DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND

In the Matter of the Appeal of

RAY'S AUTOMOTIVE **COD 20000-00005**

Appeal from Director, Planning and Community
Development Department Decision dated
July 24, 2006

PARTIES PRESENT:

Paul McMurray, City Attorney
George C. Nickum, (for Appellant)
Megan McKnight
Joshua Machen, Senior Planner

SUMMARY OF REQUEST:

The appellant appeals a determination of a Director of the City of Bainbridge Island Department of Planning and Community Development dated July 24, 2006 which requires the appellant to remove a storage container placed upon appellant's parking lot in the year 2004.

SUMMARY OF DECISION:

Appeal denied.

PUBLIC HEARING:

After reviewing the staff report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on September 28, 2006, at 1:30 p.m.

MINUTES

Parties wishing to testify were sworn in by the Examiner.

Appearing was JOSHUA MACHEN, Senior Planner who presented the staff report which, with its attachments 1-62 where admitted into evidence. Mr. Machen is a senior planner who has been with the department for approximately 11 ½ years and has been a senior planner for about one year. As senior planner, his job definition includes a shoreline stewardship, which involves providing technical assistance to Code Enforcement Officers.

He prepared the staff report, Exhibit 60. Appellant is the owner of Ray's Automotive. Within the last couple of years, perhaps 2004, the appellant placed a storage structure on his parking lot which is zoned residential. Appellant has four individual tax parcel lots; one as the appellant described is used for storage, a second is used for his home, the third is used for Ray's Automotive, and the fourth is used as a parking lot which is an accessory lot to Ray's Automotive. The lot is zoned R2 residential. The storage container is within 10-15 feet of the ordinary high water mark. This area has consistently been used as a parking area for the automotive repair shop. The storage unit is located within the native vegetation zone of the shoreline. It is in violation of the provisions governing the native vegetative zone and it is also an expansion of a non-conforming use which is in violation of the City Code. The storage container is a structure as defined by Bainbridge Island Municipal Code 16.12.030(176). The parking lot which was developed as a parking area with a free standing sign now includes this large container which is the subject of the appeal. The site's development, excluding the prohibited container, is assumed non-conforming development. The City's Shoreline Master Program designates the site as Rural Environment with Aquatic Conservancy Area waterward of OHW. The City Comprehensive Plan designates the site as open space residential two units per acre (OSR-2). On August 30, 2004 he received a complaint that the appellant appeared to have expanded a non-conforming shoreline use (Non-Conforming Zoning Use) see Exhibit 48. On October 13, 2005, Mark Hinkley sent the appellant a Notice of Violation letter (Exhibit 52). The letter required that the container be removed within 30 days and if it was not removed within 30 days, then action would be taken. Thereafter, the appellant and his attorney met with Larry Frazier. There is a dispute as to whether or not this was a formal meeting or if it amounted to a review hearing. In any event, regardless of what was held, the appellant has waived any right he might have to a review hearing if it has not occurred. On July 24, 2006, Larry Frazier sent a letter indicating that his review of Notice of Violation dated October 13, 2005, requires that structure be removed. See Exhibit 58. On September 7, 2006, the appellant filed an appeal of the director's decision, Exhibit 62. The existing parking lot is prohibited use on the property and is in violation of the native vegetation provisions of the BIMC. Placement of this storage container within the jurisdiction of the Shoreline Master Program and within the native vegetation zone is inconsistent with the policies and procedures of the shoreline master program. A storage container is not allowed in the area and is considered an expansion of a nonconforming use.

The parking lot is an existing nonconforming use that appears to have been in use prior to the effective date of the City's Shoreline Master Program November of 1996. Placing the storage structure on the property changes the intensity of the use and is a new commercial development, which is prohibited by the Shoreline Master Program and it is an addition to a non-conforming use. The site is located in a scenic vista and the storage container blocks views.

Appearing was RAY ADAMS owner of Ray's Automotive. He placed the storage container on the parking lot as a replacement for a fence which had fallen down. His adjacent neighbor was complaining about the view of his business from her home as well as the noise. He thought that the container could be used to help minimize the noise. The side

facing the neighbor has a scene painted on it of Mount Rainier. The storage unit is filled with personal items, some shop equipment, but 80-90% is personal property belonging to he and his wife. It is not on the storage lot because of its use as a fence and noise barrier. He did not obtain any permits to locate the storage container on the lot. The site consists of four parcels; one parcel is the authorized storage lot, the second parcel has his family home, the third has Ray's Automotive, and the fourth is a parking lot. The parking lot is adjacent to the Puget Sound and actually borders a creek running into the Sound. After discussions with his neighbors, they were happy to see the change.

