

IN THE MATTER OF	:	BEFORE THE
Xing Du Dong	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	Case No. BA-19-040N&V

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DECISION AND ORDER

On October 6, 2020, the undersigned, serving as a Howard County Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of **Xing Du Dong**, Petitioner, for (1) Confirmation and Enlargement of a Nonconforming Use as liquor store pursuant to Section 129.0.D. of the Howard County Zoning Regulations (the "Zoning Regulations"); and (2) a variance to reduce the reduce the 50-foot setback from a public right-of-way to 19 feet for an addition to the existing building under Section 130.0.B.2 of the Zoning Regulations.

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

The Petitioner was not represented by counsel. Xing Du Dong, Shayne Lee and Darren Dong appeared in support of the petition. No one appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. **Subject Property.**

The subject property, known as 6641 Washington Blvd; Tax Map 38, Parcel 873, is in the CE-CLI (Corridor Employment – Continuing Light Industrial Overlay) Zoning District, on that land

belonging to the Petitioner containing about 20,570 SF. The Property has a rectangular shape and contains a 2,784 square foot two-story building that contains a 1,536 square foot liquor store on the first floor and 16 parking spaces. The second floor is used for the office for Mr. Dong. The liquor store is set back 19 feet from Loudon Avenue, 46 feet from Washington Boulevard, 57.6 feet from the property to the east and approximately 77 feet from the property to the south.

2. Vicinal Properties.

Vicinal properties are as follows. To the north of the Property is a parcel zoned R-MH (Residential Mobile Home) improved by a mobile home park. To the south is a CE-CLI zoned parcel used for a church. To the east is a CE-CLI zoned parcel used for a warehouse. To the west is a CE-CLI zoned parcel which is improved with a Retail/Motor Vehicle Repair facility.

3. Roads.

Washington Blvd. has four travel lanes and a turn lane within an 80-foot wide right-of-way. The speed limit is 55 miles per hour. According to Maryland Department of Transportation data, the traffic volume on Washington Blvd. in 2019 was 38,420 AADT (Annual Average Daily Traffic).

4. Water and Sewer Service.

The Property is within the Planned Service Area for Water and Sewer. The site is served by public water and sewer facilities.

5. General Plan.

The Property is in a designated Growth and Revitalization area on the Designated Place Types Map of the PlanHoward 2030 General Plan. Washington Blvd. is an Intermediate Arterial.

6. Prior Zoning History.

There is no record of a Board of Appeals, Zoning Board, or Department of Planning and Zoning case for the Property.

7. Requests.

a. Confirmation of Nonconforming Use. The Property is the site of a Class A alcoholic beverage licensed establishment which allows the sale of package goods for offsite consumption (“liquor store”). The Property has been used as a liquor store for many years, from at least as early as 2002. The use became nonconforming on April 13, 2004 when the property was rezoned from B-2 (Business: General), which permitted liquor stores as a matter of right, to CE-CLI, which does not permit liquor stores. Petitioner seeks confirmation that the current use is a legal nonconforming use.

b. Enlargement/Extension of Nonconforming Use. The Petitioner wishes to enlarge the liquor store by constructing an addition which will be used solely as storage for the liquor store.

c. Variance. The proposed addition encroaches into the 50-foot setback from Loudon Ave. The Petitioner requests a variance to reduce the setback to 19 feet for the proposed addition.

8. Exhibits. Accepted as Petitioner’s **Exhibit 1** was a slide show showing the presentation submitted by the Petitioner and presented by Shayne Lee.

9. Testimony.

a. Shayne Lee. Mr. Shayne Lee testified that the addition is to be used for storage for the liquor store use. On **Exhibit 1**, the current structure is blue and the proposed addition is in brown and tan. The new addition would be one-story. The store itself has been in

existence since at least 2000, but Mr. Dong became the owner in 2013. Mr. Lee stated that there is plenty of parking behind and beside the building, even with the new addition. The proposal is for a building with a garage door so that access is efficient off of Loudon Ave. The roof will be shingle, and the side of the building will be vinyl siding.

