BEFORE THE HEARING EXAMINER
FOR CITY OF KENNEWICK

In the Matter of the Appeal of	)	**FILE NO: APPEAL**
Andrew Landram and Storageland	)	**19-01/PLN-2019-03185**
Of City of Kennewick Denial of	)	
Use of Transportable Units as a Non-	)	FINDINGS CONCLUSIONS
Conforming Use	)	and DECISION

SUMMARY OF DECISION

The appeal of the Kennewick Planning Department's letter of October 18th, 2019, denying the use of transportable storage units as a Non-Conforming Use is denied. The Appellant has failed to prove that the use of the transportable units was lawful in a Commercial Community (CC) zone at the time the transportable units were placed on the property in 2016. The other issue, whether there has been an expansion of a nonconforming use, is moot because a nonconforming use was never created.

SUMMARY OF RECORD

Background:

Mr. Drew Landram is the owner of Storageland LLC (Appellant), a business operating a storage center at 108 West Columbia Drive, Kennewick, Washington.[1] After the City Of Kennewick (City) issued code enforcement violations for the property for the use of transportable storage units (units) on site and in violation of the Mixed Use zoning laws of the City, the Appellant petitioned the City for a certification of Non-Conforming Use (NCU) for the use of transportable units to be placed on the property. On October 18, 2019, the City denied the request and the Appellant timely appealed the City's determination to the Hearing Examiner.

Hearing Date:

The Hearing Examiner of the City of Kennewick held an open record hearing on the application on March 9, 2020.

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Testimony:

At the open record hearing the following individuals presented testimony under oath:

Mr. Greg McCormick-City of Kennewick
Mr. Drew Landram-Appellant

The Appellant was represented by his attorney, Mr. James Carmody. The City was represented by its attorney, Ms. Lisa Beaton. Both attorneys presented factual information and legal arguments.

Exhibits admitted for the public record:

At the open record hearing the following exhibits were admitted: (a-if submitted by Applicant; c-if submitted by City)

[1] In addition to being a storage center, the property is also the location of a recreational vehicle sales site. All of the issues in this appeal relate to the storage uses and not the recreational vehicles site.

A-1. Planning Director Decision (a)
A-2. Appeal Letter with attachments. (a)
A-3. Copy of Ord. 5564 (a)
A-4. Copy of Ord. 5723 (a)
A-5. Copy of County Assessor's Page for 108 W. Columbia Dr. (a)
A-6. Copies of Building Permits for the property (a)
A-7. Copies of Code Enforcement complaints (a)
A-8. Copies of Aerial Photos for 108 W. Columbia Dr: 2010, 2012, 2014, 2016, 2018 (a)
A-9. Copy of Ord. 5712 (a)
A-10. Copy of fire inspector report for 108 W. Columbia Dr. (a)
A-11. Copy of Site Plan Approval (a)
A-12. Copies of photos provided by property owner (a)
A-13. Hard copy of power Point presentation by City (c)
A-14. Written copy of Appellant's testimony (a)
A-15. City Planning Department Report to Hearing Examiner (c)

Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following Findings and Conclusions:

FINDINGS OF FACT

1. The Appellant purchased the property at 108 West Columbia Drive, Kennewick, Washington in 1993.[2] *Testimony of Mr. Landram.* During this ownership the property has historically been used as a storage facility, but in recent years the Appellant has also operated a recreational vehicle business on site. The layout of the property is the same configuration that it was at the time of purchase. *Testimony of Mr. McCormick; Testimony of Mr. Landram.* Prior to 2016, there were numerous interactions between the Appellant and the City's Code Enforcement office about the condition of the property, but since 2016 there have been no code violations cited by the City *Testimony of Mr. Landram; Exhibit A-14*

2. The storage on site has mainly occurred in a 53,000 square foot storage facility that includes 450 rental units and within an outdoor storage area of approximately 2.5 fenced acres. According to the Appellant, the entire outside area of the site has been used for storage purposes since at least 2000. *Testimony of Mr. Landram; Exhibit A-14; Appellant's Prehearing Memorandum, p*g. 4.

