

IN THE MATTER OF	:	BEFORE THE
SHMAYA ESTROGANO	:	HOWARD COUNTY
Appellant	:	BOARD OF APPEALS
v.	:	HEARING EXAMINER
HOWARD COUNTY	:	BA Case No. 720-D
DEPARTMENT OF PLANNING		
AND ZONING		

Appellee

.....

DECISION AND ORDER

On February 18, 2016, 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 Shmaya Estrogano (Appellant). Appellant is appealing a July 30, 2015 Decision and Order of the Department of Planning and Zoning (DPZ) in Non-Conforming Case No. 15-002, wherein DPZ denied confirmation of a nonconforming use for "the parking and storage of vehicles and equipment associated with an auto repair and towing company" at 6177 Pine Avenue (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 (ZR).

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.

Andrea LeWinter, Esquire, represented the Appellant. Julianne Jenny and Shmaya

Estrogano testified in support of the petition. No one appeared in opposition to the petition. Per long-standing policy, DPZ does not participate in de novo appeals of a DPZ confirmation of a nonconforming use petition decision and order.

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 5.257-acre subject property is situated at the southeastern terminus of Pine Avenue and about 590 feet southeast of its intersection with Washington Boulevard (US 1). It is identified as Tax Map 0038, Grid 0014, Parcel 220 and known as 6177 Pine Avenue (the Property).

2. General Property Description. This general description is based on the October 14, 2015 nonconforming use plan (the NCU plan) and Appellant's 2014 Deed for 6177 Pine Avenue, which was included with the appeal petition. The Property is accessed from Pine Avenue, off Washington Boulevard. At Washington Boulevard, Pine Avenue lies opposite Rowanberry Drive, then briefly turns in an easterly direction to intercept the main portion of Pine Avenue, which runs in a westerly to easterly direction. Pine Avenue is 35 feet wide.

The Property itself comprises three separate lots, Par. A, Par. B. and Par. C. The 1.77-acre Par. A lies on the easterly side of Pine Avenue and is unimproved. The rear 3.55-acre Par. B begins near a T-turnaround at or near the end of Pine Avenue, and beyond which is a single-family detached dwelling located in the southerly area. To the northwest of this dwelling (towards Washington Boulevard) is an above ground swimming pool. Beyond the T-turnaround

is a paved circular driveway providing access to the dwelling. The 20,882sf Par. C lies to the south of Pine Avenue and is unimproved. The perimeters of the Property are wooded and drop in elevation. A 10-foot drainage easement runs in an easterly direction from the T-turnaround, through Par. B and Par. A.

3. Vicinal Properties. The properties on Washington Boulevard with frontage on Pine Avenue are zoned CE-CLI and improved with existing commercial and industrial uses. The adjoining CE-CLI zoned properties fronting on Pine Avenue are each improved with a single-family residence. Parcel 769 (6151 Pine Avenue) on the northeasterly side of Pine Avenue is improved with a residence and, apparently, a commercial use. Parcel 790 on the northeasterly side of Pine Avenue (6157 Pine Avenue) is owned by Odunlami Aromire, who purchased the property in 2012 with the intention of using it for a child care facility, and for which a site development plan is required. Running along the Property's irregularly shaped northwesterly, northerly, easterly and southerly lot lines is a stream (Buds Run) and FEMA floodplain on Parcels 221 and 224. Portions of the stream and floodplain run through the perimeters of the Property.

With one exception, the properties to the west, along Par. B and C of the Property, and fronting on South Hanover Road are zoned CE-CLI. Adjoining Part C of the Property is the 1.024-acre Parcel 813, Par. B (6205 South Hanover Road), which Appellant Shmaya Estrogano owns as PLE Real Estate, LLC and is the site of a legal nonconforming use for a motor vehicle repair facility with towing operations and vehicle storage (See Additional Zoning History.) The current businesses operating at 6205 South Hanover Road are Montgomery Service Center, BASE Auto

Body and Miles Towing. This property accesses South Hanover Road from a common driveway with Parcel 813, Par. B-4. Vehicles are parked along the common lot line with Par. B of the Property. Based on the location of the Parcel 813 stormwater management facility, the strip of adjoining land beyond where these vehicles are parked may be a drainage area channeling runoff to this facility, perhaps through an underdrain pipe system.

