

May 31, 2016

**CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER**

CODE INTERPRETATION APPEAL DECISION

Proceeding: Administrative Code Interpretation Appeal of Tom Coultas

File number: PLN50422 ADM INT

Appellant: Tom Coultas, *represented by*
Dennis D. Reynolds, Attorney
200 Winslow Way West, Suite 380
Bainbridge Island, WA 98110

Location: The Farm Business Park
8893 – 97 Three Tree Lane

FINDINGS OF FACT

1. On December 28, 2015, Tom Coultas, through his attorney Dennis Reynolds, applied to the City's Planning and Community Development Department for an administrative code interpretation. Mr. Coultas is in the process of constructing a business park in the Business/Industrial (B/I) zone and wishes to site a beauty shop within the project. While personal services businesses such as beauty shops are generally prohibited in the B/I zone, Mr. Coultas argues that a heading within the BIMC 18.09.020 Permitted Use Table referring to "Commercial/Residential Mixed Use Developments" has the effect of allowing all forms of mixed use development to be sited in the B/I zone notwithstanding specific code provisions to the contrary. He also contends that the existence of personal use businesses in the nearby Coppertop Park / Sportsman Park Business Park complex requires similar treatment for his proposed beauty shop.

2. The City's Interim Planning Director rejected Mr. Coultas's proposed analysis in a code interpretation issued March 1, 2016, stating that "if a use is not permitted in the B/I zone as a stand-alone use, it does not become permissible by placing a caretaker or residential unit on the site in an attempt to convert it to a "Commercial/Residential Mixed Use Development". Mr. Reynolds filed a timely appeal of the Planning Director's code interpretation decision, and an appeal hearing was held by the Hearing Examiner on May 4, 2016. The record was held open until May 23, 2016, for further briefing.

3. B/I zoning was adopted in the area containing the subject property in 2011, replacing prior light manufacturing (LM) zoning. As described within the BIMC 18.09.020 Use Table, the B/I district is the only zone in the City where manufacturing and research facilities are permitted outright. Retail operations are mainly limited to services that support the core B/I uses (delivery and transport), with some allowance also made for services that require larger facility spaces (animal sales and service, self-service storage, car washes). As noted, no personal service businesses are allowed. But a few professional service facilities are conditionally permitted that support the principal B/I purposes:

In the B/I district, professional offices shall be limited to those that do not provide services directly to the general public or attract customers from the general public. For example, accountants', lawyers', and architects' offices are not permitted. Establishments that provide professional services to other businesses are permitted, such as civil, mechanical, or electrical engineers and research and development establishments. (BIMC 18.09.030.D(6)(c)).

4. There is a single entry reading “Commercial/Residential Mixed Use Developments” appearing in the BIMC 18.09.020 Permitted Use Table. It applies to the general category of principal residential uses under the subheading “household living” and depicts “Commercial/Residential Mixed Use Developments” as being permitted outright in the five Winslow Mixed Use Town Center districts plus the High School Road, Neighborhood Service Center and B/I districts – all subject to use-specific standard B-3. This development condition reads as follows:

Commercial/Residential Mixed Use Development. Principal and accessory uses shall comply with the applicable development standards and performance standards of the B/I and NSC districts as well as the other standards listed here.

a. In the B/I district, a single residential unit for security and/or insurability of the premises is permitted. No other residential uses are allowed; and

b. In the NSC district, residential units must be located above the ground floor if the building is located on a collector or secondary arterial or higher road classification; however, for mixed use projects, if the building fronts on a local or private street, residential units can be located on the ground floor. Density for mixed use projects in the NSC district shall be calculated pursuant to BIMC 18.12.030.D. (BIMC 18.09.030.D(3)).

5. No specific definitions of “Commercial/Residential Mixed Use Developments” or “Mixed Use” are provided in the zoning code. But the Mixed Use Town Center zone, the High School Road zones I and II, and Neighborhood Service Center are treated collectively in BIMC Chapter 18.06 as “Mixed Use Districts” while the B/I zone appears under the later heading of “Other Districts”. A basic description of “mixed use” concept as implemented by the City zoning appears at BIMC 18.06.030.A:

Purpose. The purpose of the Mixed Use Town Center zone is to implement the Mixed Use Town Center sections of the comprehensive plan. The Mixed Use Town Center should strengthen the vitality of downtown Winslow as a place for people to live, shop and work, to provide a strong residential component, and to encourage a lively community during both the day and night. The Mixed Use Town Center zone includes five overlay districts that allow diverse types of housing,

shopping, civic facilities, recreation and employment. The mix of land uses promotes a pedestrian atmosphere, enhances the viability of the town center, and allows development in a manner that is harmonious with the scale of the town center. Land uses that require outdoor storage or that have an auto orientation, such as drive-through establishments, are not permitted within the Mixed Use Town Center.

6. Mr. Coultas made no serious attempt at the hearing to offer supporting historical details with respect to his argument based on the presence of personal use businesses in the nearby Coppertop development. It appears undisputed that service businesses such as gymnasiums, bakeries, wine shops and private schools currently exist at Coppertop. The uncontradicted testimony of City planner Joshua Machen was that these businesses were established under the previous LM zoning, many pursuant to conditional use permits. No comparisons of current B/I use provisions with the earlier LM provisions that they replaced were offered.

CONCLUSIONS

1. BIMC 2.16.020.D(3) provides as follows:

Any person may request an interpretation of the zoning code, shoreline master program, or subdivision regulations. The director of planning and community development may issue interpretations of the zoning code, shoreline master program, or subdivision regulations as needed, and shall post issued interpretations on the city website.

