

**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BURLINGTON**

In the Matter of the Appeal of	)	Case No. LUP 4-23
	)	
Bernard Morris and	)	<b>Morris NOV Appeal</b>
Rio Vista Shop, LLC, Appellants	)	
	)	
	)	FINDINGS, CONCLUSIONS,
<u>From a Notice of Violation</u>	)	AND ORDER

This matter, having come before the Hearing Examiner on December 12, 2023; the testimony of witnesses having been heard; and all exhibits admitted into evidence having been considered, the Hearing Examiner makes the following findings, conclusions, and order:

**FINDINGS**

1. Rio Vista Shops, LLC (Appellant), represented in this appeal by owner and non-attorney Bernard Morris, owns the subject property at 1724 Rio Vista Avenue, within the city of Burlington. *Testimony of Bernard Morris.*
2. The property is currently zoned MUR-1, a zoning that became effective May 22, 2023. Prior to that, the property was zoned MR-NB, which became effective November 17, 2015. Prior to that, the property was zoned URR, a zoning that was carried over during the process of annexation from Skagit County to the city of Burlington. Annexation became effective September 6, 2015. *Testimony of Mike Fohn; Exhibit 1; Exhibit 5; Exhibit 6.*
3. There are multiple buildings on the subject property. The buildings were formerly used for agriculture, but Mike Fohn, a previous owner of the property, converted the buildings into commercial uses, and leased them out to commercial tenants. The conversion of the buildings occurred years prior to annexation of the subject property. *Testimony of Mike Fohn.*
4. There are multiple commercial businesses at the subject property, including commercial storage, mechanic shops, electric shops, painting contractors, civil sitework contractors, and winemaking facilities. *Testimony of Bernard Morris; Testimony of Mike Fohn; Testimony of Rob Barker; Testimony of Annie Avery; Testimony of Steve Perry; Testimony of Shawn Devries.*
5. These businesses occasionally store equipment and inoperable vehicles on the subject property outside of the buildings. *Testimony of Annie Avery; Testimony of Steve Perry; Exhibit A-5 Photographs.*

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6. Neither the Appellant nor any of these businesses has ever received a building permit or use permit from either Skagit County or the City of Burlington (City). *Testimony of Rob Barker; Testimony of Kim O'Hara; Testimony of Bernard Morris; Testimony of Mike Fohn; Testimony of Steve Perry; Testimony of Shawn Devries.*
7. The property is served by a private septic system but is not connected to a municipal sewer line. A sewer line passes within 200 feet of the subject property. *Testimony of Brad Johnson; Appellant's Closing Argument.*
8. During the period that the City was considering annexation of the subject property, Mike Fohn was in communication with the City regarding the commercial uses. Mike Fohn believed he had established an agreement between himself and the City that all commercial uses then existing on the subject property would be allowed to continue, regardless of permit status. *Testimony of Mike Fohn.*
9. On May 26, 2023, the City issued a Notice of Violation (NOV) to Mr. Morris, accusing him of five Burlington Municipal Code (BMC) violations:
  1. Illegal building occupancies, modifications and uses in violation of City of Burlington building and fire code requirements (BMC 15.04.110, 15.043.050, and 15.08.150).
  2. Violations of City of Burlington zoning codes including maintaining or establishing uses prohibited in the MUR-1 zone and without required permits (BMC 17.01.110, 17.30.050, 17.50.090.E).
  3. Posting of unauthorized addresses, building, unit, tenant, or suite numbers and the occupancy of buildings, units, tenant spaces, or suites without official addresses or unit numbers assigned by the City of Burlington (BMC 15.10.090).
  4. Failure to connect to the municipal sewer system, maintaining or using a private wastewater disposal system, and the establishment or occupancy of buildings, tenant spaces, or uses without suitable toilet facilities and a municipal sewer system connection (BMC 13.04.270, 13.04.020, and 13.04.450).
  5. Uses or activities constituting nuisances including the storage of paint cans, lumber, pallets, electrical conduit, meter boxes, storage containers, building materials, debris, tires, vehicle parts and inoperable, abandoned, junk, or disused vehicles, equipment, trailers and recreational vehicles (BMC 8.12.020.N, 8.12.020.L, and 17.30.080.C).

*Exhibit 11.*
10. The NOV directed Mr. Morris to perform the following eight corrective actions:
  1. Discontinue all use or occupancy of the buildings, suites, or tenant spaces on the property.

2. Discontinue all uses occurring on the property that are in violation of the MUR-1 zoning regulations including, but not limited to outdoor storage, wine making, warehousing, indoor storage, vehicle or equipment repair, light industrial uses, and contractor services.
3. Discontinue all uses occurring on the property that constitute nuisances including, but not limited to the storage of building materials, electrical conduit, electrical meters, automotive parts, tires, paint cans, abandoned, junked, unused, or inoperable vehicles, equipment, trailers, or recreational vehicles. All such items must be removed from the property.
4. Discontinue the use or occupancy of any building, suite, area, or tenant space that has been established without permits or authorizations from the City of Burlington Building Official and Fire Marshal. Any use or occupancy that has not been explicitly authorized or approved shall be discontinued.
5. Discontinue the use or occupancy of any building, suite, area, or tenant space that has not been assigned an official unit number by the City of Burlington and remove any unauthorized or unpermitted unit numbers or addresses from the property.
6. Discontinue the use or occupancy of any building, suite, area, or tenant space that is not connected to the municipal sewer system. No building, suite, area, or tenant space may be used or occupied without approved toilet facilities and a connection to the City of Burlington Municipal sewer system.
7. Remove any portable toilets and decommission any septic systems, cesspools, wells, or private wastewater disposal systems located on the property in full compliance with Skagit County Health Department regulations and permitting requirements.
8. Contact the City of Burlington Building Official and Fire Marshal and schedule a complete inspection of the property and buildings. Any violations identified during the inspection process shall be immediately addressed.

