

KITSAP COUNTY HEARING EXAMINER

Action Services Corporation - Code Interpretation Appeal Appeal No. 18-01136

June 28, 2018

SECTION I. FINDINGS OF FACT

1. Overview

1.1 Action Services Corporation, at 4948 State Highway 303, and at 1740 NE Riddell Road, Suite 120, in Bremerton, WA, provides indoor and outdoor facility maintenance and clean-up services. Business activities include parking lot sweeping, storm drain cleaning, emergency spill clean-up, landscape maintenance, janitorial work, and equipment rental. Owned by Mr. Sandefur, the business has been at the same location for over thirty years.

1.2 During a code enforcement matter, Kitsap County Department of Community Development ("DCD") raised a question on whether the use was permitted within the Commercial zoning designation. At DCD's suggestion, Action Services requested a code interpretation on use legality under the zoning code.

1.3 DCD issued a Director's Interpretation, determining the use was not permitted within the Commercial zone, and although established since 1982,¹ was not a legal non-conforming use. Concerned the decision would cause business closure, Mr. Sandefur appealed the decision to the County Hearing Examiner.

2. Hearing Proceedings

2.1 A pre-hearing conference call was held on April 11, 2018, with the parties agreeing to a hearing schedule, including briefing, witness disclosure, and exhibit submittal deadlines.² The parties later revised the hearing schedule by stipulation.³

2.2 The Examiner conducted a site visit on May 10, 2018, and an open record hearing was held on June 7, 2018. Pre-hearing briefing included Action Services' opening brief, DCD's response, and Action Services' reply. Instead of closing arguments, the parties submitted simultaneous post-hearing briefing.⁴ DCD also submitted a supplemental brief, and Action Services filed a rebuttal. The Examiner admitted both briefs.

¹ DCD's Code Interpretation uses a 1988 establishment date. That was the year Mr. Sandefur purchased the 4948 building, but his business activities started before then, when he leased space at the site.

² See Pre-Hearing Orders of March 22, 2018 and April 11, 2018, as corrected on April 16, 2018.

³ Stipulation to Change Hearing Date and Briefing Schedule, May 14, 2018.

⁴ The Examiner suggested briefing lengths of about 7-8 pages at the hearing. DCD's was ten; Action Services' was nine.

2.3 Exhibits from DCD included DCD-1 through DCD-19 and from Action Services, A-1 through A-18, and A-31 through A-43.⁵ The Examiner admitted all exhibits per party stipulation.

2.4 At the hearing, four witnesses testified:

Action Services:

Jacob Kennedy, Action Services Corporation, Employee
Tony Sandefur, Action Services Corporation, Owner

DCD:

Eric Worden, Public Works Stormwater Inspector
Scott Diener, DCD Manager, Development Services & Engineering

2.5 After the hearing, Action Services submitted a declaration on procedural issues (A-44) to address DCD delay contentions. DCD did not object, and the Examiner admitted the declaration. Action Services created no procedural delays. The parties cooperated throughout the proceeding to agree on hearing deadlines and obtain necessary documents.

3. Nature of the Use

3.1 Mr. Sandefur started his cleaning business when he was in high school in the late 1970s. Originally work included facility maintenance, cleaning, and parking lot sweeping. The operation was small; his car sufficed for transporting cleaning equipment.

3.2 Around 1980, his parents bought McCormick Iron,⁶ an iron and structural steel fabrication operation, and Mr. Sandefur stored his cleaning equipment there. About 1982, Mr. Sandefur moved his business next door, leasing shop and parking space from what was then a transmission shop.⁷ Core services continued to be janitorial and exterior building maintenance, including parking lot sweeping, at sites throughout the County.

3.3 In 1988, the transmission repair shop moved, Mr. Sandefur obtained a Small Business Administration loan, and bought the 4948 site. He then improved it. He hooked the site to sewer, installed storm drainage, added fencing, and paved the private gravel access road. His core business operations continued, with about four or five trucks regularly parked on site.

3.4 In the 1990s, with increasing stormwater regulation, Action Services started providing storm drain maintenance services and more space was needed. The single desk area no longer sufficed, so Mr. Sandefur leased the adjacent office building on Riddell. In the early 1990s, his vehicles expanded to about 20, with Action Services' first vactor truck⁸ purchased in 1993 or 1994.

⁵ A-31 is also at DCD-16, Conditional Use Permit for SAW Enterprises.

⁶ Building built in the 1950s.

⁷ Building constructed about 1968.

⁸ A vactor truck vacuums waste and sludge from facilities such as storm drains.

3.5 Throughout the 1980s, the site's zoning was Business Commercial, and nearby uses included Kelly-Moore (paint store), the Handy Andy store, McCormick Iron, and the office building. Excepting these uses, the area was sparsely developed. These commercial uses were surrounded by woods and blueberry bushes, with some residential uses located further away.

3.6 The present use is a maintenance and equipment rental operation. The fenced and locked yard (about 50' x 100'), includes equipment such as a light tower for night work; hot water pressure washers; snow removal equipment; field mowers for mowing ponds/landscape maintenance; a couple man lifts; and a couple trailers. Rentals vary, but are about 25-30% of the business in the summer, and less during the winter.⁹

3.7 Action Services provides professional maintenance work services. The company cleans storm drains; provides janitorial services; sweeps parking lots; does landscaping and storm water detention pond maintenance, including mowing and tree trimming; replaces outdoor light bulbs; and completes emergency repairs and spill clean-up. A component of this work involves emergency response, such as responding to fuel spills, which requires containing the spill and hauling the product away. Emergency clean-up work can occur at a building site or within right-of-way. As an example, one customer dropped deck sealant and flooded half of a street, and Action Services cleaned that up. Also, if a business receives regulatory compliance notice due to waste management issues, Action Services often assists with cleaning up the waste and achieving compliance. And, when food compactors leak and threaten to contaminate storm drains, vactors and hot water pressure washers are used to clean the area. Clients include the adjacent Fred Meyer site, Lowe's, and Home Depot. At one point, Action Services worked for the state, sweeping I-5.