No one spoke further in this matter and the Examiner took the matter under advisement. The record will remain open until October 12, 2006 for each of the parties to file briefs and then for October 19, 2006 for responsive briefs to be filed.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted Exhibits 1-62 into evidence into the record, reviewed the same, heard testimony, viewed the site, researched the issues, and taken this matter under advisement.

2. Notice of this appeal was filed in accordance with the provisions of Bainbridge Island Municipal Code, see Exhibit 61.

3. The appellant is the owner of a black top parking lot, located on the east side of Eagle Harbor Drive, between Eagle Harbor Drive and Puget Sound. The entire lot is within 200 feet of the shoreline. It is a flat, low bank, bulkheaded parcel of property. The parking lot site is bounded on the north side by a creek and on the south side by Ray's Automotive. The appellant owns four contiguous lots located between Eagle Harbor Drive and Puget Sound. The family residence is located on a lot south of Ray's Automotive building and south of the single-family residence is a fenced storage area the appellant uses to store vehicles and other equipment for use in his shop. The four parcels yield a long, narrow strip of land between Eagle Harbor Drive and Puget Sound.

4. All parties referred to the paved parking lot as an existing, nonconforming development. However, there was no evidence submitted to the Hearing Examiner indicating that the parking lot is an established, legal, nonconforming development and this decision should not be interpreted in anyway or sited for the proposition that the parking lot meets the requirements of Bainbridge Island Municipal Code (BIMC) 1806770 that: (1) the parking lot existed on the date specified in the zoning code; (2) that it was a lawful use on that date; and (3) that it has continued in use as a parking lot ever since. See *State v. County Pier* 65 Wn. App. 614 (1992) and BIMC 18.06.0770. Neither party discussed the issue of whether or not this parking lot was

a legally established use on the date the zoning code was enacted, nor is there anything in the zoning file with reference to this lot which indicates that the site was legally established as a parking lot.

5. The site is zoned Residential two units per acre (R2). The purpose of the R2 zone is to provide for residential neighborhoods of increased density in a rural environment (BIMC 18.30.010). Parking lots are not permitted in a R2 zone.

6. The City's Shoreline Master Program (SMP) designates the upland portion of this site as rural environment with the water portion being aquatic conservancy. The SMP is intended to implement the Shoreline Management Act by planning for and guiding the ordered development of the shoreline, protecting shoreline resources, and helping to share public access to the shoreline. The SMP helps both property owners and the City and staff in the permitting process. It also educates the community in the use and protection of its shorelines. BIMC 16.12.150 indicates that parking lots are prohibited in the rural upland environment of the shoreline. The SMP also prohibits parking lots in areas with aquatic conservancy over water environments. The SMP provides for a 200 foot natural vegetative buffer.

7. Bainbridge Island Comprehensive Plan use map designates this site as open space, residential two units per acre (OSR-2). Non-water oriented commercial uses are prohibited in the Rural Shoreline Environment.

8. As the above indicates Mr. Adam's parking lot and the adjacent Ray's Automotive is located in the rural shoreline environment. The business and the parking lot therefore are nonconforming uses. They were in existence before the current zoning laws were in effect.

9. According to Mr. Adams, sometime in 2004 he placed a large cargo-type container (8x8x20) on the parking lot adjacent to his business. He placed the cargo container on the lot to replace an existing fence. The cargo container had a painting on one side which is the side facing the adjacent residential use. The neighbors had been complaining about the fact that a fence which had protected them from their view of Ray's Automotive, had been torn down. Mr. Adams placed the container with the painting on the site, adjacent to the creek in order to protect the neighbor's view of his automotive business as well as perhaps absorb some of the sound from his business. He did not obtain any permits to do so. He did not request any exemptions from the shoreline regulations. He just placed the container on his site. His attorney indicated in his briefs that the container was temporary, however it now appears that it has been on his premises in excess of two years. According to Mr. Adams, he is using the container to store personal items and some business items. Approximately 80% to 90% of the container is used to store personal items, some of which was inherited from a deceased relative. Based upon his testimony, it would appear that the container is placed upon the parking lot not for a commercial use but a personal use.

10. On August 30, 2004, the City of Bainbridge Island received a complaint about Mr. Adam's placement of the cargo container on his parking lot. The cargo container is a type of container which is used to transport materials on trains or ships. It is eight foot by eight foot by 20 foot and metal composure. At the time of the complaint, a review of the zoning files on Mr. Adam's parcels of property indicated that Mr. Adams had problems in the past with trying to expand his use and structure without permits. The history of his attempted expansions include an addition to his automotive business building without obtaining any permits and the placement of a used mobile home on site without any permits. Both of these incidents were thoroughly investigated and enforcement was time consuming and costly for the City. In each case the record is clear that the appellant is currently aware that his site is within 200 feet of the shoreline and that his uses are not water related, water oriented, or for water enjoyment. He has been previously informed that all development and construction activity on these sites must comply with the guidelines and regulations stated in the City's SMP and with state law. All new uses and activity must have appropriate permits or letters of exemption.

