HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER

IN THE MATTER OF	:	BEFORE THE
ROBERT H. FLATHMAN Petitioner	:	HOWARD COUNTY
	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA 737-D RE: NCU-16-001

ORDER

On March 27, and May 18, 2017, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the administrative appeal of Robert Flathman (Petitioner). Petitioner is appealing a November 30, 2016 Decision and Order of the Department of Planning and Zoning (DPZ) in Non-Conforming Case No. 16-001, in which DPZ denied confirmation of a nonconforming use for a motor vehicle storage use and portions of a motor vehicle repair use operating in structures/additions/areas other than a 30'x50' pitched roof building at 7009 Brookdale Drive (the Property), which is located in a CE-CLI (Corridor Employment: Continuing Light Industrial) Zoning District. The appeal is filed pursuant to § 129.0.D.4 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the notice, posting and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Petitioner was not represented by counsel. John Donelan testified in support of the petition. Per longstanding policy, DPZ does not participate in de novo appeals to the Hearing Examiner from a DPZ confirmation of a nonconforming use decision and order.

PRELIMINARY MATTERS

I. The Nonconforming Use Plan. Prior to the March 27, 2017 hearing the Hearing Examiner informed Petitioner his Howard County GIS base map submitted with the appeal petition as the nonconforming use plan (NCU Plan) was inadequate. Petitioner submitted an adequate NCU Plan with the Amended Petition introduced as Exhibit 2 at the May 18, 2017 continuation hearing. Note: the NCU 16-001 order identifies the size of the pitched roof motor vehicle use building as 30'x50'. The NCU Plan identifies it as 31'x24'. Based on the 1993 aerial photograph, the Hearing Examiner finds the building sans additions was about 30'x50' in size.

II. The Hearing Examiner's Remand. At the March hearing, the Hearing Examiner determined to remand the above captioned matter to DPZ because the department failed its administrative due process obligation, a prejudicial procedural error, to apprise Petitioner fully of the laws and regulations supporting the decision to deny confirmation of a non-conforming use for the post-1984 motor vehicle repair use and the motor vehicle storage use. Accordingly, administrative due process obliged DPZ to cite in full all applicable versions of the Subdivision and Land Development's (SLDR) SDP requirements. The procedural due process owed Petitioner – a right of notice and reasonable process – would be afforded through a written Supplemental Decision and Order (Supplemental Order), with the Hearing Examiner retaining jurisdiction to

allow Petitioner to present argument at the BA 737-D continuation hearing. The April 5, 2017 Preliminary Remand Order and DPZ's May 5, 2017 Supplemental Order responses are as follows.

1. Set forth in full all Subdivision and Land Development Regulations pertinent to DPZ's denial of the requested confirmation of non-conforming use in NCU-16-001, including effective dates, and including any definition of "Site Development Plan," "Development," and any other definition informing the NCU-16-001 denial.

- Supplemental Order, pg. 5, Findings ## 11-16.

  11. The Subdivision and Land Development Regulations in effect in 1974 were the First Edition, which became effective on March 7, 1961 and Amendment No. 1 to the First Edition, which became effective May 4, 1974. Neither version required that new nonresidential uses obtain Site Development Plan approval.

  12. The Second Edition of the Subdivision and Land Development Regulations became effective on February 7, 1976 and did not require that new nonresidential uses obtain Site Development Plan approval.

  13. The Third Edition of the Subdivision and Land Development Regulations became effective on March 12, 1993 and was amended on September 6, 1994 and July 1, 1995. The Fourth Edition of the Subdivision and Land Development Regulations became effective May 6, 1996 and was amended on July 7, 1998 and August 19, 1999. The Fifth Edition of the Subdivision and Land Development Regulations became effective January 8, 2002 and was amended on October 2, 2003. All versions defined "development" as "the establishment of a principal use on a site; a change in a principal use of a site; or the improvement or alteration of a site by the construction, enlargement, or relocation of a structure; the provision of stormwater management or roads; the grading of existing topography; the clearing or grabbing of existing vegetation; or any other non-farming activity that results in a change in existing site conditions." They also defined "site development plan" as "the plan indicating the location of existing and proposed buildings, structures, paved areas, walkways, existing and proposed grades, vegetative cover, landscaping, and screening within a lot or parcel proposed for development."

  14. Sec. 16.155(a) of the Third, Fourth, and Fifth editions of the Subdivision and Land Development Regulations stated "A site development plan, approved by the Department of Planning and Zoning, is required for .... non-residential development." The term development included new uses, changes to an established use, and/or enlargement of a structure.

  15. Sec. 16.155(a) of the Third and Fourth editions of the Subdivision and Land Development Regulations stated "A site development plan, approved by the Department of Planning and Zoning, is required prior to issuance of grading permits or building permits." This provision established a prerequisite for the issuance of grading permits and building permits to ensure that Subdivision and Land Development requirements were met prior to issuance of permits. This provision was not intended to require a site development plan only when a grading permit or building permit was required.

  16. Sec. 100.0.E Construction and Effective Date in effect on April 13, 2004 did not contain provisions authorizing a land use that did not receive approval of a required site development plan.

- Attached to the Supplemental Order was a copy of SLDR § 16.155 applicable on April 13, 2004, several and the SLDR § 16.108(b) (apparently) definitions of "site development plan," "development," and "building development."

2. Reference all "grandfathering" construction and effective dates in the applicable Zoning Regulations section (currently contained in § 101.0.E).

- Attached to the Supplemental Order was a copy of then Howard County Zoning Regulations (HCZR) § 101.E (apparently).

3. File the Supplemental Decision and Order with the Hearing Examiner no later than 30 calendar days from the date of this Preliminary Order.

- The Supplemental Order was issued on May 5, 2017.

In addition, because DPZ denied the uses at issue in this appeal on the same substantive grounds as its denial of NCU 16-006, which the petitioner appealed to the Hearing Examiner in BA 734-D (also decided July 19, 2017), the Hearing Examiner scheduled the BA 737-D continuation hearing directly following the BA 734-D continuation hearing, where the petitioner in that appeal was represented by counsel intending to present oral argument on the interpretation of the Site Development Plan (SDP) regulations at issue and to present evidence on compliance with HCZR § 129.0.D. Mr. Flathman and Mr. Donelan observed the BA 734-D hearing.

