

IN THE MATTER OF : BEFORE THE
DANIEL BOHORQUEZ : HOWARD COUNTY
Appellant : BOARD OF APPEALS
: HEARING EXAMINER
: BA 765-D, RE: NCU 18-006

DECISION AND ORDER

On April 15, 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 Daniel Bohorquez (Appellant) from the Department of Planning and Zoning (DPZ) Director's December 6, 2018 Decision and Order in Non-Conforming Case NCU 18-006, wherein DPZ denied confirmation of a nonconforming use for a motor vehicle sales, motor vehicle parts and tire store at 9921 Washington Boulevard (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 case 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.

Appellant 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 Meachum, 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.

Appellant introduced into evidence the exhibits as follows.

1. Used Vehicle Licenses 2003-2019;
2. Howard County Trader's Licenses 2004-2019;
3. Two lists of customers who have purchased motor vehicles from the business;
4. Photographs of tires and installation equipment;
5. Affidavits of customers and wholesale tire dealers regarding pre and post 2004 business activity;
6. Invoices of sales and service of tires;
7. Craigslist documents evidencing sales of tires and auto parts;
8. Aerial photos on DPZ website from 2003 to date showing cars for sale on property;
9. Used Vehicle Licenses 2000-2004;
10. Howard County Trader's Licenses 2000-2004;
11. Location Survey 2000 (wood frame addition encroachment has been removed);
12. Location Survey dated 7/17/18;
13. Excerpt of appraisal for purposes of purchase by present owners in 2002 describing then use of property;
14. List of customers who have purchased motor vehicles (see #3 above);
15. Photographs of tires and installation equipment (see #4 above);
16. Affidavits of customers and wholesale tire dealers on sales of tires and auto parts (see #5 above);
17. Another list of motor vehicle customers (see #3 above);
18. Invoices showing sales and service of tires (see #6 above);
19. Aerial photo on DPZ website for 2003 showing motor vehicles on the property for sale (see #8 above).

FINDINGS OF FACT

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

1. Property Identification. The subject property is located in the 6th Election District on Washington Boulevard, about 100 feet southeast of Hill Street. It is identified as Tax Map 0050,

Grid 0004, Parcel 262 and known as 9921 Washington Boulevard (the Property).

2. Property Description. The Property is improved with a 2,326sf, two-story office sales building, a 500sf maintenance shed, a 100sf storage shed/trailer, and outdoor vehicle storage areas. The site is currently used for a motor vehicle sales, parts and tires store.

3. Zoning District and Applicable Howard County Zoning Regulations

➤ *Zoning District History*

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

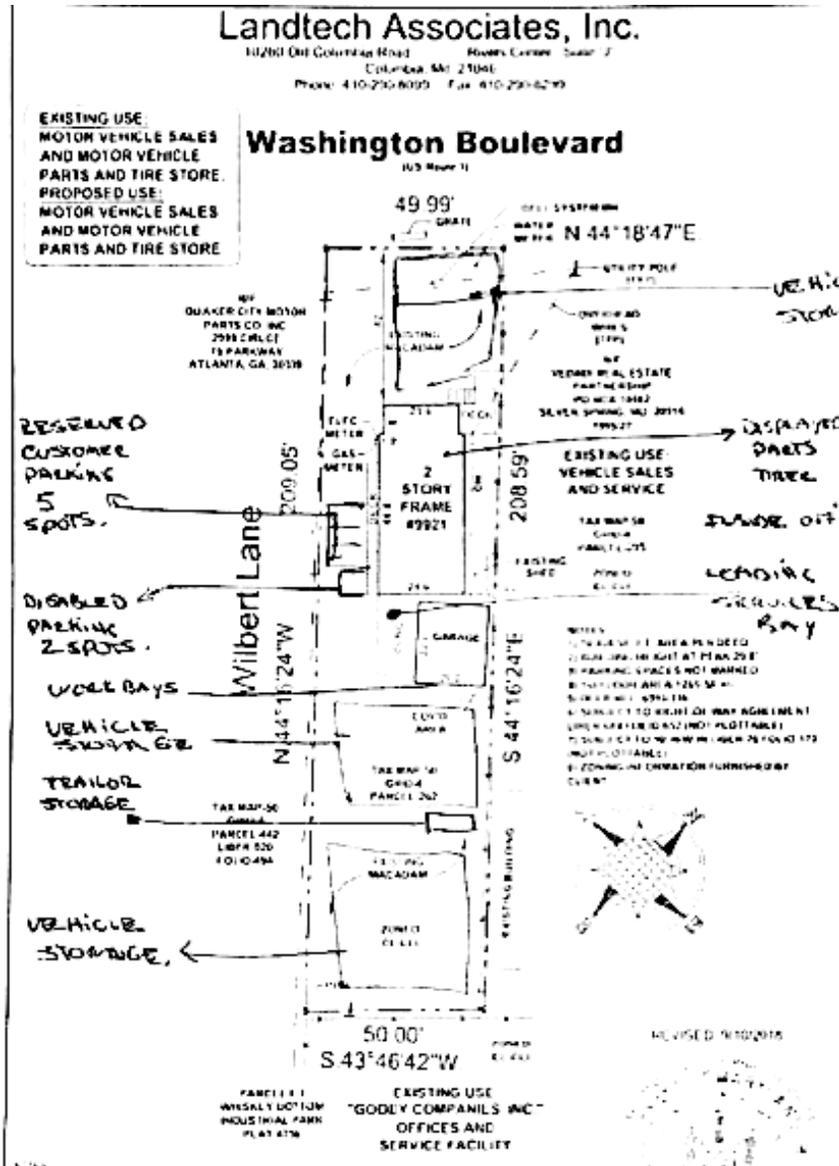
1985. The Property was rezoned to B-2 (Business: General) during the 1985 Comprehensive Zoning Plan.