3.8 Action Services has also been called in to assist with homeless camp clean-up after a government closure, including disposing of human waste, needles, garbage, and other refuse. This may occur with police escort.

3.9 In the 1990s, the company worked outside the state. Now, the company works within the Puget Sound area, including for several cities. At its height, the business had 80 employees. Now Action Services has about 30. It pays retail taxes, with a business characterization of retail sales tax for services.

3.10 Action Services is just off Highway 303, adjacent to a large parking area. Client work is done off site, but some customers visit the office to pay bills or schedule services. The shop/yard area is behind the business office, so cannot be seen from the public entrance. On the other side, the shop shields about three-fourths of the yard area which houses rental and maintenance equipment, and cannot be seen from a public street.

⁹ In 1992, Mr. Sandefur was a partner in a rental business on site, but the business grew and was moved to where Star Rentals today.

3.11 Fred Meyer owns property outside the retaining wall bordering the Action Services site. The Fred Meyer property is elevated about four to five feet, limiting views to the top one-third or one-half of the Action Services building and to the tops of the trucks parked at Action Services. Vehicles parked on the Fred Meyer side of the fence are more visible, but take up only a small portion of the parking lot, which appears on aerial photos as if it could be as large as or larger than the Fred Meyer store.¹⁰

3.12 Some chemicals are stored to maintain machinery. During a County visit in July 2017, the business was informed of limits on the amount of fuel which can be stored. Action Services has removed the excess amounts.¹¹ Action Services stated that the Fire Marshal visits the site regularly, and this concern was recently raised.

3.13 Testimony from Action Services indicated that on-site spills have been minimal; testimony from DCD questioned this. Action Services cleans the storm drain on the adjacent Kelly-Moore site, and Mr. Sandefur testified that about one-fourth of an inch of oil on top has accumulated at times. DCD testimony expressed concern about the level of sludge in that drain, which receives stormwater from a drain on the Action Services site. DCD's stormwater inspector testified that he has not been able to schedule a site visit, as Mr. Sandefur has not returned his calls to allow same to occur. When asked during re-direct about this, Mr. Sandefur testified that he would schedule a visit that day (day of the hearing). Stormwater inspectors who have visited the site in the past are no longer with the County.

3.14 The Applicant testified that some trucks return to the site with loads disposed of the next day or when used again, and that no dumping occurs on site. Contaminated catch basin waste is taken to PRS (a waste disposal company), and no reportable spills have occurred on site. DCD's view appeared to differ, but testimony on this topic was limited as the parties had agreed not to address code enforcement in this proceeding.

3.15 The number of vehicles/trucks at the site varies, but is about 10 to 12. This is coupled with vehicles stored on adjacent properties. For example, when DCD visited the site, it counted 12 trucks/vehicles on the Action Services site, 21 on the Fred Meyer site,¹² and four at the adjacent catering company site.¹³ About 12 vehicles on the Fred Meyer site were not working and had not been recently moved, as evidenced by moss growing beneath them.¹⁴ Action Services testified that all non-operable vehicles have since been removed, and all parked vehicles are licensed and roadworthy. This would then leave roughly nine on the Fred Meyer site, for about 25 vehicles/trucks parked on three parcels.

3.16 Parking has been occurring long before Fred Meyer existed. When the store was built, an easement was granted, and there is a parking agreement. Mr. Sandefur testified there

¹⁰ DCD-4 and DCD-5.

¹¹ A-5; Testimony from Mr. Sandefur.

¹² At an earlier site visit on February 15, 2017, the number was 20. DCD-13.

¹³ DCD-15; Hearing Testimony, Eric Worden.

¹⁴ DCD-15; Hearing Testimony, Eric Worden.

had been no conflicts with customers visiting other business, including Fred Meyer. No evidence was presented to the contrary.

3.17 The Fred Meyer parking lot and the Action Services parking area were both constructed for truck traffic. The area where trucks are parked has a six-inch asphalt base. It was originally a four-inch base, but was redone. Mr. Sandefur testified there is no cracking or wearing where vehicles are parked, nor has there been since Fred Meyer was built.

3.18 The area the site is within is off of a state highway, and is vehicle oriented. The local street structure is not laid out in a tight grid framework.¹⁵ The Fred Meyer parking lot is large, containing possibly as much or more area than the store itself, and two gas stations and a tire store are nearby.¹⁶

3.19 Mr. Sandefur testified that his operation is not a Contractor Storage Yard, which he views as a yard to store/maintain heavy equipment for constructing building roads/structures. Action Services does not do construction work. It does not build roads. It maintains them, along with other properties throughout Kitsap County. The company does maintenance for every major retailer in the County and every major shopping center. It does about 75-80% of their sweeping, and used to do about 90%.

3.20 The company has an annual payroll of roughly one million. Mr. Sandefur testified that with this money going back into the community, and with buildings well maintained and so drawing more customers, he believes the company promotes the County's Comprehensive Plan policies.

3.21 Mr. Sandefur emphasized the importance of this location for his business. This is where it has been for over 30 years. He bought the 4948 building after scraping the funds together as a kid, built the business from this location, and has worked there his entire adult life. If he were put out of business here, he has no alternate location. In 30 years, no zoning compliance issues were ever raised. The issues with the County first arose a couple years ago, with this matter escalating last year.

¹⁵ DCD-4 (2015 Aerial Imagery). The photo includes two gas stations and a discount tire store.

¹⁶ Hearing Testimony, Mr. Diener; DCD-4, DCD-5.

4. Zoning

4.1 Date of Business Establishment and 1980s Zoning Code

4.1.1 The business was originally established in the 1980s. The date the Director's Interpretation used was 1988. However, this date may be based on the date Mr. Sandefur purchased the 4948 building. The site was leased before then, with evidence from Action Services supporting an earlier 1982 establishment date.¹⁷ Both parties recognize the business was growing throughout the 80s and 90s.

4.1.2 The zoning code the parties rely on as governing the use is the 1983 code, as amended in 1986. The site was zoned Business General. There was no allegation that the code revisions in the 1980s affected code treatment of the use.