3. At the time of purchase in 1993 the property was zoned Commercial General (CG) by the City of Kennewick. This zoning designation remained until 2014. *Testimony of Mr. McCormick; Exhibit A-3, pg. 2*

[2] In his testimony and submittal (exhibit A-14), Mr. Landram stated that he purchased the property in 1993. In the Appellant's Prehearing Memorandum, the year of purchase was listed as 1995. During both years the property was zoned CG.

4. An area wide rezone was approved by the City in 2014. The Appellant's property was included in the rezone and its zoning designation was changed from CG to Commercial Community (CC). *Exhibit A-3 (Ord 5564).* Mini-storage was a limited permitted use in the CC zone, *KMC 18.120.010. A*, subject to the provisions of KMC *18.12.130* - Mini-Storage Development Standards. *Exhibit A-3- Ordinance 5564 passed by the Kennewick City Council July 1, 2017.*

5. In 2016, two years after the approval of the zoning change of his property to CC, the Appellant placed transportable container units on site. At the hearing, the City representative submitted that the transportable units were an allowed use subject to a permit being obtained from the City pursuant to KMC *18.12.010 A.* According to City records, the Appellant never received a permit for any of the units. *Testimony of Mr. McCormick.*

6. The Appellant testified that there has been no disruption of the storage use on site since 2000. In his testimony, the Appellant described the storage as including "…use of portable wooden containers, vans, truck trailers, campers and recreational vehicles." *Testimony of Mr. Landram; Exhibit A-14, pg. 2*

7. In 2016, the Appellant had the placement of the transportable units placed on site in "the same area used for outside storage previously". He placed the "transportable containers[3]" on the outside storage area of his property. The purpose of these containers was to be for use as commercial storage. The Appellant opted for these units because they were safe, secure and clean and offered protection from the weather elements, rodents, insects and had limited fire risks. *Testimony of Mr. Landram; Exhibit A-14, pgs. 2 and 3*

8. According to the Appellant, while different permits were issued by the City for various activities on site, at no time did any City official state to him, or to any of his workers, that the transportable units required a permit in order to be placed in a CC zoned parcel of land. *Testimony of Mr. Landram*

9. In 2017, the City again rezoned a large area of properties that included the Appellant's property. The new zoning designation of property in the general area as the Appellant's property was changed to Urban Mixed Use (UMU). This zoning designation remains the zoning designation of the site. In a UMU zone transportable units are not a permitted use with or without permits. *Testimony of Mr. McCormick*; *Exhibit A-9*

10. In a letter dated October 18, 2019, the City of Kennewick, through its Planning Department, notified the Appellant's attorney, that the Appellant could not proceed with plans to use transportable units on his property as a "legal nonconforming use" for a storage business at 108 West Columbia Street, Kennewick, Washington. *Exhibit A-1.* On October 30, 2019, the Appellant filed a notice of appeal of the City's determination. *Exhibit A-2*

[3] Throughout the record of this proceeding transportable units were also referred to as "cargo units"

11. The Applicant was unaware of the requirement for a "permit" for transportable containers to be allowed in a CC zone. He testified that the City official never informed him of the need for the permit, even though he had secured building permits and a public utility permit from the City for work done on his property. *Exhibit A 14, pg. 3*; *Testimony of Mr. Landram* [4]

12. In 2007 the Kennewick City Council passed Ordinance 5180. That ordinance, later codified as KMC 18.21.270, addressed transportable units in the City. The first sentence of the 2007 ordinance (Kennewick ordinance 5180) read:

    > Transportable units may be used for storage purposes when ancillary to a permitted use in a C, I, PF, and O zones, provided, that all setback and access requirements are met.

13. The quoted sentence of KMC 18.21.270 in the previous Finding was deleted from KMC 18.21.270 by another ordinance passed by the Kennewick City Council on October 17, 2017. City of Kennewick Ordinance 5712, section 8 effectively removed the allowance of transportable units on C zoned properties. While no other deletions were made to KMC 18.21.270 at that time, Ordinance 5712 added language to KMC 18.21.270 which read:

    > Transportable units that are in good repair may be utilized for business activities, other than storage, in the UMU zone.