To the north of Parcel 813, Par. B is Parcel 813, Par. A, which may be a drainage area. To the south of Parcel 813, Par. B, Par. B-3 is the stormwater management facility servicing Parcel 813. To the south of this facility is the M-1 (Manufacturing: Light) Parcel 827, Par. A. in industrial use. The area stream/floodplain runs along the southerly side of this parcel.

4. Zoning History.

1971. The 1971 Zoning Map depicts the Property as zoned R-16. The Property's zoning history is outlined in NCU Case No. 15-002, which surmises this zoning may be an error, because a later Zoning Board case in the same vicinity involved a rezoning of a 9-acre parcel from R-12 to M-1 and there were other R-12 zoned properties nearby. The 1971 Zoning Map, which depicted certain land uses by symbols, depicts the Property as used for a single-family detached dwelling, as were several lots on Pine Avenue.

1977. The 1977 Zoning Map depicts the Property as zoned M-1 (Manufacturing: Light). There being no record of a piecemeal Zoning Board case for the Property between 1971 and 1977, it is assumed the Property was rezoned to M-1 by the 1977 Comprehensive Zoning Plan.

1985 and 1993. The M-1 zoning was retained by the 1985 and 1993 Comprehensive Zoning Plans.

2004. The Property was rezoned to CE-CLI by the 2004 Comprehensive Zoning Plan, with the effective date of April 13, 2004. The 2003 Land Use Map depicts the land use for the Property as a single-family detached residential use.

2013. The CE-CLI zoning is retained by the 2013 Comprehensive Zoning Plan. The current Land Use Map depicts the Property as a residential use.

2015. NCU Case No. 15-002, Denied July 30, 2015. Confirmation of a nonconforming use for the repair and towing Use of 6177 Pine Avenue. Date of alleged nonconformance: the effective date of the 2004 Comprehensive Zoning Plan (April 13, 2004). Basis: Noncompliance with § 129.0.A of the 1993 Zoning Regulations and Subdivision Regulations § 16.155. Zoning Regulations § 129.0.A. states: "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 these regulations or as a result of any subsequent amendment thereto." (Emphasis added.) The decision and order concluded that to be lawful, the requested use would have had to comply with pre-2004 Subdivision Regulations § 16.155, which contained the provisions for DPZ-required site development plans for nonresidential uses, such as the Repair and Towing Use or the previous Miles Towing use, and which to be lawfully established as a nonresidential use, required an approved site development plan for the change in use of the nonresidential portions of the Property.

5. Additional Zoning History. Included in the petition package is a copy of DPZ NCU Case No. 09-001. DPZ on July 28, 2009 granted Appellant Shmaya Estrogano's petition for confirmation of a nonconforming use for a motor vehicle repair facility at 6205 South Hanover Road, the site of a multi-bay industrial building used as an auto body shop and auto mechanic's shop with towing operations and vehicle storage (the Motor Vehicle Use). The date the Motor Vehicle Use is stated to have become nonconforming was April 13, 2004, the effective date of the 2004 Comprehensive Zoning Plan, which rezoned the M-1 property to CE-CLI.

6. The Nonconforming Use Confirmation Request and the NCU Plan. Appellant is seeking confirmation of a nonconforming use for the parking and storage of vehicles and equipment associated with an auto repair and towing company. According to the December 17, 2015 preliminary motion, "the parking and storing of vehicles is a permissible M-1 use under ZR § 122.0.(B)(36) [sic] and was a permissible use between 2000-2004." The NCU plan identifies the nonconforming use vehicle storage use area as follows.

Par. A: All of Par. A, excepting the area of the existing treeline and an area denoted as 30'

parking and fence setback on the north side of Pine Ave.