4.2 Current Zoning and Comprehensive Plan Designation

4.2.1 The Comprehensive Plan designation is Urban High Intensity Commercial/Mixed use; the zoning designation is Commercial.¹⁸ The uses authorized outright or through an administrative conditional use permit include:

- Accessory use or structure
- Auto parts and accessory stores
- Automobile rentals
- Automobile repair and car washes
- Automobile service station
- Automobile, recreational vehicle or boat sales (ACUP)
- Nonmotorized recreation rentals
- Boat/marine supply stores
- Conference center
- Equipment rentals
- Farm and garden equipment and sales
- General office and management services – 10,000 s.f. or greater
- General retail merchandise stores – 15,001 to 24,999 s.f.
- General retail merchandise stores – 25,000 s.f. or greater (ACUP)
- Lumber and bulky building material sales (ACUP)
- Off-street private parking facilities
- Public facilities and electric power and natural gas utility facilities, substations, ferry terminals, and commuter park-and-ride lots (ACUP)
- Recreational vehicle rental (ACUP)

¹⁷ Appellant's Opening Brief, pgs. 1 and 4, and Errata to Appellant's Opening Brief.

¹⁸ DCD-7, DCD-8.

- Tourism facilities, including seaplane and tour boat terminals (ACUP)
- Transportation terminals (ACUP)
- Marinas (ACUP)
- Storage, vehicle and equipment (ACUP)¹⁹

The Commercial zone includes several categories of uses, including commercial/business, industrial, recreational, institutional, and resource lands. The above list is from multiple categories, and does not include all authorized uses.

4.2.2 There was testimony on some of the above listed uses, such as Equipment Rentals. Mr. Sandefur was in the rental yard business, and testified that equipment rental typically includes significant heavy equipment, such as backhoes and loaders. He estimated that 80-90% of rental business is delivered heavy equipment, including construction equipment. More heavy equipment is typically kept on site than Action Services has, and like Action Services, most work is performed off site.

4.2.3 DCD also provided testimony on the Equipment Rentals use classification. Examples of rented equipment included man lifts, sod cutters, lights, track hoes, and bobcats. DCD placed more emphasis on customer pick-up, when customers have a flatbed, but agreed with Action Services that rental equipment is also delivered to the site.

4.2.4 Contractor Storage Yards are storage yards for heavy equipment. They are not permitted in the Commercial zone, but are allowed in the Industrial zone, and in rurally zoned areas through the conditional use permitting process. Of the example conditional use permits provided, three involved construction of structures, while one involved landscaping construction. None involved Equipment Rentals or facility maintenance, such as parking lot sweeping, snow removal, drainage cleaning, and janitorial work.

4.2.5 DCD viewed the Contractor Storage Yard as best describing the use, as employees pick up equipment and go to job sites, which is what happens at Action Services. DCD clarified that in identifying similar uses through KCC 17.100.040, the uses need not be identical. DCD felt that the fact that Action Services did not do construction work was not a distinguishing factor.

4.2.6 Action Services' assessment was different. Mr. Sandefur testified that his business only performs facility maintenance. The use is similar to Equipment Rentals, which is permitted outright in the Commercial zone, and Action Services' work does not impact the neighborhood to an extent greater than Equipment Rentals.

4.2.7 The majority of the Action Services vehicles do not require a Commercial Driver's License ("CDL"), which is required for vehicles weighing over 26,000 pounds. While the tractor truck requires a CDL, the parking lot sweepers and lift truck do not. Only three to four vehicles require a CDL.

¹⁹ KCC 17.410.044.

4.2.8 Mr. Sandefur testified that vehicle maintenance (which is more limited than described in the Director's Determination), is performed consistent with requirements. He detailed how chemicals on site are maintained, and the regularity of fire inspections. Although in operation over thirty years, no documentation was presented regarding explosion, fire, or other incidents which have harmed anyone.

4.2.9 Equipment Rentals necessarily involve some maintenance, similar to the maintenance activities Allied Services' conducts, as described at the hearing. No fabrication, construction, or manufacturing occurs at the site.

4.2.10 The Commercial zoning designation does not limit the number or size of the vehicles which may be within a Contractor's Storage Yard, an Equipment Rental operation, or in a Vehicle and Equipment Storage area. Also, there is no prohibition on a use being categorized differently in two zones and authorized in both.

5. Hearing Testimony on Director's Interpretation

5.1 DCD testified to its reliance upon the entire Plan in developing the Interpretation, but focused on a few Land Use and Economic Development Plan policies (Land Use Policies 8 and 41 and Economic Development Policies 3, 7, and 10). In considering these policies, DCD's focus was really on the Commercial zoning designation's implementation of the Plan to address impacts between commercial and industrial uses. If the zoning code classified the use differently, DCD's analysis on Plan consistency could come out differently.

Q: Would you concede that if it's properly characterized as a commercial use, that the uses and activities meet the Comprehensive Plan policies?

A: I don't know that I could concede that, but I would concede that the analysis might be different.

5.2 DCD further explained that while "certain [Plan] elements were met," it was only when applying a more narrow application, and looking at whether the use was permitted or not in the implementing designation, that it determined the use was not "necessarily supported" by the policies.

5.3 DCD's identified policies do not support placing this use in only the Industrial zone. One policy provides for creating performance standards in commercial and industrial areas.²⁰ However, no regulatory standards in the Industrial zone were identified that would better mitigate the use than in the Commercial zone. The use may actually be better mitigated in the Commercial zone, given physical proximity to uses served, which reduces transportation impacts. Also, no sites in the Industrial or other zones were identified in which the use could be

²⁰ "Create performance standards for commercial and industrial areas that reflect impact of use for zoning purposes." DCD-11, Comprehensive Plan, Land Use Policy 8.

better placed. Another policy protects industrial lands to prevent commercial encroachment.²¹ However, there was no evidence suggesting this use's location in a Commercial zone was impairing industrial uses.