*Exhibit 11.*

11. The NOV set a compliance deadline of June 26, 2023, and told Mr. Morris that if he had not taken all corrective actions by that date, the City would begin to assess monetary penalties and might pursue other legal remedies. The NOV also included instructions about Mr. Morris's right to appeal the NOV to the Hearing Examiner. *Exhibit 11.*
12. The City also delivered a more detailed letter to Mr. Morris, also dated May 26, 2023. The letter informed Mr. Morris that City staff had visited the property on May 25, 2023, and had observed violations. The letter contained a "summary of violations" as follows:

1. It is a violation of BMC 17.01.110 to use a structure or property without first obtaining permits, or to use a structure or property for any use, or in any manner, prohibited by the Burlington Municipal Code. The City has no records of permits or authorizations for the uses occurring on the property.
2. The property at 1724 Rio Vista Avenue is zoned MUR-1. Our staff observed uses and activities including vehicle repair, outdoor storage, and contractor services. Vehicle repair, outdoor storage, and contractor businesses are prohibited in the MUR-1 zone (BMC 17.30.050 and 17.50.090.E).
3. Buildings and tenant space numbers were observed on numerous doors. The City of Burlington has not assigned building, tenant, or suite numbers for this property. It is a violation of the Burlington Municipal Code to post addresses or building numbers other than those assigned by the City of Burlington and no building, suite, or tenant space may be used or occupied without an official address or unit number assigned by the City of Burlington (BMC 15.10.090).
4. The City of Burlington has not issued any occupancy permits or authorized the use, occupancy, or modification of any building or tenant space on the property. Our staff have previously conducted inspections and observed unpermitted occupancies, illegally established tenant spaces, and unpermitted building modifications. It is a violation of BMC 15.04.110 and 15.08.150 to alter, use, occupy, or modify any building or structure without obtaining permits under, and in full compliance with, the fire and building codes adopted by the City of Burlington under BMC 15.04.050.
5. The City of Burlington's records indicate the property is not connected to the municipal sewer system and the Skagit County Health Department has confirmed that one or more buildings on the property may be connected to a septic system, cesspool, or private wastewater system. In addition our staff observed a portable toilet located on the property. It is a violation of BMC 13.04.270 to maintain or use any septic system, cesspool, or private wastewater disposal system. All properties within 200 feet of a municipal sewer line are required to connect to the municipal sewer system (BMC 13.04.020). A sewer service is available adjacent to the property and no building or tenant spaces may be used or occupied without approved sewer connections and toilet facilities. Failure to connect to the municipal sewer system, or the use of a private wastewater disposal system constitutes a nuisance under BMC 13.04.450.
6. Our staff observed paint cans, lumber, pallets, electrical conduit and meter boxes, storage containers, various building materials, and debris being stored outdoors. The storage of such items constitutes a nuisance under

BMC 8.12.020.L and is prohibited in the MUR-1 zone under BMC 17.30.080.C.

7. Our staff observed the storage of apparently disused, abandoned, or inoperable vehicles, equipment, trailers, and recreational vehicles on the property. Our staff also observed the storage of tires and automotive parts on the property. The storage of such items is a nuisance under BMC 8.12.020.N and is prohibited in the MUR-1 zone under BMC 17.30.080.C.

*Exhibit 7.*

13. The May 26 letter repeated the same eight compliance actions, compliance timeline, and appeal explanation as the NOV. The letter also added, “It is extremely important that you address the issues identified in this notice immediately. If you have any questions please feel free to contact me . . . Brad Johnson, Community Development Director.” *Exhibit 7.*
14. Mr. Morris appealed the NOV to the Hearing Examiner on June 9, 2023. *Exhibit 9; Exhibit 13.*
15. A hearing on the matter was held on December 12, 2023. At the hearing, the Hearing Examiner admitted the following exhibits into the record:
  - Exhibit 1: Staff Report, dated December 17, 2023<sup>1</sup>
  - Exhibit 2: Skagit County URR Code, dated October 19, 2023
  - Exhibit 3: Fourteen Aerial Photos, dated 2007–2021
  - Exhibit 4: Documents from Previous Owner, various dates
  - Exhibit 5: Annexation Ordinance No. 1818, adopted July 23, 2015
  - Exhibit 6: MR-NB Zoning Ordinance No. 1822, adopted November 12, 2015
  - Exhibit 7: Notice of Violation, dated May 26, 2023
  - Exhibit 8: Preliminary Notice of Violation, dated February 14, 2022
  - Exhibit 9: Permit Application No. LUP 4-23, received June 9, 2023
  - Exhibit 10: Appellant’s Appeal Letter, received June 9, 2023
  - Exhibit 11: Notice of Violation Site Posting, dated May 26, 2023
  - Exhibit 12: Ten Photos of Notice of Violation Site Posting, dated May 26, 2023
  - Exhibit 13: Notice of Appeal Hearing, dated November 27, 2023
  - Exhibit 14: Email Chain, various dates
  - Exhibit 15: Email Chain, various dates
  - Exhibit 16: Email Chain, various dates
  - Exhibit A-1: Notice of Appeal Hearing and Other Miscellaneous Documents, various dates
  - Exhibit A-2: Miscellaneous Documents, various dates
  - Exhibit A-3: Miscellaneous Documents, various dates