Par. B: An area to the east of the storage use area on Par A., generally to the northeast of the dwelling and excepting the area within the existing treeline and a second area south of the pool, excepting the 30' parking and fence setback from Pine Avenue and extending to Par. C and including the area shown as an existing treeline

Par C: South of Pine Avenue, beyond the 30' parking and fence setback on the south side of Pine Ave, including the area within the existing treeline

Testimony of Julianne Jenny

7. Julianne Jenny testified to residing at 6177 Pine Avenue. She moved there in the spring of 1992 to be a companion to Gloria Shipman, the property owner. Mrs. Shipman added her to the deed in 2001 or 2002. She and Mrs. Shipman sold the property to Appellant in 2014. Ms. Jenny further testified to having lived continuously on the Property from 2001/2002 through 2014 and subsequent to selling the Property. She still lives on the Property based on an agreement when the Property was sold that Ms. Jenny and Mrs. Shipman would be able to stay there two years after the sale, until October 2016. Mrs. Shipman died in 2015, after having lived there since the 1960s.

8. Ms. Jenny testified that before becoming an owner, Mrs. Shipman allowed boats and trailers to be parked there and that after she became an owner, they continued to allow neighbors to use the Property.

9. According to Ms. Jenny, Mrs. Shipman knew Mark Wilkens, who at one time owned Miles Towing, a towing and auto repair business located on Pine Avenue, until it moved over to South Hanover Road. At some point Mrs. Shipman allowed Miles Towing to park excess cars in the top end of the field (boats, cars, trailers) and that other areas of the Property were also

used. There seemed to have always been vehicles parked there in the evening or whenever extra space was needed since she moved to the Property. The use predated 2004 and she permitted the use as a co-owner. The area open to Mr. Wilkens' use included the area from the turnabout to the end of the Property line. This includes the area from the fence on the easterly side of Pine Avenue, and which runs down to the stream and on the other side past a horse fence toward the big willow tree. Ms. Jenny indicated on the Hearing Examiner's copy of the NCU plan the location of these fences. The chain link fence is located on the easterly side of Pine Avenue along the common lot line with Parcel 790 and the horse fence, on the westerly side of Pine Avenue and running along the common lot with Parcel 771. This is approximately the same area marked as the truck and storage areas, but that the area marked as the treeline, which is sloped, was not a storage area.

10. In 2002, the informal arrangement with Mr. Wilkens was formalized in a written agreement. She did not draft it. Referring to the April 12, 2002 agreement included in the appeal petition (the 2002 Agreement), she testified to it being an agreement on Montgomery Firestone Service Center letterhead and signed by Gloria Shipman, Julianne Jenny and Shmaya Estrogano, Owner, Mile Towing/Montgomery Firestone Service Center. It states:

This is an agreement between Gloria Shipman and Miles Towing/Montgomery Firestone Service Center to use 6177 Pine Avenue, Elkridge, Md. 21075 as an "Over-Flow" Parking Lot for employee and customer parking, storage and truck parking. Miles Towing agrees to keep the lot clean at all times, maintain the yard (cutting grass, trimming bushes) and snow removal.

Miles Towing will be responsible for insurance for the lot.

After Mr. Estrogano took ownership of Miles Towing, he continued to use the Property in the same manner as Mr. Wilkens. When Ms. LeWinter asked if it was true that Mr. Estrogano at some point later signed the document, Ms. Jenny replied yes. She recalled signing the agreement on April 12, 2002. This agreement was neither filed in the Land Records nor provided to DPZ. Neither Mrs. Shipman nor Ms. Jenny ever charged Mr. Wilkens to use the Property.

11. When asked if Mr. Estrogano bought the business in 2006, Ms. Jenny testified she was not sure of the year. When asked if Mr. Estrogano continued to use the Property after he purchased it, Ms. Jenny testified he continued to use the land in the same manner as Mr. Wilkens without charge. The use at issue has continued since 2002. The vehicles are parked and stored on the Property after hours, from 4:00-6:30 pm, when cars, trucks and towed vehicles are parked and continuing through the morning, when the vehicles would be moved back to the shop.

12. The Hearing Examiner questioned Ms. Jenny about her testimony about the chain link fence along the common lot line and the horse fence along south side common lot line. The horse fence is a white wooden fence.

Testimony of Shmaya Estrogano

13. Shmaya Estrogano testified to purchasing the Property in September 2014. Prior to the purchase, his business used the Property for employee vehicles, company vehicles, and vehicles towed for the police. He began using the Property in 2006, when he bought the Miles Towing business at 6205 South Hanover Road. He operates Miles Towing as PLE Towing. The

South Hanover Road operation also includes Montgomery Service Center, and BASE Auto Body.

