

**FINDINGS AND DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

PARFITT WAY MANAGEMENT CORPORATION

ADM12755

from a Code Interpretation by
the Director, Planning and Community
Development Department

Background

Parfitt Way Management Corporation (PWM) requested a Code Interpretation regarding the potential to create on-street parking pursuant to Footnote 7, BIMC 18.40.030 in conjunction with development of property owned by PWM. The Director concluded that PWM could not make use of Footnote 7 as sought by PWM. PWM appealed that administrative decision.

The Hearing Examiner held the appeal hearing on October 5, 2006. Parties represented at the hearing were: the Director, Planning and Community Development Department (PCD or Department), by Rod P. Kasaguma, attorney for the City of Bainbridge Island; and, the Appellant, Parfitt Way Management Corporation (PWM), by Dennis D. Reynolds, attorney at law.

After due consideration of all the evidence in the record, the following constitutes the findings, conclusions, and decision of the Hearing Examiner on this appeal.

Findings of Fact

Subject Property

1. The appellant, Parfitt Way Management Corporation (PWM), owns property located on the northern shore of Eagle Harbor near the southwesterly edge of Winslow's "downtown" core. The subject property (tax parcel number 272502-4-136-2003) is approximately 34,151 sq. ft., including tidelands. [Exhibits 1 and 10]
2. Development on the subject property, addressed as 231 Parfitt Way SW, includes the "Harbour Public House" restaurant (Pub) and the Harbour Marina. The zoning and Comprehensive Plan designation of the property is Mixed Use Town Center – Core (MUTC) and has it an "Urban" environment designation under the Shoreline Master Program. [Exhibit 1]
3. The subject property has shoreline frontage to the southwest, but does not have street frontage. Vehicular access is through the parking lot north of the Pub to/from Parfitt Way. This paved and landscaped parking lot is shared with the Harbourside

Condominiums to the north. Most of the parking lot (*i.e.*, extending approximately 250 ft. to Parfitt Way from PWM's northern property line) is on Harbourside Condominium property. The southern 40 ft. of the parking lot is within PWM's property (the Pub building appears to be an equivalent distance south of the southern end of the parking lot; see Attachment A, Exhibit 1). [Testimony of Waite; Exhibits 1, 33, and 34; Hearing Examiner Decision SSDP/SPR12755, Findings 1, 3, 4, 78]

4. PWM has an easement for "vehicular access and parking" through that portion of the parking lot that is owned by the Harbourside Condominiums [see area marked in yellow in Exhibit 34]. The total number of spaces within the parking lot has been disputed in a previous proceeding. Five spaces are allocated for condo use and the remaining spaces are for the uses on PWM property (Pub and Marina). There are easements for pedestrian access through the entire parking lot (over both condo and PWM properties) allowing for public access to the shoreline. [Testimony of Waite; Exhibits 1, 33, and 34; Hearing Examiner Decision SSDP/SPR12755, Findings 1, 3, 4, 78]

5. In the immediate vicinity the Pub, the zoning, Comprehensive Plan, and shoreline designations are similar to that of the subject property. Uses to the east include commercial and office development. Multifamily development is adjacent to the north (Harbourside Condominiums) and to the west (Marina Condominiums). Farther west, across Wood Avenue, zoning and use is single-family residential. Residential uses and zoning predominate north of Parfitt Way. [Exhibits 1 and 11, Hearing Examiner Decision SSDP/SPR12755, Findings 1, 3, 4, 78]

Interpretation

6. PWM has an application pending for an expansion of the Pub. That application was the subject of a previous appeal. The Hearing Examiner decision in that matter [Hearing Examiner Decision SSDP/SPR12755] remanded the matter to the Director for consideration of additional information to be provided by PWM regarding parking and how required parking could be provided.