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<sup>1</sup> This date appears to be an error because the City filed this exhibit on December 7, 2023, and it was admitted at the hearing on December 12, 2023.

- Exhibit A-4: Miscellaneous Documents, various dates
- Exhibit A-5: Nineteen Site Photographs, undated, and Miscellaneous Documents, various dates
- Exhibit A-6: Emails from Mike Fohn, various dates

16. The Hearing Examiner also considered the following post-hearing filings:

- City’s Closing Argument, dated December 27, 2023
  - Attachment 1: Argument from Rob Barker Re: Building Code
  - Attachment 2: *Latta v. Chelan Cty.*, No. 39261-9-III (Wn. App. October 31, 2023)
  - Attachment 3: Assessment of Penalties, dated November 3, 2023
- Appellant’s Closing Argument, dated December 27, 2023

#### Testimony

17. At the December 12, 2023, hearing, Rob Barker, City Building Official, testified that he investigated the property in response to citizen complaints of unauthorized uses on the property of Rio Vista Shops, LLC. Mr. Barker testified that there were numerous commercial tenants at the subject property, including mechanic shops, electric shops, painting contractors, civil sitework contractors, and winemaking facilities. No building permits had been issued prior to these occupancies being established—indeed, no building permit of any kind. He admitted it was possible that Skagit County had issued permits for the subject property prior to the City’s annexation of the subject property in 2015, but Mr. Barker had never seen any such permits. He admitted that he had not checked for any Skagit County permits, but he had asked Mr. Morris for any permit Mr. Morris might have, and Mr. Morris had not produced any. *Testimony of Rob Barker.*
18. Kim O’Hara, City Permit Manager, testified that she had searched for Skagit County building permits and had not located any. She had found onsite septic permits in 1998 and 1999, and a permit for a pressure test gas line in 2014, but no others. *Testimony of Kim O’Hara.*
19. Brad Johnson, Community Development Director, testified that the municipal code requires the property to connect to a sewer line if there is one within 200 feet of the property. The existence of the septic tanks permitted in 1998 and 1999 were irrelevant, because all property owners must connect to a sewer line within 200 feet, even if they are currently using septic systems. He said the code specifically prohibited the continued use of septic systems, so the use was not grandfathered. *Testimony of Brad Johnson.*
20. Annie Avery, City Fire Inspector, testified that she visited the site in August 2021 and observed a painting contractor, personal storage units, mechanics, storage for a chapel, construction offices and equipment, an electrical contractor, a winemaking business, and a general contractor. These tenant businesses did not have visible building addresses. She also observed approximately 15 to 20 inoperable vehicles around the edge of the property

and among some of the tenants. She did not enter any photographs into the record.  
*Testimony of Annie Avery.*

21. Mike Fohn testified that he is the managing member of the LLC that is the former owner of the subject property. Mr. Fohn testified that the City Council had agreed with him, prior to annexation of the subject property, that existing commercial uses would be allowed to continue as pre-existing nonconforming uses. He said the Planning Commission had expressed support for the uses to continue. Were it not for the City's agreement to allow the pre-existing uses to continue, Mr. Fohn would not have agreed to annexation. Since annexation, he said there had been no major remodels or changes of uses that would require a permit application to be submitted. There had only been repairs and maintenance, but those did not trigger the requirement for a permit. The Planning Commission had always planned to rezone to MR-NB, but had always expected the uses to continue as nonconforming uses. Mr. Fohn said there was an arrangement between himself and the City to that effect.

Mr. Fohn cited Exhibit A-6, PDF 10 and 11, email dated December 5, 2013, and December 6, 2013, between then-City official Margaret Fleek and Mr. Fohn. In the December 5 email, Mr. Fohn wrote:

Margaret, Sorry for the delay response. I have talked with Chad and Joe and we would like to proceed with the annexation of the Delahunt property provided:

1. Zoning is established first.
2. Regarding the zoning, based on prior discussions, we understand the City of Burlington would be agreeable to:
  - A. MR-NB for all 15 acres
  - B. The existing buildings would be grandfathered into for all development and building codes.
  - C. New commercial buildings up to 12,000 square feet would be allowed.
  - D. Multifamily buildings with more than 8 units would be a permitted use.
  - E. The portion of the property within 300' of toe of dike can be used to compute density for multifamily dwellings at one unit per 3,000 square feet.
  - F. Maximum building height allowed would be three stories, but not more than 40'.

Mr. described this December 5 email as the basis of his agreement with the City that the existing uses would be allowed to continue.