III. <u>What is being "Appealed</u>?" Although the petition form for an appeal from a DPZ NCU decision and order is the administrative appeal form, the "appeal" is heard on a "de novo basis" pursuant to HCZR § 129.0.D.4, meaning the Hearing Authority assigns to the "petitioner" the preponderance of evidence burden of proof through the admission of new evidence. This "appeal" framework often challenges NCU appellants/petitioners because Section 1 of the administrative appeal petition form instructs applicants to state the manner in which the appellant is aggrieved by the ruling, and to identify factual or legal errors. Because Mr. Flathman

was happy with DPZ's decision to confirm nonconformance for the single-family dwelling use and a portion of the motor vehicle repair use in a 30'x60' pitched roof building, he appealed only the DPZ's adverse decisions, the motor vehicle storage and motor vehicle repair use denials of confirmation, alleging in part error of law in DPZ's interpretation of "nonconforming use" as one that "legally existed" on the alleged date of nonconformance. Thus, the petition states in Section 1, "[i]n conclusions of law, Item # 6 ruling indicates automotive storage not established prior to April 13, 2004."

Shortly before the hearing, apparently, DPZ instructed Mr. Flathman to amend the petition to include the two nonconformances it had confirmed, a single-family detached residential dwelling use and a motor vehicle repair use operating in the pitched roof 30'x50' pitched roof building. According to Mr. Flathman, DPZ explained to him the appeal would be a new hearing where the "entire" petition is heard as if there had been no proceeding below, thus requiring him to "appeal"/petition the Hearing Examiner for approval of all three requested nonconformances.

This DPZ interpretation being one of "first impression, "the Hearing Examiner sought confidential advice from the Office of Law pursuant to Howard County Code § 16.303(3) on this issue: when a petitioner/appellant appeals a DPZ decision confirming certain uses as nonconforming but denying other uses, does HCZR § 129.0.D.4 require petitioners to "re"-petition the Hearing Authority to confirm anew the existence of the DPZ-confirmed uses? The Office of Law advised DPZ might reasonably interpret § 129.0.D.4's "de novo" language as meaning to start anew, as if their decision never existed. It also found reasonable the Hearing

Examiner's interpretation that petitioners need appeal only the adverse part of a DPZ decision, based in part on the principle of quasi-judicial efficiency. Lastly, the Office alerted the Hearing Examiner that any future appeals from an adverse DPZ decision might require a petitioner to appeal the entire decision in question, depending on the situation.

The Office of Law's advice notwithstanding, this appeal still raises certain questions about the standard of review and degree of Hearing Examiner scrutiny of a DPZ's nonconforming use adverse decision involving not only petitions for multiple nonconformances but also how petitioners challenge DPZ's legal conclusions about an alleged nonconforming use needing site development plan approval prior to the date of alleged nonconformance. It is problematic how Mr. Flathman may challenge DPZ's interpretation of the applicable "law of nonconformances" under a preponderance of evidence burden of proof. The answer, presumably, is that he must prove the law does not apply to him, which begs the question of why he would even raise the interpretation on appeal, since the decision and order would be a straight up approval or denial, not an affirmation or overruling of DPZ's decision. Surely, in appeals like Mr. Flatman's, the administrative appeal petition form seems unsuited to provide appellants/petitioners sufficient guidance when multiple land uses and questions of law are involved.

Also to be considered is this: the Hearing Examiner gained her knowledge of DPZ's "de novo basis" interpretation through her questioning of Mr. Donelan in relation to his submission of a revised petition. There is nothing in the record, including DPZ's original or Supplemental Order, where DPZ sets forth its new interpretation, and which is inconsistent with their acceptance of the BA 720-D and BA 734-D administrative appeal petitions from denials of

requested nonconformances as referenced in this Order. An administrative agency charged with interpreting and enforcing a particular set of statutes or regulations is accorded a degree of deference for longstanding interpretations but no deference is due for an abrupt departure from these interpretations.

For these reasons, this appeal is concerned only with Petitioner's request for confirmation of a nonconforming use for a motor vehicle storage use and portions of a motor vehicle repair use operating in structures/additions/areas other than a 30'x50' pitched roof building at 7009 Brookdale Drive.

IV. The Late Request for Confirmation of the Entire Property as a Motor Vehicle Storage Use

On the close of Petitioner's case, Mr. Donelan sought approval for confirmation of the entire Property for a motor vehicle storage use. The Hearing Examiner may not consider this request because he did not amend the petition/NCU Plan to present this requested nonconformance and there was no attendant public notice and advertising. Conceivably, had this request been made properly, petitioner would have been required to seek approval anew for all three land uses.

Petitioner introduced into evidence the exhibits as follows.

1. Robert Flathman affidavit
2. March 20, 2017 amended appeal petition and documentation (identified as "Enclosures"), including a 2-page nonconforming use plan identified as Enclosures 1A & 1B. The Amended Petition was admitted in accordance with Hearing Examiner Rules of Procedure 9.4 and 9.5.

FINDINGS OF FACT

Based upon the evidence of record the Hearing Examiner finds as follows:

1. Property Identification. Robert H. Flathman is the owner of the 52,272sf subject property located on the north side of Brookdale Drive approximately 960 feet southeast of US 1. It is identified as Tax Map 0043, Grid 0005, Parcel 469, and also known as 7009 Brookdale Drive (the Property). It is located in the 3rd Election District and zoned CE-CLI (Corridor Employment: Continuing Light Industrial) zoning district.

2. Property Description. To assist the reader, the 2016 county aerial photograph of the Property is provided after this description (aerial photograph 1.)

Area 1. The front section of the Property is partially paved and merges with the Brookdale Drive paving. During her site visit, the Hearing Examiner observed several vehicles parked in this paved area. These vehicles are visible in the photographs included an Exhibit 2 as Enclosures 6, 7, and 8 and in the 2016 county aerial photograph (Enclosure 32).