7. On March 6, 2006, in conjunction with the remand of application SSDP/SPR12755 [see Finding 6], PWM requested that the Director do a Code interpretation. Specially, PWM asked whether it could use Footnote 7 to create on-street parking along the south side of Parfitt Way to satisfy parking requirements. [Exhibit 1] (PWM requested two interpretations, but only the Director's decision regarding Footnote 7 was appealed.)

8. Shortly before the hearing in this matter began, a decision was issued in Kitsap Superior Court prohibiting PWM from expanding the Pub as proposed in application SSDP/SPR12755 without the consent of the Harbourside Condominium owners [Exhibit 29]. As PWM is continuing to examine options for development and future use of the subject property, the interpretation of Footnote 7 remains of interest, but as explained at hearing, PWM does not have a specific proposal for creating on-street parking. [Testimony of Waite]

9. The development standards in BIMC 18.40.030 specify the number of parking spaces required for uses in the MUTC district. Footnote 7 provides that for commercial and non-residential uses:

On-street parking legally created in conjunction with and adjacent to a project may be included in the parking space calculation.

10. PWM's request for a Code Interpretation asserted that "Parfitt's on-street parking proposal as shown in Attachment B ... is adjacent to the proposed project" [Exhibit 1, page 6]. This "on-street parking proposal" shows 20 angle-spaces along the southern frontage of the Parfitt Way right-of-way, from the eastern end of the block at the Wood Avenue intersection, to just west of the driveway entrance to the parking lot. On-street parking is shown along the entire Parfitt Avenue frontage of property owned by Junkoh and Christina Harui [see the parcel north of Harbourside Condominiums, between Wood Avenue and northernmost part of the parking lot on Harbourside's property].

11. The Director responded to the requested interpretation in a letter to PWM dated June 1, 2006 [Exhibit 10]. The Director rejected PWM's approach to Footnote 7 [see Findings 12-14 and Exhibit 10].

12. "*Adjacent*" is not defined in the Code and the result here would vary depending upon which of two common meanings was contemplated. The Director considered dictionary definitions [Exhibit 10] and found that:

The word "adjacent" means "close to; next to; lying near; adjoining." *The American Heritage Dictionary of the English Language*. The word "adjoining" means "neighboring; contiguous; next to." *Id.* The word "contiguous" means "sharing an edge or boundary; touching; nearby; neighboring; adjacent." *Id.* In another dictionary, the word "adjacent" is defined as "not distant or far off; relatively near and having nothing of the same kind intervening; having a common border: abutting, touching." *Webster's Third New International Dictionary*.

13. The Director determined that, given the different meanings possible (*i.e.*, "immediately next to, or touching, as well as nearby but not touching"; see Finding 12), "adjacent" is an ambiguous term (*i.e.*, its meaning is susceptible to more than one reasonable interpretation). To decide which meaning is intended in Footnote 7, the Director applied the principle of interpretation that an ordinance "must be construed to give effect to its purpose, and to avoid unlikely, absurd or strained consequences". [Exhibit 10, emphasis added]

14. The Director found that interpreting "*adjacent*" to include the meaning "nearby but not touching", could have the "absurd and strained" result of precluding projects on abutting parcels (*i.e.*, next to the on-street parking) from using this provision to meet parking requirements. The Director determined that the "logical and reasonable interpretation of City Council intent" was that Footnote 7 allows creation of on-street parking in the street right of way to the extent that a parcel abuts (*i.e.*, is physically "touching") that right-of-way. Therefore, a parcel that has its access through another parcel (like PWM), "can only create parking spaces in the right of way frontage abutting the parcel through which access is gained." PWM could potentially create on-street parking in the right-of-way along the frontage of the Harbourside Condominium property

(through which it gains vehicular access), but not along the frontage of the Harui property. [Exhibit 10]

Appeal

15. On June 14, 2006, PWM timely filed an appeal of the Interpretation [Exhibit 11]. Required notice of the appeal hearing was properly given [Exhibits 14, 17, and 18] and hearing was held on October 5, 2006. Prehearing Orders [Exhibits 23 and 27] denied requests from neighboring property owners to intervene and/or participate in this appeal proceeding [Exhibits 16, 19- 22, and 24-26]

16. At the appeal hearing, the Director and the Appellant summarized the bases for their differing views as to how Footnote 7 should be applied [see Exhibits 10 and 28].