Mr. Fohn also cited Exhibit 4, PDF 27, the minutes of the City Planning Commission, June 17, 2015. He particularly highlighted the reference on that page to “Amendment the Comprehensive Plan to CB Commercial Business for existing farm building site and set zoning for that portion as MR-NB Medium Residential-Neighborhood Business to allow commercial uses to continue with no redevelopment as apartments.” Mr. Fohn cited this language as an understanding by the City to allow the existing commercial uses to continue. He said any “agreement” he may have had with the City was more of an “understanding.” He had not seen the need, in those days, to reduce an agreement to writing.

Mr. Fohn also cited Exhibit 4, PDF 28, of the June 17, 2015, Planning Commission minutes for a line that read, “Fleek stated the business are currently in the County; the Winery went to County for approval, but the other business did not. We do not have control at this time.” Mr. Fohn interpreted this line to mean that the winery had some kind of permit. He had never seen any winery permit with his own eyes.

On cross-examination, Mr. Fohn testified that the property was used for a mixture of agriculture and storage uses at the time he had acquired the property. When he sold the property to Mr. Morris, the use of the buildings was commercial. He acknowledged that he had initiated the commercial uses on the property. He acknowledged he had never applied for or received permits from Skagit County. He reiterated that the City had promised to allow existing commercial uses to continue. He cited his own December 5 email to Ms. Fleek (quoted above) as the basis for his exemption from City building codes. He said the communication between himself and Ms. Fleek was the only agreement or documentation that the pre-existing commercial uses would be allowed to continue.  
*Testimony of Mike Fohn.*

22. Steve Perry testified that he is one of Mr. Morris’s commercial tenants. He is a general contractor. Mr. Perry testified that his business had been at the subject property since November 2013, during the time of Mike Fohn’s ownership. He had not acquired any permits from either Skagit County or the City. Mr. Perry was not aware of any code compliance issues until some new houses had been built nearby. The new homeowners had complained about code compliance at the subject property. Mr. Perry did not see any need for the City to initiate a code enforcement action against Mr. Morris. Mr. Perry testified that there could be 15 to 20 broken-down cars on the subject property, but those were being worked on by mechanics, Mr. Morris’s tenants. Mr. Perry testified that he was not aware of the zoning change. *Testimony of Steve Perry.*
23. Shawn Devries testified that he runs a painting business on the subject property. He had never acquired permits from Skagit County or the City for the land use. Mr. Devries argued that the tenants should not have to change their use. He believed all tenants were grandfathered in. He was satisfied with the subject property as a place to run a business.  
*Testimony of Shawn Devries.*

### Closing Arguments

24. In its closing argument, the City argued that the evidence showed that the Rio Vista property is being used for a commercial storage facility and is being leased to commercial tenants, including contractors and a mechanic, all without any permits, and in violation of applicable zoning, building, fire, and life safety codes. The City pointed out that the Appellant does not dispute the factual accuracy of these claims, nor that the property is currently zoned MUR-1, nor that the MUR-1 zoning would prohibit each of these uses. The Appellant's own witnesses verified these factual claims.

The City argued that the Appellant's lawful non-conforming use defense should fail. The City cited BMC 17.01.050 for the proposition that a non-conforming use must be *lawfully* established, including through permitting under the International Building Code or International Existing Building Code, per BMC 17.100.050.E and BMC 15.04.050. Mr. Fohn, the former owner, testified that he had established the commercial uses on the property without permits, and two current tenants also testified they did not have permits. The City cited Rob Barker's arguments in Attachment 1 to its closing for the proposition that, at all times, both under Skagit County jurisdiction and City jurisdiction, building permits would have been required to change the use of the existing buildings from agriculture (their original use when Mr. Fohn acquired the property) to commercial use (the use he established prior to selling the property to Mr. Morris). Without the permits, the uses were never lawfully established.

The City pointed out that Ordinance 1818 (Exhibit 5), which annexed the subject property, and Ordinance 1822 (Exhibit 6), which established zoning for the annexed land, did not include any provisions for allowing unpermitted uses to continue. The City asked the Hearing Examiner to uphold the NOV and assess daily penalties pursuant to BMC 1.44.150. *City's Closing Argument*.

25. In its closing, the Appellant pointed out that the burden of proof to establish a violation was on the City. The Appellant argued that the standard of proof was "beyond a reasonable doubt." The Appellant pointed out that the City had not provided photographs of the alleged code violations or witness statements other than those made during the hearing. The Appellant argued that the previous owner, Mr. Fohn, had conditioned his support for annexation of his property on the City's agreement that the commercial buildings and uses on the property would be considered pre-existing nonconforming uses, which would be allowed to continue. The Appellant cited the financial information in Exhibit 4, PDF 1-4, and the witness statements of its tenants, to show that tenants had been renting on the property for 10 years, which would be two years prior to annexation. The Appellant cited in particular Exhibit 4, PDF 27-28 (the minutes of the June 17, 2015 City Planning Commission meeting): "Amend the Comprehensive plan C-B Commercial/Business for existing farm building site and set zoning to MB-NR to allow commercial uses to continue." The Appellant argued this was evidence of the intent by the City to allow all commercial uses on the property to continue, regardless of those uses' permit status. The

Appellant argued that the commercial uses were allowed under the MR-NB zoning that the City put in place following annexation. The Appellant argued there had been no change of use since annexation that would trigger a permit requirement.