Area 2. Beyond this paved area is a gated fence, and beyond this fence another paved or gravel parking area in front of an "L"-shaped residential structure.

Area 3. Running along the westerly lot line is a paved or gravel driveway, which, beyond the dwelling, becomes a gated gravel or paved area. Within Area 3, sitting almost on or on the westerly lot line, is a shipping/storage structure (a cargo/sea container or trailer), with a roll-off container next to it. Running along or on the easterly lot line, behind the dwelling, is an approximately 30'x50' pitched roof building. There are multiple additions on its northerly, westerly, and southerly facades. Multiple motor vehicles, boats, trailers and trucks and other items surround these structures.

Area 4. Area 4 is the partially paved or gravel back section of the Property, where a large number of vehicles, some of which appear to be dismantled or inoperative, are stored.

Aerial Photograph 1, 2016
7009 Brookdale Drive

3. Vicinal Properties. Adjacent properties are also zoned CE-CLI. The northwestern Parcel 55 appears to be used for a business leasing office trailers and storage containers. To the southeast, Parcel 56 is used as a single-family dwelling, trucking business, and motor vehicle storage. Parcel 56 is the subject of Nonconforming Use Confirmation case NCU-16-004. Across Brookdale Drive to the southwest, Parcel 627 is the site of a warehouse and distribution building approved by a redline revision to SDP-08-031 dated May 25, 2016.

4. Zoning and Land Use History. DPZ records indicate the Property was zoned M-2 on the 1954 Zoning Map. The Property remained zoned M-2 through the 1961, 1977, 1985, and 1993 Comprehensive Zoning Plans. The Property was rezoned to CE-CLI by the 2004 Comprehensive

Zoning Plan, with the effective date of April 13, 2004. The 1964 Land Use Map shows a single-family detached dwelling use on the Property. According to the State Department of Assessments and Taxation information, the house was constructed in 1950. The current Land Use map designates the Property as Low Density Residential.

5. The Nonconforming Use Confirmation Requests and the NCU Plan. On appeal, Petitioner is seeking confirmation of two uses.

- "Additions" to Motor vehicle Repair Use in Area 3. The petition seeks nonconformance confirmation for three additions to the 30'x50' pitched roof building and a storage/shipping/cargo container/trailer (the container/trailer) as part of the motor vehicle repair use in Area 3. These structures are outlined in blue on the NCU Plan, which dimensions them as the 31'-long pitched roof building, a 41' addition, a 42' addition, and a 52' addition. The pitched roof building, the additions, and container/trailer are called out in aerial photograph 2 on the next page.

- Motor Vehicle Storage Use in Area 4. Petitioner is seeking confirmation of nonconformance for the motor vehicle storage use of Area 4. This area is outlined in orange on the NCU Plan.

Aerial Photograph 2, 2016
ARB (Auto Repair Building), 30'x50' pitched roof building
1. Addition 1, 44'
2. Addition 2, 42'
3. Addition 3, 52'
4. Container/trailer, 45'

6. In support of the motor vehicle repair additions and storage container/trailer being legally nonconforming, Mr. Donelan conceded some were built after 2004. Addition 1, however, was built before the SLDR mandated commercial SDPs, which he argued was not until 1993. Addition 2 was built when an SDP was required. It is an almost open-air, almost "cardboard" structure.

7. In support of Petitioner's claim to the motor vehicle storage use being legally nonconforming, Mr. Donelan testified to it being established in 1974 when Mr. Flathman bought

the property for automotive repair use. Vehicles would be moved on and off the Property. He further testified to several Exhibit 2 aerial photograph Enclosures demonstrating the establishment and continued uninterrupted presence of the use.

- Enclosures 9 & 26. 1952 and 1977 county aerial photographs show a significant difference in vegetation in the back section.
- Enclosure 27. 1984 county aerial photograph shows vehicles in the back lot and along the edges of the lot.
- Enclosure 28. 1993 county aerial photograph. Some encroachment in adjoining lots, including trailer. Vehicle storage area increases.
- Enclosure 29. 1998 county aerial photograph, motor vehicle storage area increases
- Enclosure 30. 2006 county aerial photograph, motor vehicle storage area increases
- Enclosure 31. 2007 county aerial photograph, motor vehicle storage area increases
- Enclosure 32. 2016 county aerial photograph, motor vehicle storage area increases

8. Mr. Donelan further testified to Exhibit 2 including "updated affidavits."

9. Mr. Donelan also testified no notices of violation had been issued related to the uses on the Property. The Hearing Examiner takes notice the county actually served the responsible party such notices.

CONCLUSIONS OF LAW

I. The Law of Nonconforming Uses and HCZR § 129.0.D

The Maryland Court of Appeals in 2015 reviewed the legal principles of nonconforming uses.

> We summarized Maryland's non-conforming uses jurisprudence in Trip Associates, Inc. v. Mayor & City Council of Baltimore, 392 Md. 563, 898 A.2d 455 (2006). A property owner establishes a non-conforming use if the property owner can demonstrate to the relevant authority (often a local board of appeals) that the property was being used in a then-lawful manner before, and at the time of, the adoption of a new zoning ordinance which purports to prohibit the use on the property. Trip Associates, 392 Md. at 573, 898 A.2d at 455. Such a property owner has a vested constitutional right to continue the prohibited use, subject to local ordinances that may prohibit "extension" of the use and seek to reduce the use to conformance with the newer zoning through an "amortization" or "abandonment" scheme. See Trip Associates, 392 Md. at 574-75,

> 580, 898 A.2d at 455-56, 459. *Nevertheless, nonconforming uses are not favored by Maryland law, and local ordinances regulating validly non-conforming uses will be construed to effectuate their purpose.* Trip Associates, 392 Md. at 573, 898 A.2d at 455-56 (quoting Cnty. Council of Prince George's Cnty. v. E. L. Gardner, Inc., 293 Md. 259, 268, 443 A.2d 114, 119 (1982)).

Emphasis added. Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co., 444 Md. 490, 514 n.16 (2015) (citations omitted). The ultimate purpose of zoning regulations, including the HCZR, is "'to reduce nonconformance as speedily as possible with due regard to the legitimate interests of all concerned.'" Trip Assocs., Inc. v. Mayor & City Council of Baltimore, 392 Md. At 574, 898 A.2d at 456 (quoting Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 307, 129 A.2d 363, 365 (1957).

The HCZR seeks to reduce nonconformance through two pertinent provisions. First, the petitioner pursing nonconformance confirmation of a land use bears the burden of establishing its existence on the effective date of the prohibiting zoning ordinance. Second, the use must have been a "lawful existing use" on this effective date, as declared in the HCZR § 129.0.A definition of "nonconforming use."

> [A]ny *lawful existing use*, whether of a structure or a tract of land, which does not conform to the use regulations of the zoning district in which it is located, either on the effective date of these regulations or as a result of any subsequent amendment thereto. A structure that is conforming in use but which does not conform to the height, setback, land coverage, parking, loading space or other bulk requirements of these regulations, shall not be considered nonconforming within the meaning of these regulations. No existing use shall be deemed nonconforming solely because of the existence of nonconforming accessory signs. The casual, temporary or illegal use of land is insufficient to establish the existence of a nonconforming use.

Emphasis added. These provisions "must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses." Cnty. Council of Prince George's Cnty. v. E. L. Gardner, Inc., 293 Md. 259, 268 (1982) (citations omitted).

Compliance with HCZR § 129.0.D. Confirmation of Nonconforming Uses

HCZR § 129.0.D.1 codifies the burden on Petitioner to produce credible evidence to substantiate the existence of the use on the date it became nonconforming and to clearly demonstrate the continued and uninterrupted use or operation thereof from the specified date to the time of filing the application. See County Com'rs of Carroll County v. Uhler, 78 Md.App. 140, 145, 552 A.2d 942, 944 (1988). "The party asserting the existence of a nonconforming use has the burden of proving it." Calhoun v. County Board of Appeals, 262 Md. 265, 167, 277 A.2d 589 (1971); Lapidus v. Mayor & City Council of Baltimore, 222 Md. 260, 262, 159 A.2d 640 (1960).

a. A statement and plans or other illustrations fully describing the magnitude and extent of the nonconforming use.

The Amended Petition includes in pertinent part the following.

- A March 20, 2017 letter to the Board of Appeals detailing the contents of the petition. The letter summarizes the Property's use history and outlines in pertinent part the Enclosures supporting the establishment and continued nonconformance for the motor vehicle repair and motor vehicle storage uses.
- The NCU Plan (Enclosures 1A&B). The NCU Plan is based on the 2014 county aerial photograph of the Property, apparently. The structures shown as comprising the automotive repair use are outlined in blue. These structures include the pitched roof building and additions and the storage/shipping/cargo container/trailer shown in aerial photograph 1 on p. 9 and identified as Area 3 in the above description of the Property. Area 4 is identified as the location of the motor vehicle storage use.

b. A statement identifying the date the use became nonconforming to the use provisions of the Zoning Regulations.

The petition states the motor vehicle repair and motor vehicle storage uses became nonconforming on April 13, 2004, the effective date of the 2004 Comprehensive Zoning, through which the Property was rezoned to CE-CLI.

c. Documentation substantiating the existence of the use on the date it became nonconforming and clearly demonstrating the continued and uninterrupted use or operation thereof from the specified date to the time of filing the application. The burden shall be on the property owner to establish the existence of the nonconforming use.

- Exhibit 1. Affidavit from Robert Flathman affirming his use of the Property from September 1974 for the operation of his construction business, completing automotive repair, completing construction equipment repair, open storage of automobile vehicle parts, construction equipment and construction job materials
- Enclosure 10. Affidavit from Antonio Vallecillo affirming his rental of the "Property" from April 1, 2004 to the present day for outdoor storage and automotive repairs on the property; that Geno Jones used the property for outdoor storage and automotive repair from September 1, 1997 to September 30 1999, and; that Carlos Rosaro used the property from November 1, 1999 to January 31, 2004
- Enclosure 17. March 15, 2017 affidavit from Christy Parkent affirming the "Property" has been used for Motor Vehicle (automobile) repairs and Motor Vehicle (automobile) storage since 1974, including construction vehicle repair, open storage of vehicle parts, construction equipment and materials from constructions jobs
- Enclosure 25. March 18, 2017 affidavit from Gary Weil attesting to having worked for Petitioner from 1974-1997 and that the Property since 1974 through 1997 was actively used for completing automotive repairs and construction vehicle repairs, had open storage of automobiles, vehicles parts, construction equipment vehicles and construction materials.
- Enclosure 9. 1952 county aerial photograph of property
- Enclosure 26. 1977 county aerial photograph of property
- Enclosure 27. 1984 county aerial photograph of property
- Enclosure 28. 1993 county aerial photograph of property
- Enclosure 29. 1998 county aerial photograph of property
- Enclosure 30. 2006 county aerial photograph of property
- Enclosure 31. 2007 county aerial photograph of property
- Enclosure 32. 2016 county aerial photograph of property

Discussion

A. <u>The Motor Vehicle Repair Use Additions and the Container/Trailer</u>

1. The Affidavits

As a first matter, the Hearing Examiner accords no weight to the affidavits, in line with Maryland law. In BA 720-D (decided March 3, 2016) and BA 737-D **(decided July **, 2017),**

wherein the Hearing Examiner denied the appellants' requests for confirmation of motor vehicle uses because they failed to prove the existence of the use before the properties were rezoned, the Hearing Examiner reviewed the Maryland courts' view of voluntary affidavits in support of nonconforming use confirmation requests as weak evidence.

> It is said in 32 C.J.S., Evidence, § 1032, p. 1075: "Affidavits when admissible as a general rule are only prima facie evidence, and they are not conclusive of the facts stated therein even though not contradicted by counter-affidavits. Indeed, ex parte affidavits are commonly regarded as weak evidence, to be received with caution, and not to be used where better evidence is obtainable." Bard v. Bard, 279 Ky. 683, 132 S.W.2d 44; Griffin v. Tomlinson, 159 Va. 161, 165 S.E. 374; Germain v. Raad, 297 Mass. 73, 8 N.E.2d 355; Thomson Spot Welder Co. v. Ford Motor Co., D.C.Mich., 268 F. 836, affirmed 6 Cir., 281 F. 680, certiorari granted 260 U.S. 718, 43 S.Ct. 96, 67 L.Ed. 479, affirmed 265 U.S. 445, 44 S.Ct. 533, 68 L.Ed. 1098; Tennant v. Divine, 24 W.Va. 387. It was said by this Court in Patterson v. Maryland Ins. Co., 3 Har. & J. 71, 74, 5 Am.Dec. 419: "A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where better testimony can, from the nature of the case, be had." It was said in United Surety Co. v. Summers, 110 Md. 95, 110, 72 A. 775, that a mere voluntary affidavit is not raised above the grade of hearsay.

Aaron v. City of Baltimore, 207 Md. 401, 411, 114 A.2d 639 (1955).

The Hearing Examiner here takes notice of several nearby DPZ-confirmed nonconforming use petitions and the supporting documentation demonstrating the date of nonconformance and continuance of use with Petitioner. No credible business documentation was submitted with the instant petition.

- NCU 12-005 (10052 Washington Boulevard), rezoned to CE-CLI through the 2004 Comprehensive Zoning. Nonconforming use confirmed for a motor vehicle sales, maintenance, and repair and parts sales use. Supporting documentation: MVA vehicle dealer Licenses and State of Maryland business licenses demonstrative date of nonconformance and continuous use.
- NCU 13-001 (9921 Washington Boulevard, rezoned to CE-CLI through the 2004 Comprehensive Zoning. Nonconforming use confirmed for a car dealership. Supporting documentation: certified letter from MVA to demonstrative date of nonconformance and continuous use.
- NCU 16-002 (9990 Washington Boulevard), rezoned to CAC through the April 13, 2004, 2004 Comprehensive Zoning Plan. Nonconforming use confirmed for a motor vehicle repair use. Supporting documentation: Site Development Plan SDP 73-63 (October 1, 1973), 2002 aerial photograph depicted motor vehicle behind and front of building "in a manner that suggests the storage of vehicles prior to or after repairs" to demonstrate date of nonconformance and continuous use, and BOA Case No. 95-

37V, wherein the decision and order reference a cement block building used for an automobile repair business.

Secondly, although hearsay is permitted in evidence in Hearing Examiner cases, the attestations are not credible and so have no probative value going to the motor vehicle use and the critical construction dates of the additions because they contain contradictions and inconsistencies, as discussed herein where relevant. Even more, several affidavits in Exhibit 2 going to the motor vehicle storage and repair uses lack notary seals, violating of Md. Code Ann. State Gov't § 18-108.

- Enclosure 10. Affidavit from current tenant Antonio Vallecillo lacks a seal.
- Enclosure 17. Affidavit from Christy Parkent lacks a seal.
- Enclosure 25. Affidavit from Gary Weil lacks a seal.

2. The NCU Plan

The NCU Plan is of no assistance because its representation of the multiple additions to the 30'x50' pitched roof building and the container/trailer is derived from the county's 2014 aerial photograph. Petitioner's obligation was to produce evidence of the extent of the uses on April 13, 2004. Notably, the petition does not include the 2004 county aerial photograph, which is shown as aerial photograph 5 on p. 30.

3. The County Aerial Photographs

a. The Additions

Addition 1 on the northerly side of the pitched roof building was built sometime between 1984 and 1993, based on the aerials from these years (Enclosures 27 and 28). This expansion required SDP approval, as discussed in Part II, and so must be denied pursuant to the strict

construction mandates of the NCU regulations.

Addition 2 on the south side of the pitched roof building first appears in a county aerial photograph in 2006 (Enclosure 30), where its tan roof is readily visible. In 2006, the Property had been rezoned to CE-CLI, which does not permit automotive repair uses. Mr. Vallecillo was the tenant when Addition 6 was built, but his affidavit, even as "updated" after the DPZ hearing, does not reference it.

Addition 3 is a series of small and what appears to be casually built add-ons to the pitched roof building and Addition 2. Some of the add-ons first appear in the 2006 aerial (Enclosure 30) and the CE-CLI district does not permit the use.

b. The Container/Trailer

The first indication of the container/trailer motor repair use is 2007, based on aerial photograph Enclosure 31. Critically, the HCZR have never permitted the permanent use of shipping/storage/cargo containers or trailers as structures.[1] Accordingly, in BA 708-D (decided January 26, 2017) the Board of Appeals on appeal from DPZ's denial of a requested confirmation of nonconformance for a shipping container (NCU 14-004) denied the petition in pertinent part because the HCZR have never permitted the container storage use. For these reasons, the requested confirmation of this use for a motor vehicle repair use must be denied.

B. <u>The Motor Vehicle Storage Use</u>

The Hearing Examiner must deny the requested confirmation of the motor vehicle storage

[1] The County Council is currently considering CB 53-2017 (ZRA 169), which would amend the HCZR to permit sea containers in limited circumstances in certain zoning districts, but not in the CE-CLI district.

use, the HCZR having never authorized "motor vehicle storage" as a principal land use. A motor vehicle storage use is always an accessory land use. This is the 1993 HCZR § 103.3 definition of accessory use.

> A use or structure which is incident to, or subordinate to, and customarily found in connection with a principal use or structure and which is situated on the same lot as the principal use of structure, except that where specifically provided in the applicable sections of these regulations, accessory uses need not be located on the same lot.

The NCU Plan shows the use of Area 4 for motor vehicle storage is a principal land use; it occupies the most land area and is not incident or subordinate to the motor vehicle repair land or residential use. Moreover, reviewing all the aerial photographic Enclosures contained in Exhibit 2, the evidence of record indicates that many vehicles are inoperable or junked, as they remain in the same location for years and that portions of Area 4 is used to store motor vehicle parts. This is not a motor vehicle storage accessory use.

The aerials on which Mr. Donelan relies on as evidence of the existence and uninterrupted continuance motor vehicle storage use are at direct odds with the HCZR § 129.0.A definition of "nonconforming use," which expressly prohibits the casual, temporary or illegal use of land to establish the exiting of a nonconforming use. These aerials instead indicate the casual, temporary and illegal, shifting land area and nature of the land use, which in some years encroached into the adjoining property. Aerial photograph 5 on p. 30 shows the Property in the late spring of 2004. There are vehicles, boats, trailers, and trucks everywhere on the Property and even on adjoining properties. The scale of this use convinces the Hearing Examiner it is only modestly associated with the principal motor vehicle repair use.

II. Nonconforming Uses & Site Development Plan Approvals

The Hearing Examiner's evaluation of this aspect of the petition begins with the then HCZR § 129..A definition of "nonconforming use," which is unchanged in the applicable period.

> [a]ny *lawful existing* use, whether of a structure or a tract of land, which does not conform to the use regulations of the zoning district in which it is located, either on the effective date of these regulations or as a result of any subsequent amendment thereto. A structure that is conforming in use but which does not conform to the height, setback, land coverage, parking, loading space or other bulk requirements of these regulations, shall not be considered nonconforming within the meaning of these regulations. No existing use shall be deemed nonconforming solely because of the existence of nonconforming accessory signs. *The casual, temporary or illegal use of land is insufficient to establish the existence of a nonconforming use.*

Emphasis added. Another directive zoning rule is the Construction and Effective Date language in then HCZR § 101.E.2, which applies to the comprehensive zoning process and so to this appeal.

> Applications for subdivision or site development plan approval are considered pending unless the initial residential plan submittal, as defined in the Subdivision and Land Development Regulations, or the site development plans for all other types of development is technically complete prior to the date the legislation is adopted.

Also implicated is para. 1 of HCZR § 101.E.

> These regulations upon enactment shall be the sole Zoning Regulations of Howard County. The provisions of these regulations are minimum requirements and shall be in addition to *any other requirements of law. Where higher standards are required by other regulations, the higher standards shall apply unless the particular provision of these regulations expressly provides otherwise.*

Emphasis added.

The "other requirements of law" on which DPZ relied - as does the Hearing Examiner - to deny the motor vehicle use and motor vehicle repair use additions are the SLDR SDP provisions. The legislative history of these regulations were detailed in BA 734-D (pgs. 24-26) and are repeated here.

Site Development Plan Requirements in the SLDR – A Brief History

Note: [text in brackets] indicates deletions from existing law; TEXT IN ALL CAPITALS indicates additions to existing law.

1961 - The First Edition of the Subdivision Regulations (March 7, 1961) did not contain SDP requirements.

1974 - The Howard County Council passed Resolution No. 1- 1974 adopting Subdivision and Land Development Regulations for Howard County and replacing the Subdivision Regulations previously adopted by the County Council on March 7, 1961. Article VII, Section 143 application requirements for a site development plan were added to the Subdivision Regulations on March 4, 1974. Section 143 established SDP requirements. Section 144 provides that no building permit shall be issued without satisfying SDP requirements. Section 145 imposes SDP requirements specific to several classes of land use.

1992 - CB 121-1992 substantially revised the SLDR SDP requirements for nonresidential development through § 16.155(a)(1), including applicability to a "change in use," in the definition of "development."

> 16.155. APPLICABILITY.
> (a) A SITE DEVELOPMENT PLAN, APPROVED BY THE DEPARTMENT OF PLANNING AND ZONING REQUIRED PRIOR TO ISSUANCE OF GRADING PERMITS OR BUILDING PERMITS FOR:
> (1) NON-RESIDENTTAL
> NON-RESIDENTIAL DEVELOPMENT INCLUDING COMMERCIAL, INDUSTRIAL, INSTITUTIONAL AND UTILITY DEVELOPMENT PLUS PUBLIC BUILDINGS, SCHOOLS AND OTHER PUBLIC FACILITIES EXCLUDING ROAD, WATER, SEWER OR DRAINAGE IMPROVEMENTS.
>
> "DEVELOPMENT": THE ESTABLISHMENT OF A PRINCIPAL USE ON A SITE; A CHANGE IN A PRINCIPAL USE OF A SITE; OR THE IMPROVEMENT OR ALTERATION OF A SITE BY THE CONSTRUCTION, ENLARGEMENT, OR RELOCATION OF A STRUCTURE; THE PROVISION OF STORM WATER MANAGEMENT OR ROADS; THE GRADING OF EXISTING TOPOGRAPHY; THE CLEARING OR GRUBBING OF EXISTING VEGETATION; OR ANY OTHER NON-FARMING ACTIVITY THAT RESULTS IN A CHANGE IN EXISTING SITE.

1996 - CB 20-1996 amended § 16.155 to alter certain SDP exemptions and make technical SDP changes.

> Sec 16.155. Applicability.
> (a) A site development plan, approved by the department of planning and zoning, is required *prior to issuance of grading permits or building permits* for:
> (1) Nonresidential:

> I. NEW OR EXPANDED [Nonresidential development, including commercial, industrial, institutional and utility development, plus public buildings, schools and other public facilities excluding road, water, sewer or drainage improvements.
> II *CHANGES IN USE*. A SITE DEVELOPMENT PLAN IS REQUIRED UNLESS THE DEPARTMENT OF PLANNING AND ZONING DETERMINES THAT LESS THAN 5,000 SQUARE FEET OF SITE DISTURBANCE AND NO SIGNIFICANT ALTERATION TO ACCESS, PARKING, CIRCULATION, DRAINAGE, LANDSCAPING, STRUCTURES, OR OTHER SITE FEATURES ARE REQUIRED.

Emphasis added.
2003 - CB 45-2003 amended SDP § 16.155, effective October 2, 2003. This is the current language. It deletes the "prior to issuance of grading permits or building permit" language in § 16.155(a) and revises other subsections.

> Section 16.155. Applicability.
> (a) A site development plan, approved by the Department of Planning and Zoning, is required [[prior to issuance of grading permits or building permits]] for:
> (1) Nonresidential:
> (ii) [[A site development plan is required]] ANY ESTABLISHMENT OF A USE OR CHANGE IN USE, unless the Department of Planning and Zoning determines that THE ESTABLISHMENT OR CHANGE IN USE WILL CAUSE less than 5,000 square feet of site disturbance, THAT no significant alteration to access, parking, circulation, drainage, landscaping, structures, or other site features [[are]] IS required, and THAT the proposed use does not qualify as redevelopment that requires stormwater management in accordance with the design manual.

A. <u>The Additions to the Motor Vehicle Repair Use and the Container/Trailer</u>

The 1993, 2006, and 2007 aerial photographs depict the 3 additions to the pitched roof building on its northerly, westerly, and southerly facades. These photographs are shown on pgs. 28, 31, and 32. Mr. Donelan's argument that the pre-1993 SLDR did not require SDP approval for Addition 1, built between 1984 and 1993, is incorrect. The pre-1993 SLDR § 16.155 required an SDP for nonresidential development, "development" meaning the establishment of a 'PRINCIPAL' use on a site, a change in the principal use of the site, the improvement or alteration of a site by the construction, enlargement or relocation of a structure; the clearing or grading of existing vegetation; or any other non-farming activity that results in a change in existing site."

Howard County Council Resolution No. 1-1974 adopted Subdivision and Land Development Regulations to replace the SLDR previously adopted by County Council on March 7, 1961. In March 4, 1974, Article VII, Section 143 application requirements for an SDP were added to the SLDR. The Second Edition (1975) effective February 7, 1976, included SDP requirements in § 16.143. Section 16.145 imposed SDP design requirements for specific classes of development, including commercial development. § 16.145.B. Section 16.108.47.d defined "site development plan" so.

> The plan indicating the location of existing and proposed buildings, structures, paved areas, walkways, vegetative cover, existing and proposed grades, initial landscaping, and screening with a site proposed for development which is to be submitted to the Office of Planning and Zoning for approval prior to the release of building permit on the site.

Section 16.144.4 provides, "no building permit will be approved by the Office of Planning and Zoning until such time as the requirements of these Regulations as related to Site Development Plans have been satisfied."

Lastly, the Hearing Examiner takes notice that then pre-2004 HCZR § 102.D, Violations, Enforcement and Penalties, which also appears in the 2016 regulations as § 102.O.D, imposed an additional obligation on Petitioner and his tenants: "No permit shall be issued for the construction, alteration or use of any structure or lot unless such construction, alteration or use and the related site improvements conform to all requirements of these Regulations." Had Petitioner or his tenants applied for a building permit for the additions, DILP was obliged to inform the applicant it could not issue all necessary permits absent an approved SDP. Whether

the additions at issue would have complied with the applicable building code or could now be permitted retroactively were they confirmed as nonconforming is an open question.

B. The Motor Vehicle Storage Use

The motor vehicle storage use is a principal use, which the HCZR has never permitted, and which as a matter of judicial efficiency, need not be evaluated here. Assuming arguendo, some portion of the use before 1993 was a permissible accessory use within a geographically confined area – a big reach considering Mr. Donelan's belated request to confirm the entire Property as nonconforming for the use - its creeping expansion would have been subject to SDP approval under the applicable provisions, as it involved clearing vegetation or any other non-farming activity that results in a change in existing site.

From the mid-70s onward, the nonresidential development use of the Property, like all nonresidential development, was subject to the SLDR's SDP requirements. When new nonresidential development operates without SDP approval, or when the use is expanded, or changed, subject to certain temporal and de minimus use exceptions, the Property owner or responsible party is subject to a DPZ enforcement action. Therefore in BA 557-D (decided June 26, 2006), the Hearing Examiner concluded DPZ had properly issued the property owners a notice of violation for expanding a nonresidential development without new or amended SDP approval. In CE 11-1102 (decided July 22, 2011), the Hearing Examiner found the responsible party in violation of the SLDR for failure to obtain a "red-line" revision to the approved SDP before expanding a parking lot and adding new lighting.

The 2004 rezoning granted the development no special status as an exception to the SDP approval requirement. The Property lessees, operators of a highly regulated business and the "motor vehicle storage use," did not talk to the county, apparently, before beginning, expanding or changing the nonresidential development uses.

A FINAL NOTE

During the May 18, 2017 hearing and in a long, informal discussion with Petitioner after the conclusion of the proceeding, the Hearing Examiner talked about the 2004 comprehensive rezoning process. At that time, Howard County Code § 16.204(a)(2) did not directly notify property owners of a proposed change in zoning. Public notice was provided through newspaper advertising.

> (2) The county council shall give at least thirty (30) days' notice of the time and place of the beginning of such hearing in at least two (2) newspapers of general circulation in Howard County. Such notice shall advise the general public that the county council is to consider a comprehensive zoning plan for Howard County, or a portion thereof, and shall advise the general public of the location or locations at which the entire text and map or maps zoning plan may be reviewed. No posting of any property in Howard County shall be required with respect to the giving of notice with respect to the commencement of the comprehensive zoning plan process.

The county legislature subsequently amended the county code to require written notice of the date, time, and location of the hearing by first class mail to all owners of property subject to a rezoning proposal, or whose property adjoins property subject to a rezoning proposal, and generally posting of the property with a sign listing the date, time, and location of the hearing.

