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MEMORANDUM

TO: Doug Plass
FROM: Paul Fitzer
DATE: November 28, 2012
RE: Temporary storage of building materials

ISSUE

Is an applicant precluded from expanding a validly issued permit to allow for temporary offsite storage of building materials on a separate lot?

SHORT ANSWER

No. An applicant is not precluded from expanding a validly issued permit to allow for temporary offsite storage of building materials on a separate lot.

ANALYSIS

The temporary storage of building materials incidental to a validly issued building permit does not require a conditional use permit, variance, or other such zoning application. Put simply, the applicant is not seeking to change the zoning uses on the particular lot in question. Arguably, it does not require a building permit either. Rather, with the consent of the City, the applicant is merely clarifying (and gaining permission) that the storage of the building materials is merely incidental to an already validly issued building permit and, notably, *temporary* in nature. This is not only permissible, but in fact prudent of the applicant.

A. Is a building permit even necessary?

As a general principal of property law, “landowners have a constitutionally protected property interest in their right to devote their land to any legitimate use.” *Action Apartment Ass’n, Inc. v. Santa Monica Rent Control Board*, 509 F.3d 1020, 1028 (9th Cir. 2007). However, that right is curtailed by a municipality’s valid exercise of its police power. A municipal zoning ordinance may restrict a constitutionally protected property right provided the ordinance is not

“clearly arbitrary and unreasonable, or has no substantial relation to the public health, safety, morals, or general welfare.” See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Many municipalities and counties contain provisions in their building codes establishing performance standards for the storage of building materials regulating the size, location, and duration of the storage of building materials. This is a proper exercise of a city’s police power. Properly designed storage and handling facilities decrease illegal disposal, enhance employee safety, enhance property aesthetics and decrease the potential for vandalism and unsanitary conditions and are thus within the purview of a city’s police power. While the necessity to temporarily store building materials and the subsequent generation of waste materials is a normal and unavoidable part of business and residential activities, the proper storage of materials is necessary to avoid nuisances impacting neighboring properties and the general public. Many jurisdictions even require a special “building storage permit” coupled with a building storage plan.

As a small municipality somewhat averse to “big government” regulatory activity, the City of Stanley has chosen not to adopt standards governing the storage of building materials. In the absence of a regulation providing standards for the safe storage of building materials offsite, does this mean that the practice is precluded? Of course not as this runs counter to the general maxim that property may be utilized for any legitimate use. The international building code and the Stanley Municipal Code do not prohibit the storage of building materials offsite. To the contrary, the practice is commonplace as most jurisdictions, recognizing the necessity of this function, merely provide standards by which it is to be accomplished rather than overtly prohibit it.

In the City of Stanley, a building permit is required pursuant to SMC 15.04.010 which states in part:

No building shall be constructed, erected, or altered structurally, nor shall any lot be excavated for sidewalks, sewer, water, septic tanks, roads or any other purpose, nor shall fill be placed on any lot, nor shall any lot be cleared, or fenced unless a building permit therefor has been issued by the city council or its authorized representative.

Unlike other jurisdictions, the City of Stanley does not require a “building storage permit”, “building materials permit”, or other similar building permit application. In short, the City of Stanley’s approval of the applicant’s *temporary* offsite storage of building materials incidental to and as ancillary product of a validly issued building permit does not violate the Stanley Municipal Code or the International Building Code.

B. Does this mean that any property owner may utilize its lot as a storage lot? No.

The applicant acted prudently by clarifying with the City Council that the storage of the building materials offsite was merely a temporary measure incidental to its validly issued building permit. Although the City does not specifically require a building materials permit,

the City may nonetheless regulate the placement of building materials, refuse, fill, recyclables, etc. through alternative measures. Fill requires a building permit (SMC 15.04.010). Refuse and debris constitutes a public nuisance (SMC 8.04.010, 8.04.030). The placement of any material on property that is injurious to health, or is indecent or offensive to the senses is prohibited as a nuisance (SMC 8.12.10); in the construction arena, this would include “attractive nuisances”.

C. Why is the temporary storage of building materials incidental to a building permit (Title 15) and not via a variance or conditional use permit (Title 17).

The temporary placement of building materials either on or off-site is a function of Title 15 – Buildings and Construction as it is incidental to the construction of a building. In contrast a variance or conditional use permit does not pertain to the commencement of construction at all, but is rather a function of zoning law; what zoning is appropriate for a given parcel of property irrespective of what or how the product is ultimately constructed. Implicit in the issuance of a building permit is the permission to deliver, store, and utilize the materials to effectuate the finished product subject to the building permit. Where an applicant has been issued a valid building permit consistent with and compatible to the underlying zoning of the parcel at the time of application, the subsequent requirement for the applicant to seek a rezone of the property or an ancillary property (through a conditional use permit) merely to store the materials is an illegitimate exercise of the city’s police power.

Certainly, were a property owner to hold its property out as a permanent storage facility, contractor’s shop, commercial yard, or other such use wherein the City Council could reasonably determine that the property was utilized as such in the absence of a valid conditional use permit, the City is within its police power to enjoin such use as an unlawful zoning use (SMC 17.62). By tying the temporary offsite storage of the building materials to a validly issued building permit, the “use” of the property is temporary in nature, the city can issue reasonable restrictions pertaining to the storage, and the storage may continue only to the extent of the project subject to the building permit. In contrast, a conditional use permit does not pertain to a single building construction project but renders the use as permissible on the given parcel of property. This is neither requested by the applicant nor appropriate.

CONCLUSION

The Stanley Municipal Code nor the International Building Code prohibits the temporary offsite storage of building materials. As the nature of the use pertains to Title 15 and not to the overall zoning of the parcel, the applicant prudently sought to expand its validly issued building permit to include the storage of its building materials offsite. By doing this, both the applicant and the City Council clarified that the proposed storage is temporary, shall not and may not constitute a nuisance if properly maintained, and does not authorize the property owner to utilize the property as a storage facility beyond the temporary storage incidental to a valid building permit. This is within the purview of the City’s police power and is the proper medium (as opposed to a zoning restriction) to regulate and administer

construction activities within its jurisdiction.