11. On October 13, 2005, the City, after investigating the complaint concerning the storage container, sent a Notice of Violation letter (Exhibit 52) to Mr. Adams. In that letter, the City indicated that the parking lot is a non water oriented use in the rural shoreline designation which is not allowed under the existing SMP and therefore is an assumed, existing nonconforming use. Expansion is not permitted. The City also indicated that Mr. Adams was in violation of BIMC 16.12.380 which requires either a shoreline permit, or a letter of exemption before undertaking any development or activity within 200 feet of the shoreline. BIMC 18.123.010 prohibits use of the property, in any manner, without first obtaining permits or authorization from the City. The letter requested that he remove this structure within 30 days. The letter also advised him of his right to request director's review of the letter. The request should have been submitted within seven days after service of notice.

12. On October 8, 2005, George C. Nickum, on behalf of Mr. Adams, filed a response. He had previously indicated to the City that he represented Mr. Adams on this issue and he disagreed with the City's interpretation of the law. He advised Mr. Adams that "he cannot be stopped from using that area for business purposes, simply because there are new laws on the books that would apply if they were starting a new business or making some new use."

13. It was not until July of 2006 that the director, Larry K. Frazier, reviewed the Notice of Violation issued on October 13, 2005. In the interim, there was correspondence in the file from Mr. Nickum.

14. On July 24, 2006, Mr. Frazier notified Mr. Adams that he sustained the Notice of Violation dated October 13, 2005 with a modification of deadline for removal of the storage container to 4 p.m. Friday, September 1, 2006. He indicated that thereafter,

the matter would be referred to the prosecuting attorney for enforcement action… The sum and substance of Mr. Frazier's decision was that

> "in accordance with the Bainbridge Island Municipal Code (BIMC) 16.12.390(A)(1)(a) and (c), nonconforming uses shall not be altered or expanded in any way that increases the nonconformity; and a nonconforming use cannot be changed to another nonconforming use. The storage container, while temporary in its relation to the requirement for a dwelling permit, meets the definition of a structure in BIMC Chapter 16.12 (Shoreline Master Program) and is regulated as such. Placement of new structure (the storage container) is an expansion and an increase of the nonconforming business. The existing nonconforming use of the paved area cannot be changed to a storage container."

15. On August 7, at 3:11 p.m. Mr. Adams filed his Notice of Appeal. He indicates that: "The primary issue on this appeal as well as the placement of the storage container in a paved area that has always been used for business purposes, is such 'alteration or expansion which increases the nonconformity'." The appellant denies that this storage container "increases the nonconformity" of his business. See Exhibit 62.

16. According to the testimony of Mr. Adams, the storage container was placed on the parking lot sometime in the year 2004. There is no evidence before this Examiner that the storage container was on this site when the SMP was enacted in 1996. The only evidence before the Examiner is that the parking lot was in existence. There is no evidence that in 1996 this parking lot contained a storage container.

17. Mr. Nickum, attorney for appellant, argues that the appellant cannot be stopped from using the parking lot for a business purpose. His own client contradicted him with reference to this issue by stating that 80%-90% of the container is being used for personal purposes. A storage container where cars usually park is conversion of a parking lot to a storage lot. It is a different type of use. The purpose and intent of nonconforming use ordinances is not to allow the enlargement of a nonconforming use but to restrict and ultimately phase out the use entirely.

18. BIMC 16.12.390 governs nonconforming uses and structures within the area of Bainbridge Island regulated by the City's SMP. Subsection 1 specifically regulates nonconforming uses and states:

> (1) Nonconforming uses.
>
> (a) Nonconforming uses shall not be altered or expanded in anyway that increases the nonconformity…(c) a non conforming use cannot be changed to another nonconforming use.

The placement of the storage container on a parking lot, traditionally used as a parking lot for Ray's Automotive customers, is a change in use from parking lot to storage lot. Cars cannot park where they could previously park. It is a change which adds a structure to a lot thereby increasing the nonconformity. This is a totally different use. He moved the storage container to the parking lot to provide privacy from his neighbor and to lessen the noise generated from his business to his neighbors. Not only was this a change in use, but it is an expansion of a use from a parking lot to a lot for storage containers.

