

IN THE MATTER OF : BEFORE THE
NAZARIO FAMILY, LLC : HOWARD COUNTY
Appellant : BOARD OF APPEALS
: HEARING EXAMINER
: BA 761-D, RE: NCU 18-005

DECISION AND ORDER

On April 9, 2019, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a de novo hearing on the appeal of Nazario Family, LLC (Appellant) from the Department of Planning and Zoning Director's September 28, 2018 decision and Order in Non-Conforming Case NCU 18-005, wherein DPZ denied confirmation of a nonconforming use for a motor vehicle sales and storage use in certain areas at 9595 Lynn Bluff Court (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). The Hearing Examiner heard the petition/appeal de novo pursuant to Hearing Examiner Rule 10.2(a). The burden of proof is one of preponderance of the evidence and is on Appellant to show, by competent, material, and substantial evidence, entitlement to the relief requested and compliance with all prescribed standards and requirements of the applicable Zoning Regulations.

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.

Thomas Coale, Esq., represented the Appellant. No one appeared in opposition to 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 petition decision and order.

Petitioner introduced into evidence the exhibits as follows.

- A. Site Development Plan 86-54
- B. Aerial photos on DPZ website from 1970 -2017
- C. 1993 Subdivision and Land Development Regulations § 16.155
- D. Current Subdivision and Land Development Regulations § 16.155

FINDINGS OF FACT

Based upon the evidence of record, including DPZ's decision and order, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the 6th Election District at the terminus of Lynn Bluff Court about 1,500 feet west of Washington Boulevard. It is identified as Tax Map 0047, Grid 0023, Parcel 910, and known as 9595 Lynn Bluff Court (the Property).

2. Property Description. The Property is improved with a 1,200sf one-story sales trailer, a 2,000sf one-story maintenance building, and three metal canopies, and is currently used for motor vehicle sales and storage.

3. Zoning District and Applicable Howard County Zoning Regulations

➤ *Zoning District History*

1954. The Property was zone M-1 in the 1977 Comprehensive Zoning Plan.

2004. The Property was rezoned to CE-CLI (Corridor Employment-Continuing Light Industrial Overlay District) during the 2004 Comprehensive Zoning Plan.

➤ *Zoning Regulations History*

1954-1993. HCZR § 7.A.5 of the 1954 for the M-1 Zoning District permitted "[a]utomobile, truck, or farm equipment storage, sales, repairs and services, provided vehicles shall not be dismantled or wrecked on

the premises." In 1960, HCZR § 7.A.5 was amended to add the word "construction" after the word "truck" and before the word "or" so as to read as follows; 5. Automobile, truck, construction or farm equipment storage, sales, repairs and services, provided vehicles shall not be dismantled or wrecked on the premises. Also permitted as a matter of right in the M-1 district through the 1977 Comprehensive Zoning Plan under HCZR § 116.A.16 were "[m]otor vehicle construction equipment and farm equipment sales, repairs and service."

4. The Department of Planning and Zoning (DPZ) in its September 28, 2018 NCU 18-005 decision and order granted the petition request for confirmation of a nonconforming use for motor vehicle sale and storage for the area approved for display, marketing, and rental of construction equipment where "display, marketing, and rental of construction equipment" was approved on Site Development Plans SDP-85-54 and SDP-88-194 and denied the uses on the remainder of the Property (the "restabilized grass area").

5. The Requested Confirmation of Nonconforming Use. Petitioner Appellant is seeking confirmation of a nonconforming use for motor vehicle storage and sales on the area shown in yellow on the Nonconforming Use Plan (NCU Plan) and particularly for the gravel/dirt storage area in the cross-hatched and zigzag marked areas (the re-stabilized grass area), the latter area DPZ concluded was not approved for any use through SDP-85-54 and SDP-88-194. According to the original nonconforming use petition, the use changed from equipment rental to auto sales and storage around 1994.

6. Engineer Dan Sweeney testified to the Board of Appeals granting in BA 87-039V a variance to reduce the required 150-foot use setback from the R-A-15-zoned southern property to 65 feet. The grass area on the western portion of the property was graded into a plateau through SDP-86-54, as he testified. He also testified it was always the property owner's intention to use the western area for display, marketing, and rental of construction property.

7. Mr. Sweeney introduced into evidence aerial photographs from the Howard County GIS system admitted as Exhibit B for the years 1970-2017, showing the change in use to motor vehicle sales and storage as well as the changed use area. The use and use areas for which confirmation of nonconformance are clearly shown on the 2002 aerials.

CONCLUSIONS OF LAW

I. A Preliminary Matter – The Subdivision and Land Development Regulations' SDP Requirements Are Not Applicable to a Petition For Confirmation of a Nonconforming Use

This appeal petition for confirmation of a nonconforming use and use area is a companion case to BA 765-D (Bohorquez); the BA 765-D Part I Conclusions of Law concerning the operative meaning of the term "lawful existing use" in the HCZR § 129.0.A definition of "nonconforming use" are incorporated here by reference. To summarize, the Hearing Examiner in BA 765-D concluded as a matter of law that the phrase "lawful existing use" within the HCZR § 129.0.A definition of "Nonconforming Use" means "a use that conformed to an HCZR use regulation for the zone in which it is located or to a special regulation on the date it became nonconforming to the use provisions of the HCZR." (Pgs. 9-12.)

HCZR § 129.0.A. [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.)

Consequently, although a petitioner granted nonconforming use status on the subject property may be subject to certain development/subdivision plan or other requirements related to the

use, including the need for an SDP, a redline SDP, or an SDP waiver, the need for any such approvals is not germane to a nonconformance confirmation determination. HCZR § 129.0.D and the applicable zoning district use or special zoning regulations at the date of alleged nonconformance are the exclusive standards to be considered in any petition for confirmation of nonconforming use.

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

HCZR § 129.0.D codifies the burden on petitioners 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).

1. The factual existence of a nonconforming use may be confirmed by the Director of Planning and Zoning, or the Director's Designee, upon review of a petition filed by the property owner. The petition shall contain the following:

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

The conformation of nonconforming use petition NCUP shows a yellow marked up area indicating the physical limits of the motor vehicles and storage use and area and aerial photos on the DPZ website from 1970 to 2017 showing motor vehicles on the property for sale and being stored prior to April 13, 2004.

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

The petition states the motor vehicle sales and storage use 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 B contains aerial photos from the DPZ website for the years 1970 -2017. The motor vehicle storage use area shown as the yellow cross-hatched and zigzag marked area (the restabilized grass area) in the western portion of the area is clearly shown in the 2002 aerials.

ORDER

Based upon the foregoing, it is this **20th day of May 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Nazario Family, LLC for confirmation of a motor vehicle sales and storage nonconforming use in the yellow areas shown on the Nonconforming Use Plan is **GRANTED**.

Michele L. LeFavre



Hearing Examiner

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.

In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.