The company tows for county police, state police, DEA and other law enforcement agencies.

14. According to Mr. Estrogano, Mark Wilkens told him that he would be allowed to use the Property for parking spaces and that Mr. Wilkens had been using it since 1998, a time when he operated out of another property on Pine Avenue.

15. Referring to the 2002 Agreement, he testified that it existed before he purchased Miles Towing. He is a signatory to the agreement because Mr. Wilkens was his supervisor and that his name is there to protect him when he became the owner. He signed it as the future owner. When questioned why this contradicts what he attested to in his affidavit, Mr. Estrogano replied that he bought the business in 2006 and bought the Pine Avenue Property in 2014 because they have the same driveway.

16. Between 2002 and 2006, Miles Towing, then under the control of Miles Wilkens, would tow cars at night and usually remove them in the morning. Mr. Estrogano characterized this use as an "overflow" lot. When Mr. Estrogano purchased the business at South Hanover Road in 2006, he continued this practice. From 2006 on, employee vehicles, tow trucks and vehicles towed and stored for the police were stored in the early evening. Day employee and customer vehicles were also parked there. The use has continued unabated since before 2004.

17. Mr. Estrogano further testified the South Hanover Road business benefits from using the Property because they use the same driveway, which begins in front of the house. Most of the vehicles and trucks do not use Pine Avenue to access the Property. Instead, they use South Hanover Road, and go through this property to the Property.

18. He understands Pine Avenue to be private property from about the manhole, which is located just south of the common lot line between Par. A of the Property and Parcel 790. The County does not plow beyond the manhole. The gate was installed at the end of last year to prevent cars from using the driveway on the Property to make U-turns. The gate is unlocked. Ms. Jenny often uses the access to 6205 South Hanover Road to exit the Property. Mr. Estrogano also testified the Howard County Police Department uses this access.

19. When questioned by the Hearing Examiner, Mr. Estrogano testified to possessing state and Howard County police towing licenses. When asked if county law requires him to fence in towed vehicles, he stated that if it is a county police car, it is stored at 6205 South Hanover Road. He has another storage lot area at 6205 South Hanover Road for cars towed under his Howard County towing license. The vehicles stored at the Property are cars towed for insurance. On redirect, Mr. Estrogano testified that the number of cars and vehicles varies by day and month, especially after a snowstorm, which explains the current number of cars, but they get in and out pretty quick. The county requires him to keep them not more than 30 days.

The Hearing Examiner's Site Visit and Comments

20. The Hearing Examiner described her observations of the Property during a February 8, 2016 site visit, stating she was shocked at what she observed. There were more than 30 vehicles on the Property stored everywhere. The gate and dirt and mud prevented her from entering the Property. There were commercial vehicles in the rear of the lot, and all along the fencing. In the interior were inoperable vehicles with out-of-state license plates. A tow truck was unloading a black Mercedes vehicle. Cars were everywhere, in no systematic order. Owing

to exterior conditions, it was unclear how the residence could be occupied.

21. The Hearing Examiner further explained this Property stood out because she had presided over many code enforcement actions along Washington Boulevard, so she was familiar with area automotive businesses. She was also familiar with Pine Avenue from the 2013 comprehensive rezoning process, for which rezonings were requested for several Pine Avenue properties.

22. The Hearing Examiner expressed her concern that the documentation required to be submitted with the petition did not include the standard documents routinely included with a confirmation of nonconforming use petition: including business records, checks, etc. Nor were any aerial images of the Property in evidence, including the aerial photograph incorporated into the record for DPZ NCU 15-002.

CONCLUSIONS OF LAW

ZR § 129.O.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. 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 to be 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.

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)).

Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co., 444 Md. 490, 514 n.16 (2015)

(citations omitted).

ZR § 129.0.D.1.d codifies the common law burden on Appellant 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). Whether that party has met its burden is a matter entrusted to the Board. And, since that decision, as is the decision whether to certify a nonconforming use, can be made only after hearing and determining facts, the Board acts in a quasi-judicial capacity in making it. *See Heaps v. Cobb*, 185 Md. 372, 378, 45 A.2d 73 (1945). In that capacity, the Board

acts as factfinder, assessing the credibility of the witnesses and determining what inferences to draw from the evidence. See *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513, 390 A.2d 1119 (1978); *Boehm v. Anne Arundel County*, 54 Md.App. 497, 514, 459 A.2d 590, cert. denied, 297 Md. 108 (1983)."

