

November 29, 2006

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0500579**

L. C. KEIR and FLUID MOTION, INC.
Code Enforcement Appeal

Location: 23831 Southeast Tiger Mountain Road, Issaquah

Appellants: L. C. Keir & Fluid Motion, Inc.
represented by **Laverne and Doug Keir**
23831 Southeast Tiger Mountain Road
Issaquah, Washington 98027
Telephone: (425) 391-1999

King County: Department of Development and Environmental Services, (DDES)
represented by **Bill Turner**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal; extend compliance schedule
Department's Final Recommendation:	Deny appeal; extend compliance schedule
Examiner's Decision:	Deny appeal; extend compliance schedule

EXAMINER PROCEEDINGS:

Hearing Opened:	October 4, 2006
Hearing Closed:	October 4, 2006

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On July 21, 2006, the King County Department of Development and Environmental Services (DDES) issued a Notice and Order to Fluid Motion, Inc. and L. C. Keir that alleged code violations at property located at 23831 Southeast Tiger Mountain Road, in the unincorporated area south of Issaquah near Issaquah-Hobart Road. The Notice and Order cited the noticees and the property with one violation of county code, consisting of:
 - (a) Operation of a manufacturing business (assembly and distribution of ham radio antennae including exterior storage) from a neighborhood business (NB) zone.

The violation was required by the Notice and Order to be corrected by cessation of the operation of the assembly and distribution of ham radio antennae including outdoor storage of materials and removal of all equipment and materials associated with the business from the property by October 23, 2006.

2. The noticees of the Notice and Order (the Appellants), filed a timely appeal of the Notice and Order asserting that the characterization of the business onsite as “manufacturing” is “unjust and incorrect,” and that the Appellants would provide evidence that a “similar business has been operating on this site since the late 1950’s.”
3. L. C. Keir, owner of the property, started a machine tool distribution business in the late 1940’s, and moved the business to the subject site in the mid-1950’s. The business consists of conducting sales of machine tools (chiefly Harding lathes manufactured in Elmira, New York). The vast majority of the machine tools (approximately 98 percent) sold by the Keir business were delivered directly from the manufacturer to the purchasers’ own business sites rather than transiting through the subject property. The onsite structure (which is a single-story residentially appearing building) was used as the business office and showroom and also for education seminars for vocational students. Of the proportionately few machines which transited through the subject site itself, some minor final assembly was conducted to attach accessories, coolant distributor parts, etc. The machine tools which transited through the site prior to delivery were removed from their packing crates, the accessories attached, and then transported to the final retail customer. Thus, the portion of the machine tool sales business which actually resulted in the machine tools being physically onsite was extremely low. The level of assembly work was extremely minor in scale and involved minor accessory attachment and handling rather than parts fabrication and manufacturing and full assembly of a product. Some minor repair occurred with the business operation, though this is disputed. Some business-related materials were stored on the exterior of the site in the rear of the building, consisting of machine tool cooling fluid stored in bulk containers, which was broken down into smaller volume units for sale to end-user customers.
4. From the early 1970’s until 1995, the property was zoned Business-Commercial (B-C). Pursuant to the Growth Management Act (GMA) (Chapter 36.70A RCW), and KCC 21A.01.070 the subject property was rezoned in area-wide GMA-implementing rezones from B-C to Neighborhood Business (NB).
5. At least from the time of the property’s rezoning from B-C to NB in 1995, the machine tool distribution use was a nonconforming use, since it is not permitted in the NB zone. (There was

some unfleshed-out discussion in the proceeding as to whether the use had been a nonconforming use prior to the mid-90's GMA rezoning, but that issue was not made clear factually and is not directly relevant to the appeal issues at hand and therefore unnecessary to decide here.)

6. L. C. Keir complains that the GMA rezoning to NB was conducted without notice to him and he was unaware of it having occurred. Disputation of the zoning of the property is not a matter under the Examiner's jurisdiction. Any grievance regarding the zoning of the property may be addressed for legislative remedy to the County Council via the comprehensive planning process and legislative land use amendment docket. It perhaps may also be the subject of an equity claim under the common law. The Examiner as a quasi-judicial hearing officer is generally limited to adjudicating matters under "black letter" law, *i.e.*, law enacted in statutory or ordinance form. Washington case law limits the Examiner's exercise of common law in deciding cases. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] Any equity claim would have to be brought in a court of law. It is also perhaps possible that the zoning of the property under the GMA is a matter of appeal to the Growth Management Hearings Board. [*Somers v. Snohomish County*, 105 Wn. App. 939, 21 P.3d 1166 (2001)]. The Examiner makes no judgement or advice regarding the possible avenues of relief, and neither encourages nor discourages that relief be sought; the Examiner is only finding a lack of authority to address the issue in this proceeding.
7. Keir's machine tool distribution business was ended on the site "a few years ago." In early 2004, Fluid Motion, Inc. commenced business operations onsite consisting of a ham radio antennae fabrication and assembly business. The assembly includes direct manufacture and fabrication of parts conducted onsite, such as pipe-cutting (for the antennae masts) which is conducted in operations on the exterior of the site, creating significant noise impacts to adjacent property owners and residents. The antennas are assembled completely onsite from parts delivered to, manufactured and/or processed on the site so as to conform to product dimensional and operational needs. Two exterior canvas tent structures have been erected which house the aforementioned pipe-cutting machinery and storage of materials used in the manufacturing business. Additionally, large trucks occupy the frontage of the property and even in some instances block portions of the fronting road.
8. The Appellants argue that the property's conventional building and its appearance have not changed from the Keir machine tool distribution business era. They also argue that the hardship associated with affecting local employees and a local business should be taken into consideration and that the specific local adverse impacts of the business should be the primary consideration as to whether there is a code violation as opposed to direct application of the letter of the law.
9. The antenna manufacturing and assembly business is a land use which is not permitted in the NB zone. It also does not benefit from any legal nonconforming use status as did the less-intensive and chiefly interior-conducted machine tool distribution business. Not only is it a different and more intense use, but also the machine tool distribution business was discontinued, and any nonconforming use rights to that type or similar nature, scale and intensity of business use were lost once the discontinuance exceeded 12 months. [KCC 21A.32.025, citing KCC 21A.32.045]
10. The charge of zoning code violation asserted in the Notice and Order is correct.
11. Due to the difficulties of relocating some or all of the new business on the site to a site which is properly zoned for its use classification, DDES recommends a fairly generous period for compliance.

CONCLUSIONS:

1. The violation charge of the Notice and Order is substantiated by a preponderance of the evidence submitted into the record. The appeal shall accordingly be denied except that the schedule for required compliance shall be revised as set forth below.
2. The Examiner is aware of the potential hardships associated with a “forced” relocation of a business concern, but is bound to respect and implement the law as it has been enacted. The county’s land use regulations are of a fairly rigid structural and legal nature (sometimes referred to as “Euclidean” in nature, termed after the seminal *Ambler Realty Co. v. Euclid (Ohio)* zoning case in the 1920’s [DC Ohio (1924), 297 F 307, revd 272 US 365, 247 S Ct 114, other citations omitted]¹). The county’s zoning code is not a performance-type land use regulatory scheme, where uses are not so rigidly classified but are individually assessed on a performance basis for compatibility, etc. Any desired change to the county’s approach to land use regulation is a matter not under the Examiner’s jurisdiction, but under the legislative authority of the County Council (and, to some degree, state law).
3. It may be that the Appellants can obtain a permit for establishment of a home industry use on the property (see KCC 21A.30.090). By this recitation of a possible means of preserving some or all of the antennae assembly business onsite, the Examiner makes no prejudgment on the Examiner’s or the County’s behalf as to the likelihood of approval.

DECISION:

The appeal is DENIED, except that the Notice and Order deadlines for compliance are revised as stated in the following order.

ORDER:

1. Cease operation of any and all material cutting, trimming, fabrication, manufacturing, welding, attachment, etc., in other words *any* material fabrication, manufacturing or handling, on the *exterior* of the site (except for passive storage of materials) *by no later than December 31, 2006*.
2. Remove all business-related materials and products from exterior storage on the site, except for that which is considered by DDES’s interpretation to be equivalent to the passive coolant storage previously conducted by the L. C. Keir machine tool distribution business, *by no later than January 31, 2007*.
3. Cease operation of the subject assembly and distribution of ham radio antennae onsite and remove all equipment and materials associated with the business from the property *by no later than May 31, 2007*, unless a permit has been obtained which allows the operation onsite by approval of a home industry use on the property, or other formal approval granted by King County in conformity with applicable land use and other regulations.
4. No penalties shall be assessed against Fluid Motion, Inc., L. C. Keir and/or the property if the deadlines stated within the above conditions are met. If any deadline is not met, DDES may impose penalties against said parties and/or the property retroactive to the date of this order.

¹ See Young, *Anderson’s American Law of Zoning*, 4th Edition, 1996 (as supplemented), § 9.17, p. 161 (citing generally Ziegler, *Rathkopf’s The Law of Zoning & Planning* at Chapter 9).

ORDERED November 29, 2006.

Peter T. Donahue
King County Hearing Examiner

TRANSMITTED November 29, 2006 via certified mail to the following:

L. C. Keir and Fluid Motion, Inc.
23831 Southeast Tiger Mountain Road
Issaquah, Washington 98027

TRANSMITTED November 29, 2006, to the following parties and interested persons of record:

Fluid Motion Inc.
Attn: Mike Mertel
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Doug Keir
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NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE OCTOBER 4, 2006, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0500579.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Bill Turner, representing the Department; Laverne and Doug Keir, representing the Appellant, and Mary & Joe Vidos, Stephen Love and Mike Mertel.

The following Exhibits were offered and entered into the record:

- Exhibit No. 1 DDES staff report to the Hearing Examiner for October 4, 2006
- Exhibit No. 2 Copy of the Notice & Order issued July 21, 2006
- Exhibit No. 3 Copy of the Notice and Statement of Appeal received August 2, 2006
- Exhibit No. 4 Copies of codes cited in the Notice & Order
- Exhibit No. 5 Copy of computer log notes
- Exhibit No. 6 Photographs (10 color copies and 1 black and white copy) of subject property
- Exhibit No. 7 Overhead IMPA with zoning
- Exhibit No. 8 Information from Fluid Motion website (2 pages)
- Exhibit No. 9 Photos provided by the Vidos's (6 pages of color originals)
- Exhibit No. 10 Packet of letters, photos, etc. provided by Appellant

PTD:gao
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