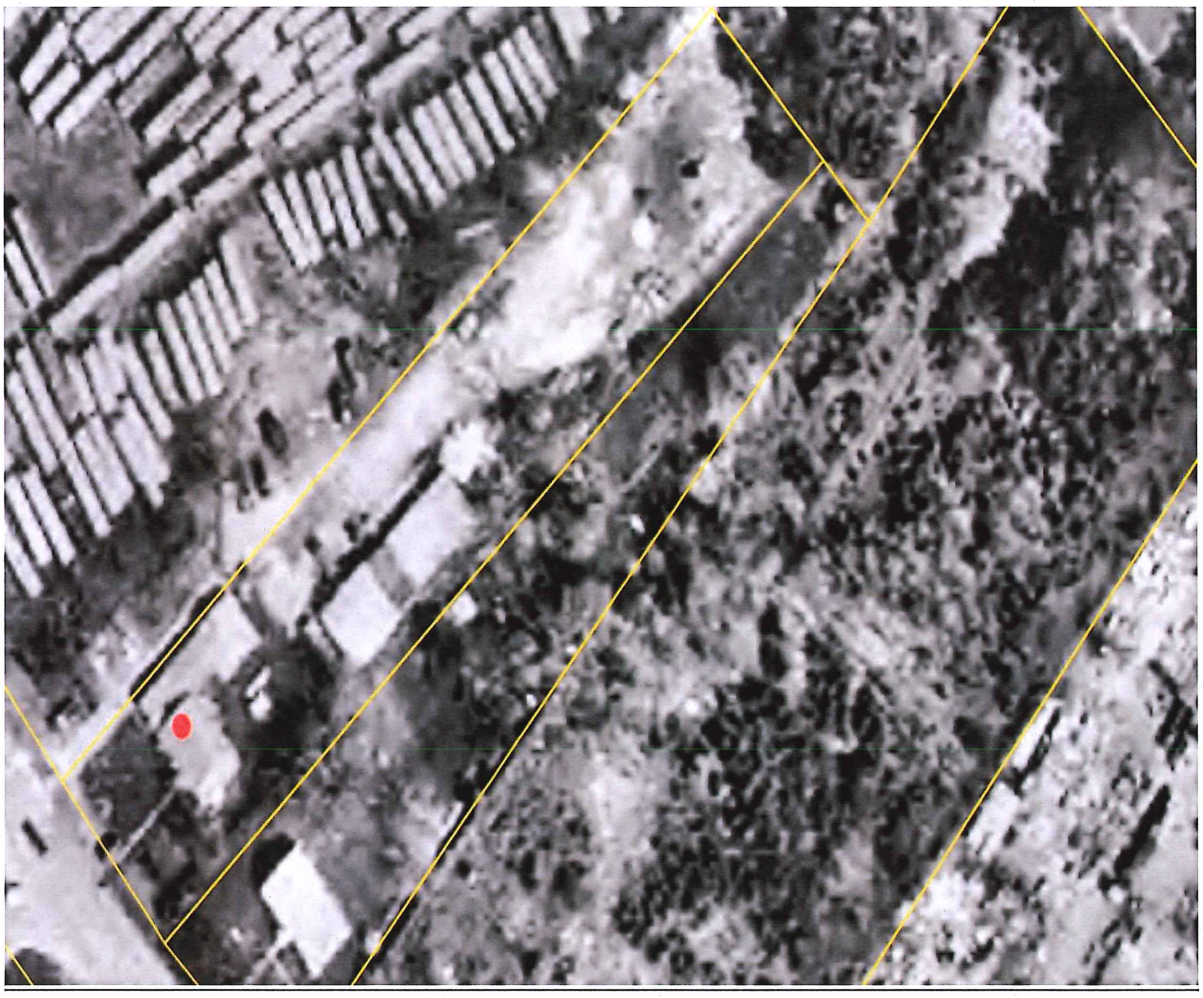
Mr. Flathman and Mr. Donelan believe the use of the Property should not be impeded because Mr. Flathman was never given notice of the 2004 comprehensive zoning hearing. The Hearing Examiner appreciates this position, as reflected in the remand order and this extended

consideration of the petition. Even so, the 2004 comprehensive zoning, with its significant focus on rezoning a large swath of the Route 1 corridor to promote economic redevelopment, affected very many property owners, especially those whose property was rezoned to CE-CLI. Since 2004, several such property owners or tenants, including an immediate neighbor (NCU 16-004), successfully petitioned either DPZ or the Hearing Examiner for confirmation of the nonconforming use of their property. They were able to do so because the uses legally existed before April 13, 2004 and the petitioners produced the business record documentation necessary to substantiate the uses' existence in 2004, and their continued uninterrupted operation.

Then, too, unlike the "law of variances," which freely enables the Hearing Examiner to approve structures for lawful uses encroaching into setbacks retroactively (subject to the petitioner obtaining a building permit), the "law of nonconformances" is an absolute bar restraining the Hearing Examiner from confirming the uses at issue because its central purpose, as addressed in Part I of the Conclusions of Law, is to "'to reduce nonconformance as speedily as possible with due regard to the legitimate interests of all concerned." The reduction of nonconformance in this case was less than speedy, allowing Mr. Flathman and his tenants to enjoy the economic benefits of the land uses for some time without incurring the costs of obtaining SDP and building permit (apparently) approval. Not to be discounted is the motor vehicle repair use confirmed as nonconforming in NCU 16-001.

Still, should Mr. Flathman pursue an appeal of the Hearing Examiner's order to the Board of Appeals, the Hearing Examiner recommends he consult with the Department of Inspections, Licenses and Permits about all necessary building permit requirements for any potentially

confirmed nonconforming additions to the pitched roof motor vehicle repair use building and for the container/trailer, which, if confirmed, is a structure that must comport with the building code, and with DPZ about all SLDR and other regulations applicable to the uses. The Petitioner is on notice that the county forwards copies of Hearing Authority "land use change" decisions and orders to the Maryland State Department of Assessments and Taxation.



Aerial Photograph 3, 1993
7009 Brookdale Drive

Aerial Photograph 4, 1998
7009 Brookdale Drive

Aerial Photograph 5, 2004
7009 Brookdale Drive

Aerial Photograph 6, 2006
7009 Brookdale Drive

Aerial Photograph 7, 2007
7009 Brookdale Drive

Aerial Photograph 8, 2011
7009 Brookdale Drive

ORDER

Based upon the foregoing, it is this **19th day of July 2017**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition on appeal of Robert H. Flathman for confirmation of a nonconforming use for a motor vehicle storage use, all additions to the 30'x50' pitched roof building confirmed as a nonconforming motor vehicle repair use in NCU 16-001, and for the use of the trailer/container as part of the confirmed motor vehicle repair use, is **DENIED.**

Michele L. LeFaivre

Hearing Examiner

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.