5.4 As for the Economic Development policies, these support keeping the use where it is, which DCD recognized at the hearing. Economic Development Policy 3 supports business retention.²² The Applicant could not identify an alternative site and forcing a move is likely to close the business. Action Services serves a community need to maintain urban areas, and it provides about 30 jobs with a roughly one million dollar payroll. Mr. Sandefur testified that some employees have even retired from Action Services. Keeping the business in place is supported by Economic Development Policy 7 ("Encourage full utilization and development of industrially and commercially zoned areas."). Economic Development Policy 10 also supports use retention in place, as the use is appropriate for the Commercial zone.²³ No development standards were identified which support use relocation to the Industrial or other zone.

5.5 In assessing the zoning code, DCD indicated that commercial zoning was designed to bring shoppers to the area and provide service needs, whereas Action Services visits other sites to do the work. DCD identified this as the biggest difference between what Action Services does and other uses in the Commercial zone. On cross-examination, DCD clarified that providing services in a way which does not always involve customer pick up does not exclude a use from being in the Commercial zone. Equipment Rental is a prime example, where all work is done off site, whether the customer or business transports the equipment. There is not a greater impact with Action Services transporting the equipment and doing the work as opposed to the customer.

5.6 In assessing public health, safety, and welfare, DCD identified concerns about people driving or walking in and around the facility. DCD did not "recall seeing anything that calls out the access area as a private easement," and expressed concern about people using the entrance as if it were a public road. Mr. Sandefur explained there are two signs posted identifying the access road as private and a photograph of one is in the record.²⁴ Also, Plan Policy LU-17,²⁵ which is not referenced in the Director's Interpretation, supports a compact, pedestrian oriented development. At the hearing, DCD did not recall if the policy had been applied in developing the interpretation. The evidence presented supports a finding that there have been no pedestrian/vehicle conflicts.

²¹ "When updating code pertaining to industrial lands ensure industrial lands uses are a priority in order to prevent commercial encroachment." DCD-11, Comprehensive Plan, Land Use Policy 41.

²² "Provide a diverse mix and appropriate range of commercial, industrial and business land uses that will encourage economic activity capable of providing living-wage jobs and reasonably scaled to the needs of the community." DCD-11, Comprehensive Plan, Economic Development Policy 3.

²³ "Develop standards for industrial and commercial development that identify appropriate site size for different types of areas, appropriate types of uses, and standards for design that encourage attractive and efficiently functioning areas." DCD-11, Comprehensive Plan, Economic Development Policy 10.

²⁴ DCD-14, pg. 1 (photograph of sign stating "PRIVATE DRIVE SPEED LIMIT 5"), emphasis on sign.

²⁵ "Support compact commercial areas in order to encourage pedestrian and non-motorized travel and transit use." DCD-11, Comprehensive Plan, Land Use Policy 17.

5.7 DCD also raised the code compliance issue, stating that "I understand that's not really at issue today," but "I think that also weighed in on our concerns about whether there's an impact to public health, safety and welfare." DCD testified that the other three criteria carried more weight. Mr. Diener added that on adverse impacts, "Tony runs a good business," and is conscious of his business activities' impacts on safety and welfare.

6. Locale

Action Services is within an auto oriented area just off a state highway. Maximum building and lot sizes and tight street grids can orient an area to the pedestrian and encourage denser and more varied development which can support the retention of smaller, more local business operations. The opposite approach caters to larger enterprises and encourages greater vehicle reliance. The latter planning approach was taken in this area.²⁶ Action Services, however, remains a comparatively small business, particularly when compared with the adjacent Fred Meyer complex. The use operates among several national chain enterprises, just as it has for over three decades, cleaning up urban waste.

SECTION II. CONCLUSIONS OF LAW

1. Code Interpretations

This is an appeal of a formal director's interpretation. Such "interpretations are binding" and as a Type I decision,²⁷ it is appealable to the Hearing Examiner.²⁸ The appeal is heard "in a de novo open-record hearing in accordance with the hearing examiner rules of procedure."²⁹

2. Standard of Review

2.1 In an administrative appeal, the burden of proof is on the appellant.³⁰ However, this is not a typical code interpretation. DCD's site specific decision looked not at what could be built, but what was built. As DCD looked back in time instead of prospectively, there is a risk the enforcement and code interpretation frameworks will improperly merge, particularly as the code interpretation is designated as "binding."

2.2 The problem with merger is that while no fine or penalty is at issue, the cost of a decision adverse to Action Services, if enforced, could shut down Mr. Sandefur's business. Such a result, despite the procedural difference, is not necessarily substantively distinct from what could occur in the code enforcement context. If the legal framework is not properly applied, this

²⁶ The approach is being shifted, but not in all areas. "Where appropriate, encourage mixed use, high density uses, and Transit Oriented Development (TOD) to reduce reliance on the Single Occupancy Vehicle (SOV)." DCD-11, Comprehensive Plan Land Use Policy 6.

²⁷ KCC 21.04.100, Decision Type 57.

²⁸ KCC 21.04.040(C)(3).

²⁹ KCC 21.04.290(C).

³⁰ *See e.g.*, KCC 17.100.070 ("This title shall be liberally interpreted and construed to secure the public health, safety, and welfare and the rule of strict construction shall have no application."); KCC 17.570.050(A) (burden of proof on the property owner to show lawful establishment of use in nonconforming use context).

appeal risks becoming a de facto code enforcement proceeding, which is not its proper function. Action Services raised this concern. "[A] code interpretation is not properly used to shut down an existing business...."³¹

2.3 To address this dilemma, the Examiner's decision must be understood to be **only** a decision resolving a code interpretation appeal. The Examiner's decision could not be construed on its own to mean that a code violation, for purposes of enforcement, has occurred. Should the matter proceed to enforcement, the burden of proof shifts to the County.³² Given this burden shift, the County could not simply use a decision adverse to Action Services in a code interpretation matter to establish a KCC violation in an enforcement proceeding. The County would also need to present evidence sufficient to meet the enforcement framework's higher burden. With that clarification, the Examiner applies the usual standard of review on a code interpretation appeal.

3. Zoning Code and the Use

3.1 Permitted Uses

3.1.1 The parties do not dispute that the office portion of the use, which is at the same site although at a separate address, is permitted outright. The parties also do not dispute that equipment rental, which can be about 25-30% of the business during the summer months, with rentals dropping off in the winter, is also an allowed use. Nor is there any dispute over Action Services maintaining this equipment. Much of the shop area is used for machinery maintenance, and much of the yard area is used to store and maintain the rental equipment. These uses are permitted outright.

