

**Interpretation of the Director
Under Seattle Municipal Code Title 23**

Regarding the Use of the

Property at

1501 - 17th Avenue East

DPD Interpretation No. 10-004

(Project No. 3011832)

Background

This interpretation was requested on behalf of the Volunteer Park Neighbors (VPN), a group of citizens who live in the vicinity of the Volunteer Park Café and Marketplace (VPC) at 1501 - 17th Avenue East. The owners of the business have applied for administrative conditional use approval to convert one nonconforming use (a store) to another use not otherwise permitted in the single-family zone (a restaurant). A decision on that application, Project No. 3011437, is being issued concurrently with this interpretation.

The question as framed by VPN is: “Based on the facts involving the historical use and non-use of this property, based on SMC 23.42.104.B.2, based on SMC 23.42.106, and based on SMC 23.42.110, must this application be denied, no matter what its mitigating conditions?” The chief question raised is whether the use of the facility as a store has already lapsed through discontinuance, according to the provisions of the code, causing it to be ineligible for conversion, by conditional use, to another use not otherwise allowed in the single-family zone. A secondary question raised is whether a conversion from a store to a restaurant could ever meet the conditional use criterion that the new use be “no more detrimental” than the old. Additionally, VPN asks that if DPD decides to allow VPC’s application to convert a nonconforming use to proceed under Section 23.42.110, that DPD opine on whether VPC’s activities constitute an impermissible expansion of the nonconforming use, as defined under Section 23.42.106.

Findings of Fact

1. The property at 1501 - 17th Avenue East is in an SF 5000 (Single Family Residential) zone. Retail establishments, including grocery stores and restaurants, are not generally permitted in areas zoned SF 5000.
2. The structure used by VPC was built in 1905 under Seattle Building Permit No. 33333, which stated: “Build 2 story frame store and residence 38 x 46 as per Plan File.” That permit predates Seattle’s first zoning code, which was adopted in 1923.

3. VPC has operated on the premises since 2006. Based on representations by Ericka Burke, the current owner of VPC, and supported by photographs, the VPC currently both food for immediate consumption and also a broad assortment of items not for immediate consumption, including cakes, pies, breads, bottles of wine, coffee beans, jars of handmade jellies, relishes, pickles and sauces, and nonfood items including market bags, aprons, t-shirts, baby blankets and hand-made soap.
4. The premises operated as "Café Europa" from 2002 to 2006. The proprietor, Amy Neely, submitted a declaration reflecting that the business sold food and beverages both for consumption on the premises and also to go. Seating was provided inside and in front of the store. Products sold included baked goods, most of which were baked in-house. Bakeries with storefronts have been commonly categorized as retail uses, and it is not uncommon for them to provide some seating for customers who wish to consume their products immediately.
5. A declaration was provided from Dorothy Erickson, who is still the owner of the property, representing that she and her family operated the business, then called "Volunteer Park Market," on the property prior to Café Europa, dating back to about 1958. During that period, the business also featured products both to be consumed on the premises and elsewhere. There was a walk-up window where people could purchase soft-serve ice cream. The store also sold sandwiches and snacks in small-sized packages. A bench and chair were provided in front of the store and a trash can for food wrappings. Some supporting photographs were provided.
6. VPN has provided records of Health Department and liquor license records reflecting that the facility was historically represented and regulated as a grocery store, but that, starting with the occupancy by Café Europa, it has been regulated as a restaurant or tavern.
7. Although the request for interpretation asks that DPD opine on the non-expansion issue of Section 23.42.106, it does not specifically identify improvements or activities that VPN believe to be improper expansions. Other correspondence points to advertised plans to add a barbecue pit and mentions the amount and location of indoor and outdoor seating associated with the restaurant use.
8. Seating for the facility has been provided on the sidewalk (in the right-of-way) both by the current business and by the previous businesses in the building. Provision of seating for a restaurant is regulated by the Seattle Department of Transportation under Title 15 of the Municipal Code (Street Use) rather than under the Land Use Code, and thus is beyond the scope of what may be addressed in a Land Use Code interpretation.
9. On September 16, 2010, VPC submitted an application for a change in nonconforming use under SMC Section 23.42.110, requesting a change from "grocery store" to "eating and drinking establishment."
10. "Nonconforming use" is defined at SMC Section 23.84A.040 as "a use of land or a structure that was lawful when established and that does not now conform to the use regulations of the zone in which it is located, or that has otherwise been established as nonconforming according to Section 23.42.102."

11. SMC Section 23.42.100 provides:

- A. The nonconformity provisions of this chapter apply to uses and sites in all zones, except for the shoreline overlay district (see Chapter 23.60.)
- B. It is the intent of these provisions to establish a framework for dealing with nonconformity that allows most nonconformities to continue. The Code facilitates the maintenance and enhancement of nonconforming uses and developments so they may exist as an asset to their neighborhoods. The redevelopment of nonconformities to be more conforming to current code standards is a long-term goal.

12. SMC Section 23.42.104 provides in part:

- A. Any nonconforming use may be continued, subject to the provisions of this section.
- B. A nonconforming use that has been discontinued for more than 12 consecutive months shall not be reestablished or recommenced. A use is considered discontinued when:
 - 1. A permit to permanently change the use of the lot or structure was issued and acted upon; or
 - 2. The structure or a portion of a structure is not being used for the use allowed by the most recent permit, except that interruption of a nonconforming use by a temporary use authorized pursuant to Section 23.42.040, if no structures are demolished, is not a discontinuation of the previous nonconforming uses; or
 - 3. The structure is vacant, or the portion of the structure formerly occupied by the nonconforming use is vacant. The use of the structure is considered discontinued even if materials from the former use remain or are stored on the property. A multifamily structure with one or more vacant dwelling units is not considered vacant and the use is not considered to be discontinued unless all units in the structure are vacant.
 - 4. If a complete application for a permit that would allow the nonconforming use to continue, or that would authorize a change to another nonconforming use, has been submitted before the structure has been vacant for 12 consecutive months, the nonconforming use shall not be considered discontinued unless the permit lapses or the permit is denied. If the permit is denied, the nonconforming use may be reestablished during the six months following the denial.

13. An “eating and drinking establishment” is defined in SMC Section 23.84A.010 as: “a use in which food and/or beverages are prepared and sold at retail for immediate consumption.” “Restaurant,” specifically included in the definition of “eating and drinking establishment,” is defined in the same section as “a use in which food and/or beverage preparation and service is provided for individual consumption either on- or off-premises, and in which any service of alcoholic beverages is accessory to the service of food.”

14. “General sales and services is defined at Section 23.84.036 as follows:

“Sales and services, general” means one of the uses listed below, in which goods are rented or sold or services are provided primarily for household and personal use rather than for business establishments, institutions, or government agencies, but excluding medical services and uses in which goods are sold that primarily need to be delivered by truck, such as building materials, major durables and/or heating fuel.

- 1. “Retail sales and services, general” means a general sales and service use that is not a multi-purpose retail sales use. General retail sales and services include general retail sales uses, general services uses, and customer service office uses. Examples of general retail sales include but are

not limited to bookstores, florists, and clothing stores. Examples of general services include but are not limited to shoe repair, hair cutting salons, pet grooming, pet daycare centers and dry cleaning. Customer service offices are uses in which services are provided to individuals and households in an office setting in a manner that encourages walk-in clientele and in which generally an appointment is not needed to conduct business, including but not limited to uses such as branch banks, travel agencies, brokerage firms, real estate offices, and government agencies that provide direct services to clients.

2. "Retail sales, multipurpose" means a general sales and service use in which a wide range of items frequently purchased for household use are rented or sold. Examples of multipurpose retail sales include but are not limited to grocery, hardware, drug, and variety stores, and farmers' markets.

15. In 1896, "store" was defined by Webster's Collegiate Dictionary as "any place where goods are sold; shop."

16. SMC Section 23.42.110 provides in part:

A nonconforming use may be converted by an administrative conditional use authorization to another use not otherwise permitted in the zone subject to the following limitations and conditions.

- A. . . .
- B. The proposed new use must be no more detrimental to properties in the zone and vicinity than the existing use. This determination shall be based on consideration of the following factors:
 1. The zones in which both the existing use and the proposed new use are allowed;
 2. The number of employees and clients associated or expected with the proposed use;
 3. The relative parking, traffic, light, glare, noise, odor and similar impacts of the two uses and how these impacts could be mitigated.
- C. The existence of a single residential unit, such as a caretaker's or proprietor's unit, accessory to a nonconforming commercial use shall not be treated as having established a residential use, and such a unit may be converted or changed provided that it is the only residential use in the structure and comprises less than half of the total floor area of the structure.
- D. Parking requirements for the proposed use shall be determined by the Director.
- E. If the new use is permitted, the Director may require mitigation measures, including but not limited to landscaping, sound barriers or fences, mounding or berming, adjustments to yards or parking standards, design modification, or limiting hours of operation.

17. SMC Section 23.42.106 provides in part:

- D. A nonconforming nonresidential use shall not be expanded or extended, except as follows:
 1. A structure occupied by a nonconforming nonresidential use may be maintained, repaired, renovated or structurally altered but shall not be expanded or extended except as otherwise required by law, as necessary to improve access for the elderly or disabled or as specifically permitted elsewhere in this Code.

* * *

18. SMC Section 23.47A.011 regulates the size and location of outdoor activities in commercial zones. Subsection 23.47A.011.E.1 requires that outdoor sales and/or service of food or beverages, except products of an agricultural use on the lot, be located at least 50 feet from a lot in a residential zone, unless the elevation of the lot with the activity is at least 15 feet above the grade of the lot in the residential zone at the common lot line.

Conclusions

1. The “store” use at 1501 - 17th Avenue East was established by permit in 1905, predating the residential zoning, and thus was a legal, nonconforming use. No more recent permit has been issued to change the use, nor has there been any argument that that the structure has been vacant for any significant period, so there is no basis for concluding that the legal nonconforming use has been discontinued according to subsections 23.42.104.B.1 or 3. The question remaining is whether the nonconforming use has been discontinued, and has lapsed, according to subsection 23.41.104.B.2; i.e. whether the premises have not been used for the use allowed by the most recent permit for a period of more than 12 months.
2. “Store” is not a defined use category under the current code, although certain types of stores are included in the definitions for general retail sales and services and multipurpose retail sales. The word “store” as used in 1905 arguably connoted a broader range of commercial activity, and we cannot conclude that a facility selling a mix of food for consumption on the premises and products to be taken away would not fall within what was contemplated as a “store” on that historic permit. On that basis, it cannot be said that the use created by Café Europa and then by VPC is not “the use allowed by the most recent permit” under SMC Section 23.42.104.B.2.
3. There is ample evidence that, like VPC, the previous operators on the premises have offered a range of products including food or beverages for immediate consumption, and provided seating for customers consuming food on-site. In addition to providing food for consumption on the premises, VPC has continued to sell other products.
4. It is evident that the focus of the commercial activity on the site has shifted in recent years more towards restaurant use. This is reflected by increased seating, by licensing records and even by the name of the businesses that have occupied the space. The proprietors have now applied for a permit to specifically establish this use, as an eating and drinking establishment, as the principal use of the space. VPN asserts that VPC should be precluded from doing this as the balance between retail and restaurant activity tipped too long ago, and thus that the nonconforming status of the use of the property has lapsed. The consequence of this stance is that the building now could not legally be used either as a store or as a restaurant. VPN asserts that VPCs recourse is to obtain City Council approval, presumably of a rezone or a code amendment.
5. This reading of the code seems harsh, given the delay, expense and uncertainty of these Council approval processes in order to simply allow the continued use for commercial purposes of a building that has been in commercial use, continuously, for over a century. This reading also is at odds with Seattle’s express policy, reflected in Section 23.42.100, recognizing the value and supporting the continuation of nonconforming uses. VPN points to case law from another jurisdiction, *Miller v. City of Bainbridge Island*, as authority that conversion of a nonconforming use to a different unauthorized use constitutes abandonment, causing the legal nonconformity to lapse. In that case, the legal nonconforming use had been a concrete supply business, and the space had been converted to numerous other uses including offices and a sandwich shop. We do not find this argument compelling, in light of the specific policy direction in Seattle’s code

and the fact that the shift in uses in the current case amounts to a shift in emphasis between two activities that have always been occurring as a part of the business on the premises, rather than a shift to wholly unrelated uses.

6. A secondary question raised was whether it would ever be possible to approve conversion of a nonconforming store to a restaurant use, or whether restaurants by their nature inherently have impacts more detrimental than those of stores. Section 23.42.110 includes three factors to be considered in determining whether a proposed new use is more detrimental than the existing nonconforming use. These factors require an analysis of the activities and impacts of a particular use at a particular site, and these impacts may be limited through conditioning associated with the approval. We reject the contention that conversion from a store to a restaurant could never be approved, under the criteria of that section. There is no evidence to say that impacts of traffic, noise, parking, and delivery impacts of a restaurant would in every case be more detrimental than those of a store, or that additional impacts could not be mitigated. It is not necessary to address this further as a general code interpretation question, however, as the related project decision approves such a conversion, based on the code criteria, subject to conditions intended to address the impacts.
7. Active use of new outdoor areas on the lot for customer seating or food preparation would be regarded as an impermissible expansion of the nonconforming use. This sort of outdoor activity is specifically regulated in other zones, such as commercial zones where outdoor seating for a restaurant is not allowed within 50 feet of a lot in a residential zone, so it would not make sense to disregard outdoor seating that is added to a nonconforming business in a residential zone in an area adjacent to neighboring homes.

Decision

The nonconforming use at 1501 - 17th Ave has not been discontinued, within the meaning of SMC Section 23.42.104.B, and is therefore eligible for consideration for an administrative conditional use permit to convert to another use not otherwise allowed in the single-family zone. For the purposes of SMC Section 23.42.110, eating and drinking establishments are not, as a matter of law, more detrimental to properties in the zone and vicinity than general or multipurpose retail sales uses. Rather, an analysis must be made based on the specific facts relating to the site and the proposed operations.

Entered this 1st day of September, 2011

(signature on file)
Andrew S. McKim
Land Use Planner – Supervisor