    Exhibit A-2, attachment H, pg. 27.

List of Legal Authority

Jurisdiction:

KMC 4.02.020:-Creation of the Hearing Examiner. The office of the Hearing Examiner, hereinafter referred to as "Examiner," is hereby created. The Examiner shall interpret, review, and implement land use regulations as provided in this Title and other ordinances, issues and matters as assigned, delegated and/or referred to the Examiner.

KMC 4.02.080:-Duties of the Examiner—Applications and Decisions.
The Hearing Examiner shall have the following duties with respect to applications of matters submitted before him or her.

Decisions of the Hearing Examiner. The Hearing Examiner shall receive and examine available information, conduct open record appeal hearings or open record public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon these facts, which conclusions shall represent the final action on the application, unless appealed further to Superior Court, as specified in this Section for the following:

[4] Building permits were issued to the Appellant and his predecessors for various projects on the property. These permits included those issued on June 9, 1987; July 27, 1987, August 9, 1988; January 11, 1989; June 2, 1993; May 24, 1995; April 7, 1997; September 24, 1997. *Exhibit A-6.* A public utility permit for the property was issued by the City of Kennewick Public Works Department on January 8, 2016. *Exhibit A-6*

- Appeals from administrative land use interpretation decisions.[5]

KMC 18.09.1380: - Nonconforming Structure or Use.

Nonconforming Structure or Use means an existing structure or use that was in conformance with effective existing code at the time or annexed prior to the adoption, revision, or amendment of the comprehensive plan and/or this Title, but which now does not conform to the requirements of the comprehensive plan and/or this Title and/or to the requirements of the zoning district in which it is located. (Ord. 5180 Sec. 1, 2007)

KMC 18.09.1290: - Mini-Storage.

Mini-Storage means a facility which provides storage spaces for the storage of domestic goods. Units may not be used for commercial or residential purposes. (Ord. 5407 Sec. 2, 2012; Ord. 5180 Sec. 1, 2007)

KMC 18.12.270: - Transportable Units.

1. Transportable units that are uniformly painted and in good repair may be used for temporary storage in subdivision sales areas and equipment yards (Section 18.12.270) and in C, I, PF, and OS zones for storage during construction and/or remodeling after a building permit has been issued. The units shall be removed from the site once the permit expires or at the end of 12 months, whichever occurs first. Screening is not required in these instances.
2. Transportable units may be used for temporary storage in "R" and "HMU" zones for new residential construction or remodeling after a building permit has been issued. The units shall be removed from the site at the expiration of the building permit. In no case shall the units remain on the site for more than 12 months.
3. Transportable units, railroad boxcars and freight cars in "R" districts that are visible and less than 125 feet from a public street must be completely surrounded by a sight-proof fence and/or landscaping (Section 18.21.060(2)) or removed before October 31, 2004.
4. Transportable units that are in good repair may be utilized for business activities, other than storage, in the UMU and IH zones.
5. Transportable units that are in good repair may be utilized for storage activity in the PF zone after construction provided they are placed a minimum distance of 125 feet from the nearest street.
6. Transportable units that are uniformly painted, in good repair and equal to or less than 16 feet long by eight feet high by eight feet wide and 2,700 pounds empty capacity and 10,000 pounds maximum loaded weight capacity, may be used for temporary storage for a period not to exceed ten consecutive days, more than two separate times in a calendar year, in all zones within the City. A unit shall not be placed in the public way for more than 72 consecutive hours.

