant area for parking since the purchase first occurred. He noted that he does not know what the vacant area was used for previously but they have attempted to use it for parking throughout their ownership of the property. *Testimony of Mr. Haj.*
10. City Planner Kelli Lambert testified that, from the beginning of this process, the City tried to be forthright about the fact that the proposal could not be approved because it failed to meet certain setback and landscaping requirements. She stressed that requirements for commercial structures (like an apartment complex) are different than for single-family residences and that it is possible that some single-family residences in the area are not complying with municipal code requirements but that would not impact the analysis of this proposal. Ms. Lambert acknowledged that the City has a process for applying for a variance from setback requirements but, here, the Appellant never applied for a variance. She noted that, in her opinion, the proposal would not satisfy the requirements for a variance. *Testimony of Ms. Lambert.*

11. Attorney Kylie Purves argued that the current appeal relates to the SPR that was denied and that additional revised plans (Exhibits A-5 and A-6) should not be considered. Ms. Lambert stated that any additional plans (such as Exhibit A-6) would need to be re-submitted as a new application in light of the appeal process moving forward. *Argument of Ms. Purves: Testimony of Ms. Lambert.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to decide this appeal, under Chapters 2.13 and 20.02 of the Bremerton Municipal Code (BMC).

Review Authority

The Appellant shall bear the burden of proving the administrative decision was not supported by substantial evidence. *BMC 20.02.140(a)(2)*. 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 (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 action, 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. *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 (1998).

Conclusion Based on Findings

The City did not err when it determined that the Appellant's initial application for Site Pan Review should be denied. BMC 20.48.030 allows the 10-unit apartment complex, a legally non-conforming structure within the R-10 zone, to continue operation without requiring off-street parking. Adding a parking area, however, requires compliance with the currently adopted standards of the municipal code. From the outset, the Appellant has been clear that the proposal would not satisfy all the setback (and, potentially, landscaping) requirements of the municipal code. The City did not err in denying the application on the grounds that it fails to meet all requirements related to setbacks and landscaping.

Since the appeal was submitted, the Appellant has provided a plan (Exhibit A-6) that appears to meet the requirements for an administrative variance under BMC 20.58.030(c) or a variance under BMC 20.58.030(d). It is clear from the record that parking in this portion of the city is a

serious concern. The Appellant has been trying, since at least 2015, to provide solutions to this problem for tenants residing at the apartment complex. And, although the City did not err in determining that the initial proposal should be denied, the record reflects that it may be possible for the Appellant to produce a plan that is acceptable to the City. The final parking plan submitted, for instance, would appear to comply with nearly all of the setback requirements of the municipal code—an administrative variance of less than 10 percent would be required—and the Appellant expressed a willingness to continue working with the City to resolve this issue and provide the necessary landscaping if such proposal were approved. Since the outset of this process, the Appellant has been forthright about the need for “compromise,” and it is unclear whether the Appellant was ever directed to apply for a variance of some kind.

Nevertheless, the Hearing Examiner lacks authority to dictate how the City processes applications and this appeal relates solely to the application that was initially submitted on December 5, 2017. That SPR application did not comply with municipal code requirements, especially related to setbacks, and the City did not err in denying the request. *Findings 1 – 11.*

DECISION

Substantial evidence supports the City’s Administrative Decision to deny the initial SPR application. Therefore, the appeal is **DENIED**.

DECIDED this 5th day of November 2018.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center