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. The 1954 HCZR § 7.A.5 for the M-1 and B-2 Zoning District permitted "[automobile, 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 and B-2 districts 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 Nonconforming Use Confirmation Request and the NCU Plan. Appellant is seeking confirmation of a nonconforming use (NCU) for a "motor vehicle sales, motor vehicle parts and tire store use." According to the original nonconforming use petition submitted during the hearing, the date the use allegedly became nonconforming is April 13, 2004. The NCU Plan shows the entire Property as nonconforming. The alleged nonconforming use includes a 2,326sf, two-story office sales building, a 500sf maintenance shed, a 100sf storage shed/trailer, and outdoor vehicle storage areas.



The Nonconforming Use Plan

5. According to aerial photographs from the Howard County GIS system admitted as Exhibit 8, car sales have been conducted on the site from 2003 to the date of the petition.
6. Appellant introduced into evidence multiple affidavits of customers and wholesale tire

dealers regarding pre- and post-2004 business activity; invoices of sales and service of tires; Craigslist documents evidencing sales of tires and auto parts; used Vehicle Licenses 2000-2004; Howard County Trader's Licenses 2000-2004; excerpts of appraisals for purposes of purchase by present owners in 2002 describing then use of property; a list of customers who purchased motor vehicles; photographs of tires and installation equipment (affidavits of customers and wholesale tire dealers on sales of tires and auto parts; a list of motor vehicle customers; invoices showing sales and service of tires and; an aerial photo on DPZ website for 2003 showing motor vehicles on the property for sale.

CONCLUSIONS OF LAW

This case recalls the admonition that an appellate court should use great caution in exercising its discretion to comment gratuitously on issues beyond those necessary to be decided.

Judge Harrell,
Garner v. Archers Glen, 405 Md. App. 43, 949 A.2d, 639 (2008)

I. Background Legal Issues - Wherein the Hearing Examiner Revisits & Clarifies the Status of a Nonconforming Use as a "Lawful Existing Use" per HCZR § 129.0.A

A. DPZ's New Legal Rationale for Denying Petitions for Confirmation of an NCU in Context

DPZ in five relatively recent confirmation of nonconforming use decision and orders appealed to the Hearing Examiner denied the petitions based on its new position that to be a "lawful existing use" per the definition of "nonconforming use" on the "date the use became nonconforming to the use provisions of the Zoning Regulations" per HCZR § 129.0.D.2, the use

would have had to have been legally established through an approved Site Development Plan.¹

This is 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.)

In NCU 15-002 (Estrango), DPZ in its July 30, 2015 decision and order denied in pertinent part a motor vehicle repair and towing use because the petitioner had not obtained SDP approval prior to the date the use became nonconforming, the April 13, 2004 effective date of the 2004 Comprehensive Zoning Plan, when the subject property was rezoned from M-1 to CE-CLI. On appeal as BA 720-D, the Hearing Examiner in a March 3, 2016 decision and order denied the requested confirmation of nonconforming use for parking and storage of vehicles and equipment associated with an auto repair and towing company because the preponderance of evidence indicated that use was not operating on the Property on April 13, 2004. BA 720-D did not address DPZ's rationale that the use was not "legally established" for want of an approved SDP.