19. The placement of this storage container on the parking lot is also a violation of BIMC 16.12.360(A)(3) which requires any person wishing to undertake substantial development or exempt development on shoreline to apply to the director for appropriate shoreline permit or statement of exemption. Mr. Adams did not apply for a Shoreline Substantial Development Permit or a Shoreline Exemption Statement for placement of the storage container at this site. This is not the first time that Mr. Adams has attempted to modify or change his use without obtaining appropriate permits or letter of exemption. He should be well aware of the regulations governing waterfront lots.

20. The placement of this storage container on a parking lot is also a violation of BIMC 16.12.390(2)(a) and (b) in that placement of this additional structure on this parking lot is an expansion of a nonconforming use without an application for shoreline variance. It is a violation of BIMC 16.12.390(B) in that the container will and does obstruct existing views of the water from a public right-of-way.

21. In Miller v. City of Bainbridge Island*,* 111 Wn. App. 1352 (2002), the court clearly indicated that a nonconforming use is defined in terms of the property's lawful use established and maintained at the time the zoning was imposed. (Miller at 164). The parties indicate that at the time the zoning was passed herein, this lot was used as a parking lot. It is assumed that that was the lawful use at that time, but as previously stated, there is no evidence indicating that a storage container was on a legally established parking lot at the time the zoning ordinance was passed. Miller went on to say that a nonconforming use in existence when a zoning ordinance was enacted cannot be changed into some other kind of nonconforming use. You cannot put a storage container on a parking lot because it changes the parking lot from being used as a parking lot to being used as a storage lot. This is an expansion of use. It is a change of use. Miller indicated that for instance you cannot change a nonconforming rooming house into a fraternity house. That would be a change of use. The facts are not comparable. The record herein reflects that there has not been a change from a parking lot where vehicles are parked to a storage container lot. This is a change of use and under Miller, it is unauthorized.

22. Appellant seemingly argues that in Keller v. City of Bellingham, 92 Wn. 2d 726 (1979) which is a five to four decision and was strictly limited to an interpretation of a Bellingham ordinance which failed to prohibit intensification of a use as legally

justifying a use as long as it is for business purposes. The Bellingham ordinance differs from the Bainbridge Island ordinance. The case is distinguishable from the current fact pattern on many different grounds and is a limited holding with reference to an intensification of a use which had been previously been planned for before the change in ordinance and in which a structure had been built for before the change in ordinance. In this particular case, we have a parking lot that now holds a storage container. The facts are not comparable. Keller was limited to an intensification of an existing use. It does not stand for the proposition that any use as long as it is a business use is permissible. The court very specifically limited the holding to the language of the Bellingham City Code and the fact pattern where a building had been constructed before the new zoning ordinance came into effect which had the capacity to provide for an increase in production. It did not include the placement of an new structure on a site.

23. As previously stated, the parking lot is a nonconforming use as it is a commercial use and commercial uses are prohibited in the rural shoreline environment. The SMP establishes an effective 200 foot native vegetative zone for waterfront property. The storage container constitutes a new commercial development, a storage container which is not a water oriented use, and therefore is inconsistent with the shoreline policy, as previously stated.

24. BIMC 16.12.090 requires the maintenance of a vegetation buffer landward from the ordinary high water mark. The Code requires that this area remain undisturbed and in its natural condition to act as a water quality filter and to provide wildlife habitat. The existing parking lot is a prohibited use on this property. This commercial storage container within the jurisdiction of the SMP within the native vegetation zone of the shore is inconsistent with the policies and procedures of the SMP. The evidence is abundantly clear. Prior to 2004, the subject site was used as a parking lot. In the year 2004, the applicant placed a storage container on the lot. He previously had not placed storage containers on this lot and had placed them on lots south of the parking lot. This is a change of use an.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide appeals of the director's administrative decisions regarding alleged violations pursuant to BIMC 2.16.130. In making that decision, the Examiner must give substantial weight to the Department Director. See BIMC 2.16.130(F)(2). To overcome substantial weight accorded a director, an appellant has to show the director's decision is clearly erroneous. Under this standard of review, the director can be reversed if the Hearing Examiner is left with a definite and confirmed conviction that a mistake has been made.

2. The appellant has failed to overcome that burden. He has placed a new structure i.e. the cargo container (a piece of work artificially built or composed of parts joined

together in some definite manner installed above the surface of the parking lot) changing the use of the parking lot to a storage container lot and a parking lot. The record is abundantly clear that the letter of Larry K. Frazier dated July 24, 2006 correctly states the law and the appellant's appeal is hereby denied.

DECISION: The appellant's appeal from Director's Decision of July 24, 2006 is denied and the storage container shall be removed forthwith.

ORDERED this ______ day of November, 2006.

___Signed in Original_________________
TERRENCE F. McCARTHY
Hearing Examiner