(Ord. 5823 Sec. 1, 2019 ; Ord. 5814 Sec. 1, 2019 ; Ord. 5763 Sec. 1, 2018 ; Ord. 5712 Sec. 8, 2017; Ord. 5180 Sec. 1, 2007)

CONCLUSIONS

[5] Other jurisdictional matters for the Kennewick Hearing Examiner are listed in the ordinance

I. Non-conforming uses

In the state of Washington, the appellate courts have had many opportunities to review whether An existing or proposed land use is a nonconforming use. One of the main cases the Courts have used as authority is *Rhoda-A-Zalea & 35th. Inc. v. Snohomish County*, 136 Wn.2d,1,6, 959 P.2d.1024 (1998). In Rhoda-A-Zalea, the Court of Appeals stated:

> "A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.

supra, pg. 6

The Appellate Court's definition of a nonconforming use is similar to the Kennewick ordinance, KMC 18.09.1380: - Nonconforming Structure or Use, which reads:

> *Nonconforming Structure or Use* means an existing structure or use that was in conformance with effective existing code at the time or annexed prior to the adoption, revision, or amendment of the comprehensive plan and/or this Title, but which now does not conform to the requirements of the comprehensive plan and/or this Title and/or to the requirements of the zoning district in which it is located. (Ord. 5180 Sec. 1, 2007)

Nonconforming uses are disfavored under the law. *Open Door Baptist vs. Clark County*, 140Wn.2d 143; Christianson vs. Snohomish Health District, 133 Wn.2d 647, 663, 946 P.2d 768, (1997), Anderson vs. Island County, 81. Wn 2d 312, 323, 501 P.2d 594 (1972)

It is the contention of the Appellant that a legal nonconforming use existed for his property at 108 West Columbia Drive, Kennewick, Washington, where he operates a storage business. Part of the business involved the placement of transportable units on site for storage purposes. The City claims that when the property was zoned CC, the transportable units were not legal and were not as an allowed except with a building permit. The City further stated that with or without a permit they are not an allowed based on the current zoning designation of Urban Mixed Use. The City denied a certification of the nonconforming use and the Appellant appealed this denial.

II. Are transportable units on the Appellant's property a nonconforming use that can remain on the UMU zoned parcel?

A key element of the Appellant's argument is that the transportable units that were placed on his property in 2016 were legal at that time, and, are now a nonconforming use because they are the same, or ancillary, use that was allowed while the property was zoned CG. Transportable units are recognized in Kennewick by KMC 18.12.270, even though there is no specific definition of this type of structure in the City's Municipal Code and more particularly in the use tables of the zoning ordinances of the Code.(see: 18.12.010 B.1-Table of Non-Residential Uses). However, the conclusion of the Appellant is that transportable units must be recognized as an ancillary use to mini-storages which were legal when the property was in the CC zone. From this premise the Appellant concludes that transportable units should be considered nonconforming uses under the new UMU zoning classification of the property.

On the other hand, the City argued that the transportable units have never been considered a mini-storage structure. The City's position is that when the subject property was zoned CC transportable units were allowed only on CC zoned properties upon the securing of a "permit". The City did not provide a specific citation for the required permit, nor did it identify who the authorizing city agency was. Its argument was that the transportable unit was not an outrighted approved use in the CC zone and could only be allowed with a permit.

KMC 18.12.270: - *Transportable Units* is key to the determination of whether there was a nonconforming use is this case. More specifically the key is whether the units were allowed in the CC zone. It is the opinion of the Hearing Examiner that both the City's and the Appellant's interpretations of KMC 18.12.270 are incorrect.

The City's misinterpretation. The City claimed that in order for a transportable unit to be a "legal" use under the previous CC zoning of the property at 108 Columbia, a permit had to be issued by the City to allow it in the zone. The City did not identify the specific required permit, nor did it identify what department or agency would issue the required permit. Without this information, evidence or citation, it can only be assumed that the City in its argument is referring to KMC 18.12.270 (1): - Transportable Units for the authority, the key part of the Ordinance reads:

> Transportable units that are uniformly painted and in good repair may be used for *temporary storage in subdivision sales areas and equipment yards* (Section 18.12.270) and in C, I, PF, and OS zones *for storage during construction and/or remodeling after a building permit has been issued.* The units shall be removed from the site once the permit expires or at the end of 12 months, whichever occurs first. Screening is not required in these instances. *Emphasis added*

The language of this ordinance is clear that transportable units are allowed in a C zone during "construction" and "remodeling" after a building permit has been issued and only in subdivision sales areas and equipment yards. The building permit is limited in time and purpose—the purpose being storage during construction and remodeling.