2. With specific reference to zoning code issues, BIMC Chapter 18.03 also offers the following guidance:

18.03.070 Minimum requirements.

In their interpretation and application, the provisions of this code shall be held to be the minimum requirements for the promotion of the public health, safety, morals, comfort, convenience, prosperity, and general welfare. Where the conditions imposed by any provision of this code upon the use of land or buildings or upon the bulk of buildings are either more restrictive or less restrictive than comparable conditions imposed by any other provision of this code or of any other law, ordinance, resolution, rule, or regulation of any kind, the regulations that are more restrictive or that impose higher standards or requirements shall govern. When one title of the BIMC is silent on the issue and another title contains explicit regulations, the explicit regulations shall govern. When one title of the BIMC contains general regulations and another contains more detailed regulations on the same topic, the more detailed regulations shall govern.

18.03.090 Interpretation by the director.

The director has the authority to provide interpretations of provisions, uses, or definitions in BIMC Titles 16, 17 and 18 and related provisions in BIMC Title 2, and will make these interpretations available to the public. Any person may apply to the director for an interpretation of any provision in these titles. The director shall provide the interpretation taking into account consistency with the comprehensive plan, the nature of the definition or use,

and its relationship to the code and its potential impacts....

The authority to provide an interpretation does not include the authority to add a new permitted (“P”) or conditional (“C”) use to the use table in BIMC 18.09.020. The director’s interpretation is subject to appeal pursuant to BIMC 2.16.020.P.1.

3. Subject to the foregoing and based on applicable case law principles, prior code interpretation appeal decisions have held that the code interpretation process is to be governed by the customary rules of statutory construction. The foundational objective is always to give effect to the legislative intent underlying the regulation. No exercise in the construction of regulatory terms is justified where regulatory provisions are clear on their face.

4. The appellant's multiple assertions that “the Code allows “Commercial/Residential Mixed Use Development” as a permitted use in the B/I zone without limitation” are simply incorrect. The framework of uses authorized for the B/I zone is consistently and exclusively focused on light manufacturing plus related and necessary supporting services. There is a clear legislative intent to exclude retail and service establishments that neither possess a connection to core B/I purposes nor impose larger space requirements than can normally be accommodated in conventional retail districts. Small personal service businesses are excluded from the B/I zone without exception. This underlying regulatory reality is not altered by the fact that some of these prohibited uses could also qualify as “mixed uses”.

5. The only arguable ambiguity in the regulatory scheme is the single appearance of the heading “Commercial/Residential Mixed Use Developments” in the residential use matrix for the BIMC 18.09.020 Permitted Use Table. The contention that this isolated heading entry should be regarded as amending the entire B/I zone regulatory scheme must be rejected for many compelling reasons, including the following:

- The general heading must be deemed superseded by the more explicit and detailed use-specific standard B-3, as required by BIMC 18.03.070.
- Any ambiguity inhering in the use of the “Commercial/Residential Mixed Use Developments” heading in the BIMC 18.09.020 Permitted Use Table is limited to the residential context in which it appears. No actual conflict exists regarding the appellant's proposed minor caretaker residential use and the heading under which this use is classified. It is illogical to suggest that an anomalous and ambiguous heading should be exported to infect and undercut other different use categories to which it does not by its terms apply, such as personal services, where the legislative intent to categorically prohibit such uses in the B/I zone is completely clear.
- The legislative intent to exclude from the zone retail and personal service businesses unrelated to core B/I uses is abundantly supported by the stated purposes of the zone and the structure and contents of the relevant use table and its related development standards. BIMC 18.03.090 explicitly forbids employing the code interpretation process to alter the BIMC 18.09.020 use table.

6. Finally, the contention that the provisions governing placement of B/I uses should be construed

in the light of other nearby uses existing in the Coppertop complex raises issues beyond the scope of this proceeding. The notion put forward by the appellant is that current application of the B/I regulatory provisions to proposed personal service uses – regardless of what such provisions may actually say – is controlled by a pattern of prior City behavior that allowed personal uses to be sited at other similarly-zoned properties. This is not a code interpretation argument but an equitable estoppel claim. BIMC 2.16.020.D(3) confers no Hearing Examiner authority to entertain equitable estoppel claims and, even if it undertook to do so, appellate case law is clear that Examiner jurisdiction cannot be extended to include equitable claims. *Chaussee v. Snohomish County Council*, 689 P.2d 1084, 38 Wn.App. 630 (1984).

7. The appellant carries the burden of proof to demonstrate on appeal that the Director's code determination was incorrect; BIMC 2.16.020.P(1)(k) provides that within an administrative review appeal the “*decision of the director shall be accorded substantial weight by the hearing examiner.*” The appellant's burden of proof has not been met and his code interpretation appeal thus must be denied. The code interpretation issued March 1, 2016, is upheld.

DECISION

The code interpretation appeal of Tom Coultas (PLN50422 ADM INT) is DENIED.

ORDERED May 31, 2016.



Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.

A party with standing may seek judicial review of this decision by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.

EXHIBIT LIST

Appeal of Administrative Code Decision Coulta (PLN50422ADM)

Staff Contact:
Joshua Machen, AICP
Planning Manager

Public Hearing: 05/04/2016
Location: City of Bainbridge Island
City Hall Council Chambers

Hearing Examiner:
Stafford Smith

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATED
1	Appeal of Administrative Decision Together with: Exhibit A – Code Interpretation of the Director of Planning and Community Development dated March 1, 2016 Exhibit B – Administrative Code Interpretation Application and Request Letter from Dennis Reynolds dated December 28, 2015	03/11/2016
2	Notice of Public Hearing and Certificate of Distribution and Posting	04/13/2016