The Appellant disputed the City's contention that inoperable vehicles were on the property. It cited the photographs in Exhibit A-5 (which had been admitted without testimony in support) to argue that no inoperable vehicles were visible in the photographs, and therefore no inoperable vehicles were present on the subject property. As for any equipment lying about, it was leftover from tenants who were moving out, and the leftover equipment would be removed once those tenants finished moving out.

The Appellant argued that it had received the NOV just four days after the property was rezoned to MUR-1. The Appellant acknowledged that a non-conforming use must meet three criteria: existing prior to adoption of current code; not abandoned or discontinued; and lawfully established in accordance with code provision in effect at time of inception. The Appellant argued that the City had conceded, at the time of annexation, that the Appellant and its tenants met the three criteria.

The Appellant argued that the City had never told the Appellant of the need to mark individual businesses with numbers or letter, and that the individual businesses were, in fact, marked. It cited Exhibit 4, PDF 2 to argue that each tenant had been issued number and letter markers. At no time had the City told the Appellant that marking the businesses would require a permit or other approval.

The Appellant argued that it had been trying to get connected to the sewer system, but the City had stymied its attempts to meet with permitting staff. The Appellant also argued it should have been given notice of the need to connect to the sewer system other than the notice provided by the NOV.

The Appellant argued that the City had failed to substantiate any nuisance on the subject property, because the City had not provided two written complaints made by nearby residents, which the Appellant believed was a requirement of BMC 8.14.140. The Appellant concluded that the NOV should be dismissed and no fines assessed. The Appellant did not propose any alternative schedule for correcting any of the alleged violations in the NOV. *Argument of Appellant.*

## CONCLUSIONS

### Jurisdiction

The Hearing Examiner has jurisdiction over code enforcement appeals, including administrative appeals of notices of violation. *Chapter 1.44 BMC; BMC 17.120.120.*

### Standard of Review

The code is silent as to the standard of review the Hearing Examiner must apply to an administrative appeal of a NOV. The Hearing Examiner concludes that the most appropriate standard of review is a preponderance of the evidence, with the burden of proof on the City. The Hearing Examiner rejects the Appellant's argument that the standard of review is "beyond a reasonable doubt," because this is not a criminal prosecution but a civil matter.

### Code Requirements

#### *Building Code*

The building code adopts the following codes by reference:

- A. International Building Code, 2018 Edition, published by the International Code Council, together with all supplements thereto, mandated amendments and subject to modifications set forth by the state of Washington in chapter 51-50 WAC;
- B. International Residential Code, 2018 Edition, published by the International Code Council, together with all supplements thereto, excluding Appendix F and subject to the modifications set forth by the state of Washington in chapter 51-51 WAC;
- C. International Mechanical Code, 2018 Edition, published by the International Code Council, together with all supplements thereto, and subject to the modifications set forth by the state of Washington in chapter 51-52 WAC;
- D. Uniform Plumbing Code, 2018 Edition, published by the International Association of Plumbing and Mechanical Officials, together with all supplements and amendments thereto, and subject to the modifications set forth by the state of Washington in chapters 51-56 and 51-57 WAC;
- E. International Fuel Gas Code, 2018 Edition, published by the International Code Council, together with standards NFPA 58 and NFPA 54;
- F. The Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition, published by the International Conference of Building Officials;
- G. Appendix chapter J, Grading, of the International Building Code, 2018 Edition, published by the International Code Council;
- H. The Washington State Energy Code, 2018 Edition, and Reference Standard 29 developed by the Washington State Building Code Council, and set forth in chapters 51-11C and 51-11R WAC, as may be further amended;
- I. Installation of Factory Built Housing and Commercial Structures, RCW 43.22.460, together with WAC 296-150C-0540, 296-150F-0540 and the

installation of manufactured and mobile homes, RCW 43.22.440 and WAC 296-150M-0650;

J. International Existing Building Code, 2018 Edition, published by the International Code Council;

K. International Property Maintenance Code, 2018 Edition, published by the International Code Council.

*BMC 15.04.050.*

The International Existing Building Code provides that:

Any owner or owner's authorized agent who intends to repair, add to, alter, relocate, demolish, or change the occupancy of a building or to repair, install, add, alter, remove, convert, or replace any electrical, gas, mechanical, or plumbing system, the installation of which is regulated by this code, or to cause any such work to be performed, shall first make application to the code official and obtain the required permit.

*IEBC § 105.1.*

Altered areas of a building and relocated buildings shall not be used or occupied, and change of occupancy of a building or portion thereof shall not be made until the code official has issued a certificate of occupancy therefor as provided herein.

*IEBC § 110.1.*

It shall be unlawful for any person, firm or corporation to conduct development activities or erect, construct, enlarge, alter, repair, move, improve, remove, convert or demolish, equip, use, occupy, or maintain any building or structure in the city, or cause the same to be done, in violation of provisions contained within or adopted by this chapter or any of the provisions of this chapter.