This ordinance did not allow transportable units in a CC zone, and clearly, the building permit would be for the construction or remodeling at the construction site as evidenced by the language "The units shall be removed from the *site* once the permit expires or at the end of 12 months, whichever comes first."

Without a legal use for transportable units in a CC zone and without a process to establish a legal use of transportable units in a CC zone for anything other than construction storage, the storage units on the subject property were never legal in a CC zone when they were brought onto the property in 2016. The new and current zoning of UMU does not include any provisions of any use of transportable units with a building permit. Because the transportable units were never legal, they fail to be nonconforming.

The Appellant's misinterpretation. While the Appellant correctly argued that the City's argument of required permits was incorrect, he was in error in claiming that the KMC 18.12.270(1) can be interpreted as allowing permanent use of transportable units in a CC zone KMC 18.12.270

provides direction for *temporary* construction storage with the use of transportable units. The dispositive language of the ordinance is again emphasized:

1. Transportable units that are uniformly painted and in good repair may be used for *temporary* storage in subdivision sales areas and equipment yards (Section 18.12.270) and in C, I, PF, and OS zones *for storage during construction and/or remodeling after a building permit has been issued.* The units shall be removed from the site once the permit expires or at the end of 12 months, whichever occurs first. Screening is not required in these instances.
2. Transportable units may be used for *temporary* storage in "R" and "HMU" zones for new residential construction or remodeling after a building permit has been issued. The units shall be removed from the site at the expiration of the building permit. In no case shall the units remain on the site for more than 12 months. *Emphasis added*

As with the City's misinterpretation, section 1 is interpreted incorrectly by the Appellant.

As noted in Findings 12 and 13, the provisions of KMC 18.12.270 were originally enacted by the passage of Ordinance 5180 in 2007. In 2017 Ordinance 5172 was approved by the City Council to amend KMC 18.12.270. While the ordinance was amended, it did not change or delete any of the language of section 1 of KMC 18.12. 270. Section 1 of the ordinance addresses temporary uses, but does not create a permanent allowed use for any activity similar to what the Appellant proposed for the use of the transportable units that were brought on the property. These units were not used for construction or remodeling storage, but were used to provide other types of storage that is not allowed by KMC 18.12.270. The units were not ancillary to any construction or remodeling activity and did not assume a permitted status to be allowed in a C zone. Further, the later rezone of the property to UMU did not allow the transportable units in a C zone. Simply put, transportable units were not an allowed use in the old CC zone and the current UMU zone. They cannot be allowed as a nonconforming use.

In addition to the above analysis of the Appellant's argument, it is also held that the transportable units are not included as a mini-storage. They are not mentioned in the mini-storage definitions. They are described in KMC 18.12.270 as temporary storage for construction and remodel. The term "mini-storage" is not included in the Ordinance and in no part of the KMC are there references to transportable as being ancillary to mini-storage.

DECISION

In the state of Washington, "…an applicant asserting a prior legal, nonconforming use bears the initial burden to prove that (1) the use existed before the county enacted the zoning ordinance; (2) the use was lawful at the time; and (3) the applicant did not abandon or discontinue the use for over a year.(citing- *Jefferson County*, 106 Wn. App. at 385)*." First Pioneer Trading Company vs. Pierce County*, 146 Wn. App. 606, at 614, 191 P.3d 928 (2008). The Appellant has failed to prove that the use was lawful in a Commercial Community (CC) zone at the time the transportable units were placed on the property in 2016. The other issue, whether there has been an expansion of a nonconforming use, is moot because there was no nonconforming use.

Dated this 15th day of April, 2020

James M. Driscoll
Kennewick Hearing Examiner