3.1.2 Action Services uses some of the equipment it rents for its facility maintenance work. The same machinery which may be rented out should also be permitted to be used to do maintenance for hire. These are the exact same activity. In one case, the renter does the work; in the other situation, Action Services does the work. There is also no dispute that the actual work of maintenance and cleaning, which does not occur on site, is permissible.

3.1.3 When combining the office and rental uses, whether the rental equipment is rented or part of maintenance operations, most if not all of the machinery within the yard area (assuming it remains operable and does not fall within the "junk" storage prohibitions),³³ is part of an authorized use. When these uses are all combined (office, rental, storage/maintenance yard, and the actual maintenance operations), they constitute the bulk of the business.

3.1.4 There would be no question that the entire use is permitted, but for the roughly 12 trucks/vehicles parked on site, and roughly 13 on the adjacent catering company property and Fred Meyer parking lot.

³¹ Appellant's Reply Brief, pg. 1:18-23.

³² KCC 2.116.120(C) ("The burden of proof is on the county to establish the commission of the infraction by a preponderance of evidence.").

³³ See e.g., Footnote 47.

3.2 KCC 17.100.040: Use Similarity Analysis

3.2.1 Code Framework

DCD's Formal Code Interpretation and its briefing evaluated whether the use is authorized through KCC 17.100.040. A "[p]rohibited use" means any use which is not expressly allowed and does not meet the criteria under Section 17.100.040."³⁴ These criteria provide:

Except as provided in Chapter 17.520, when a use is not specifically listed in this title, it shall be understood that the use may be allowed if it is determined by the director that the **use is similar to other uses listed**. It is further recognized that every conceivable use cannot be identified. In anticipation that new uses will evolve over time, this section establishes the director's authority to compare a proposed use and measure it against those listed in this title for determining similarity. In determining similarity, as well as when considering all other uses, the director shall make all of the following findings:

- A. The proposed use shall meet the intent of, and be consistent with the goals, objectives and policies of the Kitsap County Comprehensive Plan;
- B. The proposed use shall meet the stated purpose and general intent of the Comprehensive Plan land use designation and zoning classification in which the use is proposed to be located;
- C. The proposed use shall not adversely impact the public health, safety and general welfare of the residents of the county; and
- D. The proposed use shall share characteristics in common with, and not be of greater intensity, density or generate more environmental impact than, those uses listed in the land use zone in which it is to be located.

If determined similar, the unspecified use shall meet all of the code requirements and follow the approval process prescribed for the listed use.³⁵

3.2.2 Comprehensive Plan Policies

3.2.2.1 In assessing Comprehensive Plan consistency, it is not only individual policies which should be parsed, as the many goals and policies support multiple and sometimes conflicting objectives. It is the Plan's overarching vision for the community. Uses are segregated, not simply for compatibility, which was planning's primary purpose when it first originated, but to allow for efficient land use. With this approach, the biggest differences in use,

³⁴ KCC 17.110.635.

³⁵ KCC 17.100.040, emphasis added.

at least since Growth Management Act, Ch. 36.70A ("GMA") enactment, is the urban versus rural distinction.

3.2.2.2 Urban areas are designed to be more densely developed with an array of synergistic uses. The overall Plan, which was adopted under GMA so mirrors the statute's objectives, is designed to develop an urban setting which can efficiently provide urban services and facilities to an array of synergistic and more compact urban uses, rather than spreading the uses into rural areas, triggering longer commutes and creating a need for expensive transportation and utility infrastructure. Plan Goal 6 embodies this basic framework.

Direct development to designated Urban Growth Areas consistent with projected population growth, Growth Management Act and Countywide Planning Policies while considering development patterns that reduce sprawl, use urban land more efficiently, and that incorporate feasible, innovative and sustainable practices.³⁶

3.2.2.3 Allowing businesses which clean urban infrastructure, particularly commercial facilities, such as buildings and parking lots, to be sited proximate to the facilities served is in keeping with this overarching framework. Precluding siting within areas zoned Commercial has the potential to force such businesses to be sited further away, pushing employees into longer commutes to get to work and complete service visits. This may even encourage commercial development in rural areas, with its lower land use prices, which is out of sync with a Plan which envisions uses with synergistic relationships being sited within close proximity. This is a significant concern with Action Services, given its current urban location adjacent to a key client.

3.2.2.4 Longer commutes place a heavier burden on transportation infrastructure, increase air emissions, and discourage efficient use co-location. Here, although the use services much of the County, as described at the hearing, most facilities served are urban (*i.e.*, parking lots, storm drains, and identified clients in urban locations). It would contravene the Plan to require services providing parking lot sweeping, storm drain cleaning, snow removal, and emergency spill clean-up to locate further from the uses they service; or, in this case, outside of Commercially zoned areas, which contain many of the facilities served. This is the exact opposite of what GMA contemplates. Here, the approach most consistent with the Plan is to continue to allow the use within the Commercial zone.

3.2.2.5 The Plan also advocates creating pedestrian oriented environments, and Action Services maintains an operation with a large number of vehicles. However, it is more conducive to a pedestrian oriented environment to have those trucks and employees located in the commercial areas served, and avoid creating more vehicle travel. As long as there are parking lots and storm drains, this infrastructure must be cleaned, and it is better for the businesses performing the work to be located proximate to the facilities primarily served.

³⁶ DCD-11, Comprehensive Plan, Land Use Goal 6.

3.2.2.6 From an economic perspective, the approach most consistent with the Plan is to support local businesses. While communities originally tended to build out in ways which supported larger chain enterprises and that legacy remains, there is a renewed emphasis on the need to protect local businesses. The Comprehensive Plan is consistent with that objective.

3.2.2.7 DCD's error was in taking too narrow a view of the Comprehensive Plan objectives, rather than assessing how uses under GMA work together to support a vibrant urban environment, which is adequately supported by necessary services, such as facility maintenance and waste clean-up, including emergency response services.