*BMC 15.04.110.A; BMC 15.08.150.*

#### *Zoning Codes*

Buildings structures and lots in the MUR-1 zone shall only be used for the following, unless otherwise provided for in this title:

- A. Detached dwellings;
- B. Duplex dwellings;
- C. Horizontally attached dwellings;
- D. Multiunit buildings, small and medium;
- E. Boarding houses;
- F. Commercial child daycare center;
- G. Small utilities;
- H. Small private schools;

- I. Small meeting facilities;
- J. Professional offices;
- K. Personal services;
- L. Specialized instruction;
- M. Small nursing homes;
- N. Small scale retail;
- O. Small healthcare facilities;
- P. Veterinary clinics.

*BMC 17.30.050.*

A. All acts or omissions in violation of any provision contained within this title, or acts or omissions that cause or contribute to a violation of any provision contained within this title, are hereby determined to be detrimental to the public health, safety and general welfare and shall constitute a public nuisance. Further, as specified in chapter 1.24 BMC, such acts or omissions shall be subject to enforcement fines and abatement under chapter 8.12 BMC, criminal penalties as set forth in chapter 1.24 BMC, penalties for civil infractions as set forth in chapter 1.34 BMC, or civil violations as set forth in chapter 1.44 BMC.

B. It is a violation of this title for any person to initiate or maintain or cause to be initiated or maintained the use of any structure, land or property within the city without first obtaining the permits or authorization required for the use by this title.

C. It is a violation of this title for any person to use, construct, locate, demolish or cause to be used, constructed, located, or demolished any structure, land or property within the city in any manner that is not permitted by the terms of any permit or authorization issued pursuant to this title; provided, that the terms or conditions are explicitly stated on the permit or the approved plans.

D. It is a violation of this title to remove or deface any sign, notice, complaint or order required by or posted in accordance with BMC Title 15 or this title.

E. It is a violation of this title to misrepresent any material fact in any application, plans or other information submitted to obtain any land use authorization.

F. It is a violation of this title for anyone to fail to comply with the requirements of this title.

*BMC 17.01.110.*

*Addresses*

A. It shall be a violation of this chapter to post an address or number other than an address or number assigned by the city of Burlington in accordance with the requirements of this chapter.

B. It shall be a violation of this chapter to offer any unit, suite, tenant space, or building for sale, lease, or occupancy that has not been addressed in accordance with this chapter.

C. Should the department find that any building, structure or premises is not provided with numbers as herein required, or is not correctly numbered, the department shall notify the owner, agent or tenant of the correct street or unit number and shall require that the same shall be properly placed, in accordance with the provisions of this chapter, within 30 days unless additional time is provided for in writing by the department. Failure to respond to such notification shall be considered a violation of this chapter.

*BMC 15.10.090.*

*Sewer*

The owner(s) of any house, building or property used for human occupancy, employment, recreation or other purposes, situated within the city, or within the area served by the city sewer system, and abutting on any street, alley or right-of-way in which there is located a public sanitary sewer of the city, is required at the owner or owners' expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter within 90 days after the date of official notice to do so; provided, that the building to be served is not located more than 200 feet from a public sewer.

*BMC 13.04.020.*

Except as provided in BMC 13.04.280 through 13.04.310, it is unlawful to construct or maintain any privy, privy vault, septic tank, cesspool or other facility intended or used for the disposal of wastewater.

*BMC 13.04.270.*

At such time as a public sewer, as defined in BMC 13.04.010, becomes available to a property served by a private wastewater disposal system, a direct connection shall be made to the public sewer within 90 days after date of official notice to do so, in compliance with this chapter, and any septic tanks, cesspools and similar private wastewater disposal facilities shall be cleaned of sludge and filled with suitable material; provided, that cement septic tanks with reinforced concrete lids may be exempt from cleaning and filling at owner's option.

*BMC 13.04.300.*

Compliance with the terms and conditions of this chapter constitutes minimum health, sanitation and safety provisions and material; noncompliance with said terms and conditions constitutes a public nuisance and may be abated as such, in addition to any other criminal, civil and equitable remedies that may be available.  
*BMC 13.04.450.*

*Nuisances*

Each of the following conditions, unless otherwise permitted by law, is declared to constitute a public nuisance, and whenever the enforcement officer determines that any of these conditions exist upon any premises, whether residential, commercial or industrial, or in any lake, river, stream, drainage way or wetlands, the officer may require or provide for the abatement thereof pursuant to this chapter:

...

L. The storage or keeping on any premises for more than 30 days of any used or unused building materials as defined in BMC 8.12.010, whose retail cost new would exceed \$100.00, without a special permit from the building official; provided, that nothing herein shall:

1. Prohibit such storage without a permit when done in conjunction with a construction project for which a building permit has been issued and which is being prosecuted diligently to completion;
2. Prohibit such storage without a permit upon the premises of a bona fide lumber yard, dealer in building materials or other commercial enterprise when the same is permitted under the zoning ordinance and other applicable laws; and
3. Make lawful any such storage or keeping when it is prohibited by other ordinances or laws.

...

N. The existence or maintenance on any premises of a storage area, junkyard or dumping ground for the wrecking or disassembling of automobiles, trucks, trailers, house trailers, boats, tractors or other vehicle or machinery of any kind, or for the storing or leaving of worn out, wrecked, inoperative or abandoned automobiles, trucks, trailers, house trailers, boats, tractors or other vehicle or machinery or any major parts thereof.