In NCU 16-006 (Felicio), DPZ in its October 12, 2016 decision and order denied confirmation of a nonconforming use for a motor vehicle towing and storage facility because an SDP was required for "new or expanded nonresidential development and for any establishment of a use

¹Heeding Judge Harrel's counsel, the Hearing Examiner declines here to comment in dicta on DPZ's failure to provide a reasoned explanation for its unexplained departure from 60+ years of nonconforming use confirmation zoning policy and to construe its new interpretation of HCZR § 129.0 in line with HCZR § 103.0 and settled principles of statutory construction.

or change in use" and there was no approved SDP as of April 13, 2004, the effective date of the 2004 Comprehensive Zoning Plan, when the subject property was rezoned from M-2 to CE-CLI. On appeal as BA 734-D, the Hearing Examiner in a July 19, 2017 decision and order denied the requested confirmation of nonconforming use for motor vehicle towing and storage where the preponderance of evidence indicated the use did not exist on April 13, 2004.

In Part II of the BA 734-D decision and order, the Hearing Examiner in dicta considered counsel's argument that no SDP was required for the use on the date of the alleged nonconformance. Dicta - orbiter dicta - are decision-maker comments not adopted as a final determination. Matters discussed in dicta do not bind the decision-maker in subsequent decisions. Because the Hearing Examiner was also hearing a parallel appeal (BA 737-D) turning on the appellant's arguments about DPZ's denial of confirmation for a nonconforming use for want of an approved SDP, as discussed below, the decision and order in dicta considered Mr. Felicio's arguments about DPZ's interpretation of SDP approval requirements as they pertain to the law of nonconformance.

In that dicta, the Hearing Examiner theoretically considered that for an alleged nonconforming use to "lawfully exist" – what DPZ referred to as being "legally established" – an approved SDP might be required. These comments, as dicta, did not definitively resolve or operate as a final determination. The Hearing Examiner's consideration of the need for an approved SDP as bearing on what constitutes a "lawful existing use," did not factor into the denial decision. These comments did not become "Hearing Examiner precedent."

In NCU 16-001 (Flathman), DPZ in its November 16, 2016 decision and order denied the petitioner's confirmation of a nonconforming use petition for a motor vehicle repair/storage use in additional buildings/areas because the use was not legally established, there being no approved SDP. On appeal as BA 737-D, the Hearing Examiner issued her decision and order simultaneously with BA 734-D. The Hearing Examiner denied 737-D in pertinent part because the preponderance of evidence demonstrated the motor vehicle storage use, and certain additions did not exist at the date of alleged nonconformance. In dicta, the Hearing Examiner commented on DPZ's reading of "lawful existing" nonconforming use as mandating SDP approval prior to the alleged date of nonconformance.

The fifth DPZ denial decision is NCU 18-005 (Nazario Family, LLC). DPZ in its September 28, 2018 decision and order denied in pertinent part an area for motor vehicle storage and sales use because this use area was not legally established, there being no approved redline SDP or DPZ-approved exemption as of the date of alleged nonconformance. On appeal as BA 761-D, the Hearing Examiner issued her decision and order simultaneously with this BA 765-D decision. The BA 761-D decision and order confirmed a nonconforming use for motor vehicle sales and storage and incorporated by reference the Hearing Examiner's clarification of the term "lawful existing use" set forth below in this decision.

The instant appeal, BA 756-D, is taken from DPZ's NCU 18-006 decision and order where DPZ found that the requested confirmation of nonconforming use for motor vehicle sales, motor vehicle parts and tire store, was in operation as of April 13, 2004, but ultimately denied the petition absent an approved SDP on that date based on NCU 18-006 Finding of Fact No. 9,

wherein DPZ paraphrases language from BA 737-D.

In 737-D, a similar nonconforming use confirmation request, the Hearing Examiner made the following finding in denying the Petition. 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 establishes the requirements for an SDP. 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.

As a first matter, DPZ misidentifies the Hearing Examiner's comments as "findings of fact."

The Findings of Fact in BA 737-D appear on pages 8-12. The "quoted" language is dicta set forth in a wholly separate section in Part II of the Conclusions of Law (pgs. 21-22) as part of a recitation of historical amendments/revisions to the SDP requirements contained in Howard County Code § 16.100, et seq., the Subdivision and Land Development Regulations. Although perhaps inartfully worded, any Part II comment on the need for an approved SDP or the inclusion of the survey of the Subdivision and Land Development Regulations carried no evidentiary weight in the decision and order to deny the requested confirmation of nonconforming use, as shown on the aerial photos on pgs. 28-33 of the decision. The intent was to explain to the Appellant how he compromised any potential claim to nonconformance by not consulting with county officials about compliance with certain applicable laws and regulations before erecting the structures at issue.

B. What is a Lawful Existing Nonconforming Use?

For clarity, the Hearing Examiner sets forth here the proper statutory construction of the term "lawful existing use." HCZR § 129.0.A defines a nonconforming use as "[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." (Emphasis added.) By the plain unambiguous language of this sentence, a lawful existing use is 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. A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998) (citing 1 Robert M. Anderson, *American Law of Zoning* § 6.01 (Kenneth H. Young ed., 4th ed. 1996.))

The HCZR alone controls whether a use was lawful at the alleged date of nonconformance. Although an appellant or petitioner successful in obtaining confirmed nonconforming use status may be subject to certain development/subdivision plan approvals related to the use, "[z]oning and subdivision are normally separate and distinct regulatory entities." *Remes v. Montgomery County*, 387 Md. 52, 64 n. 8, 874 A.2d 470 (2005) (citing *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 352 Md. 645, 649 n. 4, 724 A.2d 34 (1999)). It is well-settled that zoning regulations and subdivision controls regulate different aspects of the land use regulatory continuum. *Peoples Counsel for Baltimore County v. Surina*, 400 Md. 662, 929 A.2d 899, 914 (20017) (citing and quoting *Coffey v. Maryland-Nat'l Capital Park & Planning Comm'n*, 293 Md. 24, 30, 441 A.2d 1041, 1044 (1982) (zoning and subdivision planning "represent separate municipal functions and neither is a mere rubber-stamp for the other."))

That a lawful nonconforming use must obtain other governmental approvals is of no matter in the factual zoning determination of nonconforming use status. *See Trip Associates v. Mayor and City Council of Baltimore*, 392 Md. 563, 898 A.2d 449, 458 (2006) (a valid nonconforming use will not be forfeited by the failure of the business owner to secure a license to operate his business) citing and quoting *Mayor and City Council v. Dembo*, 123 Md.App. 527, 541, 719 A.2d 1007, 1015 (1998) (citing and quoting *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d at 6, 959 P.2d at 1029-1030 to conclude nonconforming use holder Dembo did not abandon its nonconforming use status by its failure to apply for a license but rather retained vested nonconforming use status to operate a business with adult entertainment even without a license, that Dembo had the right to apply for a license to operate an adult entertainment business, and that the City had the right to pursue any available enforcement remedies against Dembo if it declines to apply for a license or pay the fees therefore.)

Moreover, as a practical matter, and in light of *Dembo*, DPZ's reading of the term "lawful existing use" as requiring SDP approval for a use to be confirmed as lawfully existing on the asserted date of nonconformance has the impermissible result of transforming a zoning petition hearing into a de facto code enforcement action.

Lastly, the Hearing Examiner here recognizes that while the petition used in DPZ-denied confirmation of nonconforming use decisional appeals to the Hearing Examiner is the administrative appeal form, the hearing is conducted as a wholly de novo proceeding. In such proceedings, the Hearing Examiner owes no deference to DPZ's decision or its interpretation of the HCZR. "Appellants" conundrum in these appeals is that the form requires the appellant to

assert errors of law or fact; in these appeals, DPZ's legal error about the application of the term "lawfully existing use."²

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 includes the NCUP and aerial photos on DPZ website from 2003 to 2017 showing motor vehicles on the property for sale.

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, motor vehicle parts and tire store use became nonconforming on April 13, 2004, the effective date of the 2004 Comprehensive Zoning, through which the Property was rezoned to CE-CLI.

² This same "hearing posture"/petition dilemma applies to appeals from a DPZ administrative adjustment decision.

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.

Besides the aerial photographs, Appellant introduced into evidence multiple affidavits of customers and wholesale tire dealers regarding pre- and post-2004 business activity; invoices of sales and service of tires; Craigslist documents evidencing sales of tires and auto parts; used Vehicle Licenses 2000-2004; Howard County Trader's Licenses 2000-2004; excerpts of appraisals for purposes of purchase by present owners in 2002 describing then use of property; a list of customers who purchased motor vehicles; photographs of tires and installation equipment (affidavits of customers and wholesale tire dealers on sales of tires and auto parts; a list of motor vehicle customers; invoices showing sales and service and; an aerial photo on DPZ's website for 2003 showing motor vehicles on the property for sale.

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 Daniel Bohorquez for confirmation of a motor vehicle sales, motor vehicle parts and tire store nonconforming use on the entire Property 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.