Mr. Lee explained that the area behind the proposed addition is currently empty space and that the parking for the liquor store will remain on the north and east side and front of the building. Mr. Lee explained that the addition will be attached to the existing walk-in cooler but that the addition will not be able to be directly accessed from the walk-in cooler or the original structure. One would have to walk out the back door of the current store to enter the separate door to the addition.

b. Darren Dong for Mr. Dong, Petitioner. Darren Dong, Mr. Dong's son, testified as translator for his father. When asked if the addition can be located to a place on the lot so that the setback will not need to be encroached upon, Mr. Dong responded that if the building is pushed back to 50 feet from Loudon Avenue, it would cover the parking spaces that are along the north/east border of the lot. He stated that he could move the parking to another location on the lot, but that moving the location of the addition would not be as conveniently located for easy access to the garage door which will be in the addition. Mr. Dong testified that the second story of the existing structure is not currently occupied as a residence – it is used for office space for Mr. Dong. DN TNG, LLC, an LLC owned by Mr. Dong, is the title owner of the property.

10. Evidence in the Record.

The building on the site has been licensed as a Class A package goods store since as early as 2002. Mr. Dong purchased the Property in 2013 and the license was transferred to the current

licensee in or around that time. The current licensee holds a Class A-1 (7-day) Beer, Wine and Liquor, Off Sale license in the name of Jae Kon Yoo on behalf of DNT Enterprise, Inc. t/a Harwood Convenience.

The Property has been used as a liquor store from at least as early as 2002. The use became nonconforming on April 13, 2004 when the property was rezoned from B-2 (Business: General), which permitted liquor stores as a matter of right, to CE-CLI, which does not permit liquor stores.

Petitioner provided a February 11, 2002 Decision and Order of the Board of License Commissioners for Howard County granting a transfer of Class A-1 Beer, Wine, and Liquor 7 day off-sale license for the Property and a January 24, 2002 memo from the Director of the Department of Planning and Zoning to the Administrator of the Howard County Liquor Board confirming that the Property was appropriately located in the B-2 zoning district. The Howard County Alcoholic Beverage Hearing Board approved a license transfer to the Petitioner on November 12, 2013. The Petitioner submitted a 2019 Howard County Alcoholic Beverage License, which must be renewed annually, as evidence of continued uninterrupted use as a liquor store.

CONCLUSIONS OF LAW

1. Evaluation of petition according to Section 129.0.D of the Zoning Regulations (Confirmation of Nonconforming Uses).

A nonconforming use is any 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 those regulations or as a result of any subsequent amendment thereto. Such use may be confirmed if it is shown by a preponderance of evidence that the use existed at

the time of the zoning change and has continued uninterrupted since that date.

In this case, the Petitioner has presented uncontroverted evidence in the form of testimony and documents that the Property, from at least as early as April 2002 has been used continuously as the location of a Class A alcoholic beverage licensed establishment (a liquor store).

Consequently, I conclude that the use depicted in the petition and nonconforming use plan submitted by the Petitioner is nonconforming in accordance with section 129.0.D.

2. Section 129.0.E (Extension, Enlargement or Alteration of a Nonconforming Use).

The Hearing Authority may authorize the extension or enlargement of a nonconforming use or the alteration of outdoor use areas or of a structure containing a nonconforming use, with or without conditions, provided:

- a. That any changes or additions to the activities taking place in connection with the nonconforming use will not change the use in any substantial way;
- b. That an enlargement may not exceed 100% of the gross floor area of structures or 100% of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming;
- c. That the boundaries of a nonconforming use may be enlarged only to provide additional parking area;
- d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located;
- e. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

Based upon the foregoing Findings of Fact, I conclude as follows:

- a. Section 129.0.E.1.a. That any changes or additions to the activities taking place regarding the nonconforming use will not change the use in any substantial way.**

The proposed enlargement is for storage of the type of merchandise currently sold in the liquor store and the additional floor area does not exceed the 100% maximum expansion allowed in criterion #2.

Therefore, I find that the proposed changes will not alter the existing use in a substantial way.

- b. Section 129.0.E.1.b. That an enlargement may not exceed 100% of the gross floor area of structures or 100% of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming.**

The plan indicates that the existing floor area of the liquor store is 1,536 square feet and the proposed enlargement is 1,500 square feet, which equates to 97.6%.

Thus, this criterion is fulfilled.

- c. Section 129.0.E.1.c. That the boundaries of a nonconforming use may be enlarged only to provide additional parking area.**

This Petitioner requested original nonconforming use confirmation of the entire Property.

Therefore, this criterion does not apply.