*BMC 8.12.020.*

Junk storage is only permitted outdoors when completely surrounded by a solid, site obscuring fence and not visible from an adjoining street or public right-of-way. Outdoor storage shall also be subject to the following additional restrictions and requirements:

1. Litter, trash, used appliances, used interior furnishings and discarded exterior furnishings and similar items are prohibited outdoors regardless of location.
2. Junk storage is further limited to piled used lumber, yard cleanup equipment and similar types of items; it is not intended to include the storage of any items that would be classified as a nuisance under chapter 8.12 BMC.

*BMC 17.30.080.C.*

*Non-conforming uses*

Any legally existing nonconforming structure or use may be continued and maintained in conformance with provisions of this chapter, provided no enlargement of area, space or volume occupied by the nonconforming use occurs.

*BMC 17.100.050.*

**CONCLUSIONS BASED ON FINDINGS**

1. The Appellant, Rio Vista Shops, LLC, has maintained multiple commercial businesses inside buildings located at 1724 Rio Vista Avenue, within the City of Burlington. The buildings were formerly in agricultural use, but their use is now commercial. Pursuant to Burlington Municipal Code (BMC) 15.04.110, BMC 15.04.050, BMC 15.08.150, BMC 17.01.110, and International Existing Building Code (IEBC) §§ 105.1 and 110.1, it is a requirement to obtain a permit and a certificate of occupancy prior to changing the use of a structure. The permitting requirement in the IEBC existed and still exists under the jurisdiction of both Skagit County and the City of Burlington. Among the Appellant, its representative Bernard Morris, its tenants, and the previous owner of the subject property Mike Fohn, none obtained permits or certificates for the change from agricultural use to commercial use. Therefore, the commercial uses were never lawfully established. Therefore, the uses are not allowable as non-conforming uses under BMC 17.100.050.

The Hearing Examiner rejects the Appellant's argument that the City ever agreed to allow the continuation of the commercial uses established by Mr. Fohn without a permit. There is nothing in the annexation or zoning ordinances exempting the Appellant's property from any of the building code, zoning code, or any other code requirements. There is no development agreement pursuant RCW 36.70B.170, nor other binding instrument to that effect. The evidence cited by Mr. Fohn, namely, his email discussions with the City regarding the conditions under which he would support annexation, and the minutes

describing the discussions of the City Planning Commission regarding annexation and zoning, do not have the effect of law. Neither the emails between City staff and the property owner, nor the discussions of the Planning Commission, have the power to alter the code. The code requires permits that the Appellant does not have. The Hearing Examiner is sympathetic to Mr. Fohn for his belief that he and the City had an “understanding,” but even if such an understanding did exist, it could not alter the law. For this reason, Violation 1 of the NOV, Exhibit 11, is upheld. *Findings 1–4, 6, 9–25.*

2. The subject property is zoned MUR-1. That zoning district does not allow commercial storage, mechanic shops, electric shops, painting contractors, civil sitework contractors, and winemaking facilities. *BMC 17.30.050.* For the reasons discussed in Conclusion 1, these uses were not lawfully established due to the lack of permits, and so they are cannot be allowed as nonconforming uses.

The Hearing Examiner’s conclusion here will require the unpermitted commercial uses to cease. The Hearing Examiner recognizes that this will impose a hardship not only on Mr. Morris but also on the tenant businesses, such as those of Steve Perry and Shawn Devries. The Hearing Examiner recognizes that it may seem unjust to the business owners, some of whom have been here for over a decade, that they must now either alter the nature of their business or else leave the subject property. As set forth below in his order, the Hearing Examiner does intend to give those business a reasonable period of time in which to cease their use or else leave the subject property. Notwithstanding the hardship these businesses will suffer, they are not allowed in the MUR-1 zone and cannot be allowed as nonconforming uses, and so Violation 2 of the NOV is upheld. *Findings 1–4, 6, 9–25.*

3. At least some of the unpermitted commercial uses on the subject property have posted addresses that were not issued by the City, in violation of *BMC 15.10.090.* The Hearing Examiner rejects the Appellant’s argument that the markings in Exhibit 4, PDF 2 constitute addresses that were issued by the City, because those markings do not appear to be addresses at all, nor do they appear to be issued by the City. They appear to be unit numbers generated by the Appellant itself.

*BMC 15.10.090.C* requires the City to give the owner, agent, or tenant of an improperly addressed building 30 days in which to correct the deficiency, or such further time as the City may provide. Here, the record does not reveal that the City gave the Appellant the required 30 days’ notice prior to issuing the NOV. The NOV itself, however, set a compliance deadline of 30 days from the date of its issuance. Only after the compliance deadline would fines accrue. The Hearing Examiner concludes that the NOV itself functioned as the 30-day notice letter. The improper addresses have not been corrected. Therefore, Violation 3 of the NOV is upheld. *Findings 9–25.*

4. All parties agree that there is a municipal sewer line within 200 feet of the subject property and that the Appellant is not connected to it. Instead, the Appellant relies on a lawfully

permitted, private sewer system. The Hearing Examiner reads BMC 13.04.270 and .300 to require properties with existing septic systems to connect to municipal sewers once sewers become available. Thus, even though Appellant has what might otherwise be called a “nonconforming” septic system, the law does not permit even previously allowed septic systems to continue once a sewer becomes available. BMC 13.04.020 and BMC 13.04.300, however, both require the City to issue a 90-day notice of sewer availability. BMC 13.04.270 prohibits septic systems *except as provided* in BMC 13.04.280 through .310, which sweeps in 13.04.300, with the 90-day notice requirement. As the Hearing Examiner reads these provisions, a septic system does not become unlawful where the City has failed to issue a 90-day notice. There is no evidence in the record that the City issued a 90-day notice to the Appellant. The NOV sets a compliance deadline of 30 days, not 90 days, so the NOV cannot function as the required 90-day notice. For this reason, Violation 4 of the NOV is reversed.

The parties should not misread this conclusion as an authorization for the Appellant to operate a septic system notwithstanding the proximity of a municipal sewer line. The Hearing Examiner does not authorize any such thing. The Appellant must comply with the sewer code. But the City must also comply with the sewer code, and by failing to issue the required 90-day notice letter, the City did not do so. The City remains free to issue the required 90-day notice letter if it so chooses, and it remains free to initiate a fresh enforcement action against the Appellant if the Appellant does not comply with the sewer code. *Findings 9–16, 19, 24, 25.*

5. BMC 8.12.020.L prohibits outdoor storage of buildings materials for more than 30 days. BMC 17.30.080.C prohibits outdoor storage of junk. Annie Avery’s testimony indicates she saw equipment stored outdoors. Her testimony does not indicate junk or building materials, and her testimony does indicate more than 30 days’ storage, since she only went once to the site. The Hearing Examiner cannot find a violation of BMC 8.12.020.L or BMC 17.30.080.C on the basis of this testimony.

The staff report says that “Our staff observed paint cans, lumber, pallets, electrical conduit and meter boxes, storage containers, various building materials, and debris being stored outdoors.” There is no testimony or other evidence to that effect in the record, however, so the Hearing Examiner will not rely on it. Furthermore, the staff report does not say whether those materials were present for 30 days or longer.

BMC 8.12.020.N prohibits inoperable vehicles, however, and does not set a 30-day deadline. Ms. Avery testified to the presence of 15 to 20 inoperable vehicles, and Mr. Perry’s testimony agreed with that number—although he added that the inoperable vehicles were there to be worked on by mechanics, who are some of the Appellant’s other commercial tenants. In its closing, the Appellant argues that the photographs in Exhibit A-5 show no inoperable vehicles, but that evidence is less persuasive than the testimony of two eyewitnesses who did see inoperable vehicles. Therefore, the Hearing Examiner will

uphold Violation 5 of the NOV with respect to inoperable vehicles and reverse Violation 5 with respect to everything else.

The parties should not misread this conclusion as an authorization for Appellant to store building materials outside for longer than 30 days or store junk outside for any length of time. The City failed to prove, by a preponderance of the evidence, that such violations have occurred, but the City remains free to bring a new enforcement action if it obtains evidence that such violations occur in the future. *Findings 20, 22, 25.*

### **ORDER**

Based on the findings and conclusions above, the City's May 26, 2023, Notice of Violation issued to Appellant Bernard Morris and Rio Vista Shop, LLC, is hereby **UPHELD** as to Violation 1, 2, and 3, and that portion of Violation 5 pertaining to the presence of inoperable vehicles, and **REVERSED** as to Violation 4 and the remainder of Violation 5. The following Order is issued:

1. The Appellant shall discontinue the use or occupancy of any building, suite, area, or tenant space that has been established without permits or authorizations from the City of Burlington Building Official and Fire Marshal. Any use or occupancy that has not been explicitly authorized or approved shall be discontinued.
2. The Appellant shall discontinue all uses occurring on the property that are in violation of the MUR-1 zoning regulations including, but not limited to outdoor storage, wine making, warehousing, indoor storage, vehicle or equipment repair, light industrial uses, and contractor services.
3. The Appellant shall discontinue the storage of inoperable vehicles on the property.
4. The Appellant shall discontinue the use or occupancy of any building, suite, area, or tenant space that has not been assigned an official unit number by the City of Burlington and remove any unauthorized or unpermitted unit numbers or addresses from the property.
5. The Appellant shall contact the City of Burlington Building Official and Fire Marshal and schedule a complete inspection of the property and buildings. Any violations identified during the inspection process shall be immediately addressed. Said inspection shall be scheduled to occur no later than **March 11, 2024**, or such further time as the Building Official or Fire Marshal may authorize in writing.
6. If, after **March 11, 2024**, or such further time as the Building Official or Fire Marshal may authorize in writing, all corrective actions identified in this order have not been performed, the City may assess monetary penalties at the rate provided in BMC 1.44.150 and may pursue additional remedies authorized by law. Penalties shall accrue from the date of this order onward, but penalties shall be waived to the extent the Appellant demonstrates compliance with this order on or before March 11, 2024, or within such further time as the Building Official or Fire Marshal may authorize in writing.

Entered this 8th day of January, 2024.

  
Alex Sidles  
Hearing Examiner