In this case, Appellant has failed his burden of proving the existence of the nonconforming use before April 13, 2004. Perforce of the multiple and critical discrepancies and inconsistencies within the petition documents and between these documents and the testimony of the two witnesses, the Hearing Examiner concludes there is no credible substantial evidence supportive of the existence of a lawful nonconforming use at 6177 Pine Avenue.

I. Appellant fails his burden of proving by credible, substantial evidence of the existence and continued and uninterrupted use or operation the existence of the nonconforming use.

ZR § 129.0.D.1 requires a property owner who seeks confirmation of a nonconforming use to include with the nonconformance petition the information as follows.

- a. A statement and plans or other illustrations fully describing the magnitude and extent of the nonconforming use.
- b. A statement identifying the date the use became nonconforming to the use provisions of the Zoning Regulations.
- 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.

DPZ Case No. NCU 15-002 and the information within the petition packet identify the date the use became nonconforming as the effective date of the 2013 Comprehensive Zoning Plan, April 13, 2004, when the Property was rezoned from M-1 to CE-CLI.

The evidence to support the existence of the use on this date is as follows. For convenience, the Hearing Examiner here sets forth her determination as to both the legal sufficiency of the documentation intended to prove the legal existence of the use and to the credibility of witness testimony in reference to the petition packet. For logic, the documents are reordered. The petition packet contains these documents.

1. The NCU plan, October 14, 2015
2. Additional historical and zoning information.
3. Affidavit of Shmaya Estrogano, August 25, 2015
4. Affidavit of Julianne Jenny, August 25, 2015
5. April 12, 2002 overflow parking agreement
6. Excerpt from Gloria Shipman's 1964 deed for 6177 Pine Avenue
7. Shmaya Estrogano, 2014 deed for 6177 Pine Avenue
8. 2002 joint tenancy deed, Gloria Shipman and Julianne Jenny
9. DPZ NCU Case No. 09-001, July 28, 2009
10. DPZ NCU Case No. 15-002, July 30, 2015
11. July 17, 2015 comments on the NCU 15-2015 petition from Jeff Williams, Program Supervisor, Well & Septic Program, and Bureau of Environmental Health

1. The NCU plan, October 14, 2015. As set forth in Finding #6, the NCU plan shows three main areas identifying the magnitude and extent of the "the parking and storage of vehicles and equipment associated with an auto repair and towing company" at 6177 Pine Avenue. These areas are depicted as spaced diagonal lines. They include areas shown as treelines. Ms. Jenny testified that the use does not in fact include the treeline areas, which are sloped.

The NCU Plan does not depict the new chain link fence. Ms. Jenny testified to the existence of a chain link fence on the north side of Pine Avenue and a horse fence on the south side, but did not testify to the new chain link fence running along several portions of the Property and a gate across Pine Avenue until questioned by the Hearing Examiner.

The NCU Plan calls out Pine Avenue as a public road (with attendant setbacks). Mr. Estrogano testified the public portion of Pine Avenue extends only to a manhole to the west of the Par. A common lot line with Parcel 790.

The NCU Plan does not depict the access between Appellant's business/property at 6205 South Hanover Road and 6177 Pine Avenue. This access is a key piece of Ms. Jenny's and Mr. Estrogano's testimony going to the establishment of the nonconforming use. This access in not

referenced in DPZ NCU Case No. 09-001, which granted Appellant Shmaya Estrogano's petition for confirmation of a nonconforming use for a motor vehicle repair facility at 6205 South Hanover Road.

2. Additional historical and zoning information. See the assessment re: Document #5.
5. April 12, 2002 overflow parking agreement. From Document #2. "In 2002, Miles Towing and Ms. Shipman and Ms. Jenny created a rental agreement documenting the vehicle storage and parking. When Mr. Estrogano began operations at the 6205 South Hanover Road Property, he also signed this agreement." As set forth in Finding # 10, the informal parking arrangement between Mrs. