

March 11, 2016

Final Investigative Report Concerning Ombudsman Complaint 2015-0142

COMPLAINT

An individual contacted the Municipal Ombudsman's Office alleging that two vehicle sales lots near Spenard Road and 36th Avenue, in the B-3 zoning district, were not in compliance with the landscaping and parking requirements of (old) Title 21. The Complainant had filed a complaint with the Municipality's Land Use Enforcement Division in August 2013, and he believed that his complaint had not been adequately addressed.

FINDINGS

The complaint against the Municipality of Anchorage, Development Services Department, Land Use Enforcement Division, regarding the non-enforcement of the landscaping and parking provisions of Anchorage Municipal Code (old) Title 21 for two vehicle sales lots in the B-3 zoning district, is **JUSTIFIED**.

ANALYSIS AND CONCLUSIONS

An individual contacted the Municipal Ombudsman's Office alleging that two vehicle sales lots near Spenard Road and 36th Avenue, in the B-3 zoning district, were not in compliance with the landscaping and parking requirements of (old) Title 21. The Complainant had filed a complaint with the Municipality's Land Use Enforcement Division (LUE) in August 2013. LUE disagreed with the Complainant's assertion that the landscaping and parking requirements of (old) Title 21 applied to the two vehicle sales lots in question. Consequently, LUE did not take enforcement action. The Complainant disagreed with LUE's position; he believed that his complaint had not been adequately addressed. In February 2015 the Complainant contacted the Ombudsman.

The Complainant provided the Ombudsman with a copy of the original complaint that he filed with LUE, which outlines his arguments as to why the landscaping and parking requirements of (old) Title 21 apply to the two vehicle sales lots in question:

"We would like to ask Code Enforcement to examine the following two lots: 3601 Spenard Rd and 1309 W 36th Avenue. Both are operated by the same used car company that is based on the Spenard lot.

Property research indicates that the lot at 3601 Spenard was operated as "My Club International Hostess Bar" and "Playmates" from 1989 to 1997 (Polk Directories). At some point after that the building was demolished and remained vacant for a number of years. At some point in the past 5 to 10 years, the lot began to be used as an auto sales lot.

Similarly, the lot at 1309 W 36th Avenue was used in the past as parking for the "Bunny Club." In the past year or two, the lot started to be used as an additional sales lot for the auto sales across the street.

Based on this property research, the lots do not have grandfather rights to operate as auto sales lots prior to Title 21 zoning code being in effect.

When comparing these lots to other used car lots (several along Old Seward), it is clear that they are in violation of a number of zoning and building (site) codes. Those appears to include:

- Storage of vehicles in the Right-of-Way
- No arterial landscaping
- No perimeter landscaping, including on back and sides given that the lot is used for vehicle storage or display
- Drive aisles and circulation for employees and customers not to Municipal traffic standards
- Lack of parking for employees and customers
- No pavement
- No on-site drainage facilities
- Lack of appropriate lighting – light is a temporary pole with an extension cord
- Inappropriate signage

Given the lack of adherence to the above code items, the lots are jammed with as many vehicles as possible. While many uses in Spenard have existed for a number of years and either have grandfather rights or a claim for those rights, as a newer use these lots should be required to comply with zoning and building requirements. It appears that since there is no permanent structure on these lots, the owner did not need to request a permit. However, the fact that no permanent structure is located on the lot does not eliminate the need to comply with zoning, traffic, and other civil and site requirements (i.e. an auto sales lot is not the same use as parking associated with commercial uses).

Upon confirmation of the above violations, the owners should be asked to bring their lot into conformity. “

LUE disagreed with the Complainant’s analysis; they believed that the landscaping and parking requirements are triggered by application for permits for construction of permanent structures on the lots. Since there are no permanent structures on either of the vehicle sales lots in question, no permits had ever been applied for, and consequently LUE believed that the landscaping and parking requirements of (old) Title 21 had never been triggered. When the Ombudsman contacted LUE, they provided him with their arguments for why the landscaping and parking requirements of (old) Title 21 do not apply to vehicle sales lots in the B-3 zoning district, that do not have permanent structures (emphasis and highlighting added by LUE):

“The question posed is whether, under the Anchorage Municipal Code (AMC) “old” Title 21, the “use” of a lot zoned B-3, General Business District (AMC 21.40.180) as an automobile sales lot requires installation of paving, lighting and landscaping if no subdivision of land occurs or a building is constructed or altered. The short answer is NO the code does not require them.

There is no question the “intent” of the “old” Title 21 was to require certain improvements. However the Municipality Of Anchorage failed to properly construct the ordinance(s) to require the installation of the improvements during any “use.” Instead the authors relied on the intent and certain “triggers” to determine if and when the improvements were required. That methodology was found to be inadequate and unenforceable. Under the “new” Title 21 that oversight has been rectified and improvements are triggered by “development” which is clearly defined. This assessment of the “old” Title 21 was also stated in the July 17, 2007 Decision of the Superior Court of The State of Alaska, Third Judicial District At Anchorage by Superior Court Judge Michael L. Wolverton, Case No: 3AN-06-07901 CIVIL (Copy attached) in a similar case where the Municipality Of Anchorage required installation of paving, lighting and landscaping on a parking lot. (NOTE: Wolverton decision attached to this report)

The use of the B-3 lot as a vehicle sales lot is a permitted principal use of the B-3 general business district, AMC 21.40.180.

AMC 21.40.180 K *Parking*, 21.40.180 N *Landscaping*, AMC 21.45.080 (7). *Off-street parking requirements* (Paving), AMC 21.45.125 D, *Installation of Landscaping* and AMC 21.85.010-020 Subdivision Standards,; Improvements *General Requirements and Improvement Areas Defined* provide that certain improvements are to be installed based on development activities, specifically a subdivision of land or construction or alteration of a building.

21.45.080 - Off-street parking requirements.

A. *General provisions; applicability.*

1. In all districts where off-street parking is required, the requirements set forth in this section shall be met and satisfactorily maintained.
2. Off-street parking shall be required for any new building on which construction is started after October 26, 1999.
3. Any property against which local improvement assessments have been levied for the construction of public off-street parking shall be exempted from providing and maintaining one space for each 100 square feet of property so assessed.
4. Parking areas in the PLI district shall conform to the requirements of this title unless a variance to the parking requirements is granted by the administrative official in accordance with section 21.40.020.J.
5. Off-street parking shall be required for any addition or enlargement of an existing building and for any change in the occupancy of any building that would result in additional parking space being required. The number of required parking spaces shall be that specified in this title unless it is demonstrated to the administrative official and the traffic engineer that the addition or enlargement of the existing building, or the change in the occupancy of any proposed building, will not:
 - a. increase the parking demand, and
 - b. will not reduce the total number of preexisting required parking spaces, and
 - c. the amount of the proposed off-street parking is within 90 percent of the total otherwise required for all the proposed uses and structures, including the addition or enlargement of the existing building.

As there is no existing building or new building no off-street parking is required.

Improvements, such as paving and landscaping may be required in conjunction with a subdivision of land. (AMC 21.80 and 21.85). The B-3 district is classified as an *Urban area* in 21.85.020.

There is no subdivision of land associated with this parcel.

AMC 21.45.125

"21.45.125 - Landscaping.

A. *Scope and applicability.* All landscaping required under this title shall conform to the standards in this section at a minimum. Additional landscaping may be required where authorized by law. It is the intent of this section that, where dimensional averages have been referenced, plant materials may be clustered and portions of planting bed widths made narrower or wider...etc.

D. *Installation of landscaping.* All landscaping shall be installed within 18 months after receiving a temporary or final certificate of occupancy, whichever comes first."

The trigger for installation of landscaping is the receipt of a temporary or final certificate of occupancy. As there is no “building” that requires a temporary or final certificate of occupancy the standard for installation of landscaping cannot be required.”

The Planning Department supported the Complainant’s analysis, and provided the Ombudsman with their arguments for why the landscaping and parking requirements of (old) Title 21 applied to vehicle sales lots, with or without permanent structures, in the B-3 zoning district (emphasis added by Planning):

“Automobile display lots, new and used” are a listed use in several districts in Title 21 (old), and are thus clearly a land use in code. As such, all such establishments would be required to meet the relevant standards of Title 21, whether or not they have a structure which requires a building permit.

Here’s what I think are the most relevant code citations [there may be others]:

-21.35.020B. *Use, principal* means any main activity permitted by this title. [Note—permitted by the TITLE, not by the Muni or any department]

-21.25.010A. The following are violations of this title:

1. A structure, alteration of a structure, or use of land or a structure that conflicts with a provision of this title, a regulation promulgated under this title or a term or condition of an entitlement issued under this title.

-21.40.180N. Landscaping [required in the B-3 district; other districts have other landscaping requirements and there are other landscaping requirements in 21.45.125 that may apply in some cases, but I assume most of these used car lots are located in B-3 districts]

1. Buffer landscaping. Buffer landscaping shall be planted along each lot line adjoining a residential district.
2. Perimeter landscaping. Except adjacent to collector or arterial streets, visual enhancement landscaping shall be planted along the perimeter of all outdoor areas used for vehicle circulation, parking, storage or display.
3. Arterial landscaping. Arterial landscaping shall be planted along all collector or arterial streets.
4. Visual enhancement landscaping. All areas not devoted to buildings, structures, drives, walks, off-street parking facilities or other authorized installations shall be planted with visual enhancement landscaping.
5. Maintenance. All landscaping shall be maintained by the property owner or his designee.

-21.45.010 Applicability of chapter; district classes. [Applicability of the supplementary district regulations, which govern things like “clear vision areas,” “off-street parking,” “fences,” “landscaping,” and “storm drainage.”]

In addition to the regulations applied to individual zoning districts in chapter 21.40, the regulations contained in this chapter apply in individual districts, groups of districts, or all districts as specified. Regulations shall apply to all zoning districts where a specific application is not set forth.

-21.47.020 Applicability of this chapter. [Signs]

- A. The regulations contained in this chapter shall apply to signs outside of the public right-of-way and on the property to which the standard or regulation refers, except when specifically stated otherwise. A sign may only be erected, established, painted, created or maintained in conformance with the standards, criteria, procedures, and other applicable requirements of this chapter.

Along with the code citations listed above, there are two other points I would like to make:

1. There is no place in code that says the standards of the title apply only when implemented through a building or land use permit.
2. There are other things which don't require building permits, such as fences, which are still required to comply with this title. If someone erects a fence and a complaint is made that the fence doesn't meet Title 21 requirements, Code Enforcement goes out and makes the owner of the fence comply with Title 21."

The Ombudsman reviewed the analyses and arguments put forward by the Complainant, LUE and Planning, and the relevant sections of Municipal Code. The analyses and arguments were detailed, articulate and sincere. The Ombudsman is not a land use expert, and given the complexities of the case, believed that a meeting with LUE and Planning might lead to a consensus regarding application of the landscaping and parking requirements of (old) Title 21 to vehicle sales lots, without permanent structures, in the B-3 zoning district.

On October 28, 2015, the Ombudsman met with the Director of Economic and Community Development, the Director of Development Services, Current Planning Manager, and Land Use Enforcement Supervisor, to discuss their differing interpretations of the applicability of the landscaping and parking requirements of (old) Title 21 to vehicle sales lots that do not contain permanent structures. Planning and LUE both made their cases, based on their interpretations of (old) Title 21. While there was consensus that the new Title 21 addresses this issue, and the landscaping and parking requirements of the new code would be applicable to vehicle sales lots that do not contain permanent structures, the group could not come to a consensus regarding applicability of the landscaping and parking requirements of (old) Title 21 to vehicle sales lots that do not contain a permanent structure.

Given the complexities of the issue, and the potential financial considerations for dozens of vehicle sales lots (and other businesses) that this issue could impact, it was agreed that the Ombudsman would submit a request for legal services (RFLS) to the Municipal Attorney's Office. The Ombudsman submitted the RFLS on November 16, 2015. The question posed was "In the old Title 21, do vehicle sales lots have to provide parking (for customers), and landscaping." The Ombudsman received the opinion from Assistant Municipal Attorney Quincy Arms on February 18, 2016. Ms. Arms opined that the vehicle sales lots in question do have to meet the landscaping and parking requirements of (old) Title 21.

Under (old) Title 21, property owners in the B-3 zoning district are required to comply with the parking and landscaping, requirements, which are binding on all properties in the district, whether uses are new or existing. While the code does not specifically permit "automobile display lots" (language in code) in the B-3 zoning district, "businesses" are permitted, and the Municipality of Anchorage allows "automobile display lots" under this category. The vehicle sales lots in question are subject to the requirements of (old) Title 21, including:

AMC 21.40.180.K - Parking: "Adequate off-street parking shall be provided in connection with any permitted use, subject to the provisions of the supplementary district regulations." Because automobile sales lots are not listed as a permitted use in the B-3 zoning district, they would have to meet the parking requirements for "vehicle storage yards", the permitted use that is most similar (AMC 21.45.080.W). The parking requirements for this permitted use are listed in AMC 221.45.080.V."

AMC 21.40.180.N – Landscaping- The vehicle sales lots in question must at a minimum have:

- "1. Buffer landscaping. Buffer landscaping shall be planted along each lot line adjoining a residential district.

2. Perimeter landscaping. Except adjacent to collector or arterial streets, visual enhancement landscaping shall be planted along the perimeter of all outdoor areas used for vehicle circulation, parking, storage or display.
3. Arterial landscaping. Arterial landscaping shall be planted along all collector or arterial streets.
4. Visual enhancement landscaping. All areas not devoted to buildings, structures, drives, walks, off-street parking facilities or other authorized installations shall be planted with visual enhancement landscaping.
5. Maintenance. All landscaping shall be maintained by the property owner or his designee."


Vehicle sales lots (and other permitted uses) in the B-3 zoning district, that do not contain permanent structures, are subject to the landscaping, parking, and other standards and requirements of (old) Title 21. Any "use of land" that conflicts with the code is a violation under (old) Title 21. The specific requirements of uses in the B-# zoning district are found in Chapter 21.40 (Zoning Districts) and Chapter 21.45 (Supplementary District Regulations). The Municipality of Anchorage must enforce these standards and requirements when responding to complaints that have been filed by constituents. In this instance, lack of enforcement was due to a sincere and well-thought out interpretation of the provisions of Municipal Code. Given the complexities of the issue, the Ombudsman acknowledges that the Administrative Hearing Officer or the Superior Court, on appeal of a notice of violation, may potentially have a different interpretation of the applicability of certain requirements of (old) Title 21 to vehicle sales lots in the B-3 zoning district, that do not contain permanent structures. Until any such court ruling is issued, the Municipality of Anchorage must enforce the requirements of (old) Title 21.

Because Anchorage Municipal Code (old) Title 21 requires that the applicable parking and landscaping standards and requirements be met for all permitted uses in the B-3 zoning district, and because the Municipality of Anchorage, Development Services Department, Land Use Enforcement Division, in this case did not enforce those standards, the Ombudsman finds this complaint to be JUSTIFIED.

The only recommendation that the Ombudsman would have made in this case would be for the Municipality to enforce the landscaping, parking, and other standards and requirements of (old) Title 21, in regards to the two vehicle sales lots in question. Given that Jack Frost, the Municipality's Chief, Code Enforcement, has stated that Code Enforcement will apply the legal opinion in this matter to any complaints directly related to the opinion, the Ombudsman believes that no recommendation is necessary. A copy of the preliminary report was provided to the department, which had no comments regarding the report.

Based on these findings, this case is closed.

If you object to the Ombudsman's decision to decline or discontinue this investigation or review, you may file a grievance with the Ombudsman as specified in A.M.C.R. 2.60.006.



Darrel W. Hess
Municipal Ombudsman