17. Appellant argued [Exhibit 28] that “adjacent” means “nearby or close to”, and does not mean “contiguous or touching” as interpreted by the Director. The Appellant further asserted that the Director is mistaken in his determination that “adjacent” is ambiguous (*i.e.*, its meaning is susceptible to more than one reasonable interpretation; see Findings 12 and 13). However, some of the dictionary definitions recommended by Appellant include both meanings (*e.g.*, “Lying near, close, or contiguous; neighboring; bordering on; as a field adjacent to the highway”; “...close to each other, but not necessarily in actual contact”; “Lying near or close to; sometimes, contiguous...”).

18. Roget’s II: The New Thesaurus (Third Edition, 1995), gives support for the Director’s determination that “adjacent” has these two meanings:

1. Sharing a common boundary: adjoining, conterminous, contiguous, next. *See* NEAR.
2. Not far from another in space, time, or relation: close, contiguous, immediate, near, nearby, nigh, proximate.

19. As quoted in the Appellant’s brief, courts have found that “adjacent” is: “A word of flexible meaning, depending upon context and subject matter.” [See Exhibit 28, page 7.] This is illustrated by some of Appellant’s examples of where “adjacent” is used to mean “nearby but not touching”. That is, the context makes apparent the “not touching” meaning (*e.g.*, “Adjacent landowners...within three hundred feet...”; “...adjacent...within six hundred sixty feet...”). [See Exhibit 28, pages 7-12.]

20. The appellant provided a printout of an online search of the Bainbridge Island Municipal Code for the terms “adjacent”, “adjoining”, and “abutting” [Attachments, Exhibit 28]. In some instances the Code context indicates that “adjacent” means “abutting” and not “nearby, but not touching” (*e.g.*, “...a noncommercial kennel at or adjacent to a private residence...”; “...measured from the grade adjacent to the sign”; “... a vegetative buffer shall be established adjacent to all scenic roads”). Also, there are instances in which “*abutting*” is used where “adjacent to” would convey the same meaning (*e.g.*, substitute “adjacent to” for “abutting” in: “...on a lot abutting the applicant’s lot” or “...along a property line abutting the residential zone”).

21. BIMC 2.16.130 requires the Hearing Examiner to accord substantial weight to the Director’s Interpretation. As explained in the Washington Real Property Desk Book, Third Edition, Volume VI, Section 97.3(2)(c), (citations omitted), this deference is expected when construing zoning ordinances:

The interpretation of those charged with administering an ordinance should be given substantial weight... The rationale for this deference is that local administrators have special expertise that is valuable in interpreting an ambiguous term in a manner harmonious with local legislative policies. Administrative agencies are able to “fill the gaps” via interpretative construction in order to give effect to the general statutory scheme... Some jurisdictions now specifically allow “code interpretation” by establishing procedures by which the application of the zoning code to a particular project may be ascertained.

22. Not only is the Director here charged with administering the Code after its adoption, the Director provided essential professional support and assistance throughout the lengthy ordinance development process. The Director would be fully familiar with the issues and policies that concerned the City Council during its consideration of the MUTC parking requirements. Exhibit 32, proffered by Appellant, is the “Affidavit of Katherine Cook Regarding Legislative History”. Ms. Cook is a planner for the City on the Director’s staff. Her affidavit recounts the evolution of the parking requirements ordinance from task force and Planning Commission study sessions, through adoption by the City Council. The many attachments to Exhibit 32 consist almost entirely of memos, study session guides, ordinance drafts, and other documents prepared or presented by Ms. Cook during the development of the ordinance.

23. At the hearing, PWM proffered an alternate appeal theory. The alternate theory is that, in light of the definition of “*rights-of-way*” in BIMC 12.38.010A, the Director made an error of fact in not treating the public pedestrian easement (sidewalk) through the subject property, as a right-of-way. PWM did not assert this critical “fact” in its request for Interpretation [Exhibit 1] and did not mention it in its appeal [Exhibit 11]. Appeals to the Hearing Examiner are required to “*contain a summary of the grounds for the appeal*” [BIMC 2.16.130]. This alternate theory, coming as a surprise at hearing rather than denoted in the appeal as required by the appeal procedures, cannot be considered in making this decision.

Conclusions

1. This matter is properly before the Hearing Examiner. BIMC 2.16.130 authorizes the Hearing Examiner to hear appeals of “*administrative decisions, departmental rulings and interpretations...*” In deciding such appeals, BIMC 2.16.130.F directs that the Hearing Examiner may: affirm the Director's decision, affirm with modifications, reverse the decision, or remand it to the Director. That section of the Code also requires that the Hearing Examiner give “*substantial weight to the decision of the department director.*”

2. The Appellant argued that the Director should not be accorded substantial weight because this is a “purely legal” question, and as such, is not within the expertise of the Director. That argument is rejected. The Code expressly directs the Hearing Examiner to accord deference to the Director [see BIMC 2.16.130 as noted above]. As there is no exception or ambiguity in that directive, deference is required as a matter of law. (Even if deference were not expressly required, it is established in this record [see Finding 22] that the Director has appropriate “expertise” for interpreting the parking requirements.)

3. The Hearing Examiner must give substantial weight to the Director. To overcome substantial weight, the Director's Interpretation must be shown to be clearly erroneous. Under this standard of review, the Director can be reversed only if the Hearing Examiner is left with a definite and firm conviction that a mistake has been made.

4. The development standards of BIMC 18.40.030 prescribe parking required for various uses in the Mixed Use Town Center district. Footnote 7 makes available (for some commercial and nonresidential uses) an alternative to supplying this required parking on-site. Central to this appeal is the meaning of the phrase "*adjacent to*" in Footnote 7. At issue is whether or not PWM could seek to avail itself of that Code provision in order to create on-street parking spaces to be counted toward meeting parking requirements for a "*project*" on the subject property. (Although, PWM's request for Interpretation [Exhibit 1, page 6] included an "on-street parking proposal", PWM indicated at hearing that there is currently no specific proposal. With the recent Superior Court decision [see Finding 8], it appears there also may presently be no "*project*".) The Interpretation means that, pursuant to Footnote 7, PWM could only seek to create on-street parking in the right of way abutting the parcel through which it has access.

5. The Director did not err in finding that "*adjacent*" is ambiguous. The term is not defined by the Code and there is more than one reasonable interpretation [see Findings 12 and 13]. "Adjacent" can mean "immediately next to or touching", as the Director determined is the case in Footnote 7, or it can mean "nearby but not touching", as is argued here by Appellant. Both meanings are in dictionary definitions and in the Code.

6. The Director rationally concluded that to give effect to the intended purpose of this provision, and to avoid "unlikely, absurd or strained results", the meaning of "*adjacent*" in this context is: "immediately next to or touching", rather than "nearby but not touching". This interpretation is not a mistake and it allows for reasonable and predictable use of this Code alternative to providing all required parking on-site.

7. The Director's interpretation has not been shown to be erroneous and should be affirmed.

Decision

The decision of the Director interpreting Footnote 7, BIMC 18.40.030, is hereby **AFFIRMED**.

Entered this 23rd day of October 2006.

Signed in Original

Meredith A. Getches
Hearing Examiner

CONCERNING FURTHER REVIEW

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

For land use decisions, request for judicial review of this decision by a person with standing can be made by filing a land use petition in superior court within 21 days in accordance with the Land Use Petition Act, Revised Code of Washington (RCW), Chapter 36.70C.