- d. Section 129.0.E.1.d. That an enlargement would not cause a violation of the bulk regulations for the zoning district in which the property is located.**

This Petitioner requests original nonconforming use confirmation of the entire Property including expansion and enlargement of the structures on the site which encroach into the setback from Loudon Avenue. Petitioner submitted a request for variances to address those setback encroachments. The Petitioner requests a variance to reduce the setback to 19 feet for the proposed addition.

Because the variances will not be granted, this criterion is not fulfilled. However, if the addition is properly located so that the setback from Loudon Ave is not breached, this criterion would be fulfilled.

e. Section 129.0.E.1.d. That the extension, enlargement or structural alteration would not cause an adverse effect on vicinal properties.

The proposed enlargement is for storage of the type of merchandise currently sold in the existing liquor store. No additional retail sales area is proposed. The properties to the west, east, and south are zoned CE and contain non-residential uses. A mobile home park is located to the north and is separated from the Property by Washington Blvd. Therefore, the enlargement is unlikely to cause an adverse effect on vicinal properties

Therefore, I find that the enlargement is unlikely to have adverse effect on vicinal properties.

3. Evaluation of petition according to Section 130.0.B.2.a. of the Zoning Regulations (general criteria for evaluating variances).

For a variance to be granted, the hearing authority must find:

a. That there are unique physical conditions, including irregularity, narrowness or shallowness of lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical conditions, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

The Property has a rectangular shape and is 125 feet wide by 164 feet deep. The Petition does not note any unique physical conditions associated with the Property. The Property is not constrained by irregular topography or any environmental features, such as streams or floodplains. There is no setback requirement from the properties to the east and south, since they are zoned CE-CLI; consequently, there is enough area to construct a 1,500 square foot addition elsewhere on the property and comply with the 50-foot setback required from Loudon Ave.

Therefore, no unique physical conditions, practical difficulties or unnecessary hardships exist that prohibit reasonable use of the land or prevent compliance with the 50-foot setback.

These criteria are not met and for this reason the variance cannot be granted.

- b. That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of the adjacent property; and will not be detrimental to the public welfare.**

The properties to the west, east, and south are zoned CE and contain non-residential uses. A mobile home park is located to the north and is separated from the Property by Washington Blvd. The commercial buildings to the west are setback approximately 20 feet from Loudon as are several of the homes in the R-12 zoning district.

Therefore, the variance is unlikely to substantially impair the use of adjacent properties or be detrimental to the public welfare.

- c. That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.**

There are no practical difficulties or hardships that prevent compliance with the 50-foot setback.

Therefore criterion 130.0.B.2.a.(3) does not apply.

- d. That within the intent and purpose of these regulations, the variance, if granted, is the minimum variance necessary to afford relief.**

There are no unique physical conditions, practical difficulties or unnecessary hardships that prohibit reasonable use of the land or prevent compliance with the 50-foot setback.

Thus, this provision is not applicable.

ORDER

Based upon the foregoing, it is this **19th day of October 2020**, by the Howard County Hearing Examiner, **ORDERED**:

That the Petition of **Xing Du Dong**, for:

1. Confirmation of a Nonconforming Use as a liquor store pursuant to Section 129.0.D. of the Zoning Regulations shall be and is hereby **GRANTED**;
2. Enlargement/Extension of a Nonconforming Liquor Store to add an addition filed pursuant to Section 129.0.E of the Howard County Zoning Regulations is hereby **DENIED (subject to the first provision below)**; and
3. A variance to reduce the reduce the 50-foot setback from a public right-of-way to 19 feet for an addition to the existing building under Section 130.0.B.2 of the Zoning Regulations is hereby **DENIED**.

Provided, however, that if the addition set forth on the plan is located to not encroach into the 50-foot setback from Loudon Ave, the extension and enlargement of the nonconforming use are **GRANTED** with no need for an additional hearing but shall apply only to the uses and structures (existing structure and relocated addition for liquor store use) as described in the petition and plan submitted and not to any other activities, uses, structures, or additions on the Property;

Further provided, any site development plan, or its equivalent, shall include a note containing all conditions of approval;

Further provided, that the Petitioner shall obtain approval for the extension of premises to include the addition proposed in the petition from the Howard County Alcoholic Beverage Hearing

Board and if said approval is not granted the Enlargement/Extension of a Nonconforming Liquor Store shall be void; and

Further provided, that Petitioner shall comply with all federal, state, and local laws and regulations.

**HOWARD COUNTY
HEARING EXAMINER**

Katherine L. Taylor

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.