3.2.3 Comprehensive Plan and Zoning Designation and Impact Assessment

3.2.3.1 The Comprehensive Plan designation is Urban High-Intensity Commercial/Mixed Use. The designation was implemented at this site through the Commercial zoning designation.

This zone is intended to provide for those commercial establishments which serve the shopping and service needs for large sections of the county and provides visitor services and accommodations for both destination and en route travelers.³⁷

3.2.3.2 This designation is distinct from the Neighborhood Commercial designation, which is designed to serve the more immediate neighborhood and be sized for residential compatibility.

These centers are intended to provide for the quick stop shopping needs of the immediate neighborhood in which they are located. These centers should be based upon demonstrated need and shall be sized in a manner compatible with a residential setting.³⁸

3.2.3.3 In reviewing the uses authorized in the Commercial zone, many accommodate vehicle use, including automobiles and trucks. The code does not specify a certain number of allowed vehicles in defining what is allowed. Nor does it do this indirectly, by limiting customer visits to the site, or limiting business deliveries off site. There is no mathematical precision in the definitions. Rather, the code focuses on the core nature of vehicle use.

3.2.3.4 There are several ways to describe situations where vehicles are concentrated within a single area. They may be a Contractor's Storage Yard; an Accessory use; Vehicle and Equipment Storage; or Equipment Rental.

³⁷ KCC 17.240.010.

³⁸ KCC 17.270.010.

3.2.3.5 In distinguishing these vehicle concentrations, the focus is the use's overall nature. This focus is significant, as it can change whether the activity is permitted. For example, is this use, at root, a Contractor's Storage Yard? If so, it is prohibited in the Commercial zone. If considered Vehicle and Equipment Storage, an administrative conditional use permit would be required. If considered Equipment Rental, it is permitted outright. Also, vehicle parking may be Accessory to the main use, and not require a separate permit. Two key terms are further defined.

“Contractor’s storage yard” means a place where heavy equipment, vehicles, construction equipment or any material commonly used in the erection of any structure, is stored or accumulated. Sites that involve current construction of projects with active permits involving the materials on site shall not be considered a contractor’s storage yard.³⁹

“Storage, vehicles and equipment” means an indoor or outdoor area for parking or holding of motor vehicles and boats or wheeled equipment for more than seventy-two hours. This definition excludes automotive sales and rentals, automotive service and repair shops, and auto wrecking yards.⁴⁰

3.2.3.6 At the hearing, the parties looked primarily at whether the use is best described as Equipment Rentals or a Contractor's Storage Yard. DCD emphasized the number of vehicles at the site and customer presence. Action Services focused more on use similarities to Equipment Rental and it not engaging in construction or road building, providing only outdoor/indoor maintenance services, including to the adjacent parking lot.

3.2.3.7 Vehicle number is irrelevant; it is not mentioned in the definition. A large retail use may have hundreds of parked vehicles. And, there is no limit on the number of vehicles in a Contractor's Storage Yard. That changes when it is accessory to a residential use in the Rural area; in that case the number is limited to ten.⁴¹ So, where the County wished to limit vehicle number, it knew how to do that. However, that provision does not apply here. Use function, not vehicle number, drives the analysis.

3.2.3.8 For a Contractor's Storage Yard, the definition contains a heavy focus on vehicles used for construction. The first term in the definition, "heavy equipment" is defined.

“Heavy equipment” means, but shall not be limited to, self-powered, self-propelled or towed mechanical devices, equipment and vehicles of the nature customarily used for commercial purposes such as tandem axle trucks, graders, backhoes, tractor trailers, cranes and lifts but excluding automobiles, recreational vehicles, boats and their trailers and equipment used for agricultural purposes.⁴²

³⁹ KCC 17.110.195.

⁴⁰ KCC 17.110.690.

⁴¹ KCC 17.410.042, Footnote 21.

⁴² KCC 17.110.330.

3.2.3.9 Machinery on the Action Services site includes self-powered and/or towed mechanical devices, and is used for commercial services, but most are not "axle trucks, graders, backhoes, tractor trailers, [and] cranes or lifts." While a few items fit within the definition, this list focuses on trucks carrying particularly heavy loads (tandem axle trucks), and road or building construction trucks (*i.e.*, graders, backhoes, cranes and lifts). The definition has some parallels with the Action Services vehicles, but overall these vehicles do not fit the definition's focus, which is construction equipment. The other portion of the definition also addresses "construction equipment or material" used in construction, with the last sentence excluding active construction sites. The only remaining term is "vehicle," which is all inclusive, meaning it could include cars or backhoes, so does not help in differentiating the use from authorized vehicle parking activities. However, previous County permitting decisions describe the use. All four involved construction.

3.2.3.10 Four conditional use permits were submitted which authorized Contractor Storage Yards. The use being permitted was never disputed. However, consistent with the focus of the code definition, three involved building construction, while one involved landscaping construction or installation. None involved janitorial or outdoor facility maintenance. Not one dealt with what Action Services is doing: maintaining urban facilities, such as buildings, storm drains, and parking lots. All the conditional use permits supplied fit neatly within the scope of a "construction" centered definition.

Applicants ... offer logging, roadway construction, site work and utilities installation. When working on projects the company's construction equipment generally stays on the job site until construction is complete and then typically goes directly to the next job site. ... The business currently has two excavators, two dump trucks, one tractor-trailer "low-boy," one skidder, and one bulldozer.⁴³

The Applicant [a construction company] currently owns two 10-yard dump trucks, a backhoe, an excavator, a mini-excavator, a bulldozer, a 4.5 ton roller, a 2,500 gallon water truck, a 22-foot flatbed truck, a pickup truck, and three equipment trailers. Because of the nature of the Applicant's workload, the above listed equipment is often away at a job site and not stored at the property.⁴⁴

2,400-square foot shop ... would provide storage space for three, one-ton flatbed trucks, a fork lift, and masonry materials ... [to] be used in the Applicant's masonry business.⁴⁵

Equipment stored on site would include flat bed trucks, dump trucks, excavators, front-end loaders, tractors and trailers, mowers, and other miscellaneous small landscaping equipment.⁴⁶

⁴³ DCD-16, CUP for SAW Enterprises, pg. 3. of decision.

⁴⁴ DCD-17, CUP for Lydel Construction Contractor's Storage Yard, pg. 6 of decision.

⁴⁵ DCD-18, CUP for Winslow Masonry, pg. 6 of decision.

⁴⁶ DCD-19, CUP for Rameriz Landscape Business, pg. 9 of decision).

3.2.3.11 What Action Services does is different. It sweeps parking lots; it cleans out storm drains; it cleans up spills; it does janitorial work. It also rents equipment and maintains office space. Action Services does no construction work. Action Services uses vehicles, including trucks, for this cleaning work, which are common to the area. In the Commercial zone, semi-trucks make deliveries to Fred Meyer; fuel trucks make deliveries to the two nearby gas stations; RVs may be housed on site and rented, with an administrative conditional use permit; and, Farm Equipment may be housed on site and sold, as an outright permitted use.

3.2.3.12 There is overlap between a Contractor's Storage Yard and what Action Services does, and because this decision is case-specific it should not be used to apply in other situations. However, there are other use categories which more closely describe the Action Services use. DCD's error was not in considering the Action Services parallels with a Contractor's Storage Yard, but its overly narrow focus on just that use. That tight focus led to it not adequately considering the parallels between what Action Services does with other uses identified in the Commercial zone as authorized. Given four criteria must be balanced, including the Plan's economic policies, and the overall objective of encouraging synergistic use siting in building out urban areas, and the use's public benefit (addressed below), that omission is significant. Given that in this situation it directly conflicts with Plan economic policies to force a local business which has been in place for over three decades to close, further attention should have been given to allowed uses in the zone in which the use is located.

3.2.3.13 DCD acknowledged the legality of the Action Services use was never in question until recently, although it has been in operation for over thirty years, and also that code enforcement issues drove some of the analysis. The analysis appears to have been influenced by facts not in the record and which the parties have agreed are not properly part of the use classification analysis. A fair assessment of whether the use is or is not authorized in the Commercial zone is required. Action Services has met its burden of proof to demonstrate that DCD erred in not recognizing the parallels between Action Services and other Commercial zone uses, such as Vehicle and Equipment Storage and Equipment Rental.

3.2.3.14 The roughly 25 vehicles stored on site to be used for facility maintenance could be readily categorized as Vehicle and Equipment Storage or Equipment Rental. The trucks are vehicles, and they are being stored on site for over 72 hours. The term describes what is occurring, so follows the zoning and creates impacts no greater than the identified use. Also, the impacts associated with facility maintenance work compares with Equipment Rental. The only real difference is that Action Services performs much of the work, rather than delivering the equipment off-site for someone else to complete. For similar use classification, and assessing use impact, this is not a material distinction. The impacts are similar, if not identical.

3.2.4 Public Health, Safety, and General Welfare and Impacts

3.2.4.1 DCD acknowledged that the public health and safety and general welfare criterion was not the most significant component of its analysis. While it raised concern about pedestrian conflicts with vehicles in the private alley, DCD did not consider the signs posted in the alley notifying the public of the area's private nature and identifying a speed limit. Also, such conflicts do not exceed those associated with other permitted uses, in which vehicles of all sizes are crossing private property. As addressed at the hearing, there was no evidence of pedestrian/vehicle conflicts. The enforcement issues were not made part of this proceeding. Based on party agreement, they are not relevant to the use analysis, although DCD indicated that component influenced its thinking. It should not have, as these are separate issues.

3.2.4.2 The findings detail the other uses in the area, and parking about 25 vehicles to do facility cleaning, coupled with office and equipment rental, is a use which shares characteristics with other commercial uses such as Vehicle and Equipment Storage or Equipment Rental, is not of greater intensity or density than these uses, and does not generate more environmental impacts than other listed uses, as the findings above address.

3.2.4.3 As addressed in the findings above, cleaning up urban waste protects the public health, safety and welfare. Action Services provides a necessary public service. Action Services has met its burden of proof to demonstrate this criterion is more than met. It has also met its burden to demonstrate that its impacts are commensurate with other Commercial uses, including Equipment Rental and Vehicle and Equipment Storage.

4. Uses Parties Agree are Prohibited

The parties did not dispute that the site is not intended for use as a junk yard or for storing junk vehicles.⁴⁷ According to Mr. Sandefur's testimony, all inoperable vehicles have been removed. The parties also do not dispute that the site may not be used to dispose of petroleum products and such compounds may not be stored in amounts above specified limits. As the parties viewed these questions as ones subject to the enforcement proceedings, this decision does not address what those limits are or whether illegal waste disposal has occurred. However, the parties agreed such activities are not authorized and Action Services has confirmed it has no intent to conduct such activities ("Action Services is willing to correct any safety or environmental condition").⁴⁸ The Examiner trusts that any such issues which may be outstanding at the site will be promptly corrected.

5. Legal Non-Conforming Use

5.1 Under the KCC, a lawfully established use may continue although contrary zoning is later enacted:

⁴⁷ KCC 17.110.369 (junk motor vehicle defined); KCC 17.110.370 (junk yard defined); KCC 17.410.060(B)(6) (prohibition on storage of junk motor vehicles absent compliance with specified conditions).

⁴⁸ Appellants' Opening Brief, pg. 12:2.

Within the zoning districts established by this title or any amendment later adopted, there may exist uses of land and/or structures that were lawful before the effective date of the applicable regulations, but which would be restricted, regulated or prohibited under the terms of this title or future amendment. Except as specifically allowed by this chapter, this chapter is intended to permit these nonconformities to continue until they are removed or discontinued.⁴⁹

Where a lawful use of land exists that is not allowed under current regulations, but was allowed when the use was initially established, that use may be continued so long as it remains otherwise lawful, and shall be deemed a nonconforming use.⁵⁰

5.2 Action Services established its present use in the 1980s, with more vehicles/trucks added in the 1990s. In the 1980s, there were four business zone classifications. The site was zoned Business General. In this zone, many commercial uses are permitted, along with any use identified in the Business Convenience zone, which permits any use in the Business Neighborhood zone.

5.3 Unless permitted as an unclassified use, comparable in some ways to today's conditional use permit, "only those uses, together with accessory uses, specifically permitted are allowed."⁵¹ However, the three business zones include no finite list of permitted uses, but provide "examples." While a use must be of the type permitted, it need not be the exact type.

5.4 Unclassified uses include "heavy equipment storage yards."⁵²

Heavy Equipment -- self-powered, self-propelled or towed mechanical devices, equipment and vehicles of the nature customarily used for commercial purposes such as tandem axle trucks, graders, backhoes, tractor trailers, cranes and lifts but excluding automobiles, recreational vehicles and boats and their trailers.⁵³

The term Heavy Equipment Storage Area is also defined as "a place where two or more items of heavy equipment are stored."⁵⁴ A "Yard" and "Storage Area," for use classification are not necessarily the same, but this distinction need not be resolved here.

5.5 In the 1980s, Action Services maintained four to five trucks/vehicles on site. Of these vehicles, there was no evidence these vehicles had tandem axles or were involved in construction (graders, backhoes, tractor trailers, cranes and lifts). The primary function of the vehicles was to support the principal use, facility/maintenance activities, rather than to serve as a

⁴⁹ KCC 17.570.010.

⁵⁰ KCC 17.570.020.

⁵¹ DCD-2, 1983 Zoning Code, as Amended in 1986, § 5.

⁵² DCD-2, 1983 Zoning Code, as Amended in 1986, § 9(b), #25.

⁵³ DCD-2, 1983 Zoning Code, as Amended in 1986, § 3(c), Definitions, #34.

⁵⁴ DCD-2, 1983 Zoning Code, as Amended in 1986, § 3(c), Definitions, #35.

Heavy Equipment Storage Yard. The use provided professional indoor and outdoor cleaning and maintenance services to the "surrounding communities and the region."⁵⁵

5.6 Janitorial and maintenance services are not specifically listed under the Business General zone category, but the uses identified as "examples" include automobile sales, lumber and building sales, electrical and electronic repair shops, and self service storage facilities. Also, any use authorized in the Business Convenience or Business Neighborhood zone is authorized, and these include community hardware and lumber stores, business and other professional offices. The intent of the Business Convenience zone is to:

[P]rovide commercial and professional services in neighborhood settings for the convenience needs of the nearby residents rather than the larger community. Commercial uses occurring in BC zones are intended to be those that are designed to dispense retail commodities or provide professional or personal services.⁵⁶

5.7 In the 1980's, with a small cleaning business, which included both outdoor facility maintenance and janitorial services, and no more than four to five trucks, the use followed this intent. Even the Business Neighborhood zone fits the use.

Small-scale retail and personal service establishments intended to serve the day-to-day needs of residents of rural areas and relatively isolated neighborhoods which will not attract substantial customers from large areas of the county.⁵⁷

5.8 The area was rural and relatively isolated given testimony on the undeveloped nature of the area in the 1980s, with the adjacent woods and no Fred Meyer. And, the business was not attracting substantial customers, as it was conducted through site visits.

5.9 Given the commercial and professional services provided within the local area, the use should have been considered as permitted outright. DCD's error was in considering the use and environs as it exists today, and not assessing the use established over three decades ago in 1982 (not 1988), with only four to five vehicles operating in the 1980s in a relatively undeveloped area. While the 1980s code does not specifically identify the use, it was just a small scale janitorial operation providing the indoor/outdoor cleaning services one would expect to see within a Commercial zone.

5.10 DCD made no determination on whether the use as it existed in the 1990s, with about 20 trucks/vehicles, would be a permissible intensification of the 1980s use or a fundamental alteration. Without a decision on this point, there is nothing for the Examiner to review.

⁵⁵ DCD-2, 1983 Zoning Code, as Amended in 1986, § 7(c)(1), Intent of Business General zone.

⁵⁶ DCD-2, 1983 Zoning Code, as Amended in 1986, § 7(b)(1), Intent of Business Convenience zone.

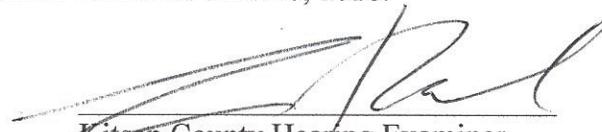
⁵⁷ DCD-2, 1983 Zoning Code, as Amended in 1986, § 7(a)(2)(a), Intent of Business Convenience zone.

SECTION III. DECISION

Based on the above Findings and Conclusions, the Examiner partially upholds DCD's Formal Director's Interpretation and partially reverses it. As concluded above:

- Action Services' office and rental equipment operations are uses the County's zoning code permits outright in the Commercial zoning designation.⁵⁸
- Action Services' provision of indoor/outdoor facility maintenance services, while permissible within the Commercial zoning designation, may require further permitting, depending how vehicle/truck parking is classified.
- The roughly 12 trucks/vehicles at the site, and roughly 13 on two adjacent sites, are properly treated as Equipment and Vehicle Storage (requiring an administrative conditional use permit), or properly classified as similar to Equipment Rental through KCC 17.100.040.⁵⁹ DCD erred in limiting its comparative use decision to allow for classification as only a Contractor Storage Yard.
- Action Services' use, as it existed in the 1980s, is a legal non-conforming use. The Code Interpretation did not compare the use as it existed in the 1980s with how it existed in the 1990s. Business growth in the 1990s may have simply intensified the established use, maintaining its legal non-conforming use status, but without a DCD determination, there is no DCD decision on this aspect of the use for the Examiner to rule on.

This Decision is entered June 28, 2018.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond

⁵⁸ This was not in contention. This is simply re-stated here for clarity.

⁵⁹ The Examiner urges the parties to work out a solution in which all zoning and enforcement issues are fully addressed. In theory, the parties could agree on a permitting approach to condition the use in a way which resolves all outstanding issues, including the enforcement concerns which were alluded to, but were not before the Examiner. However, the approach to resolution, if any is taken, is outside Examiner jurisdiction.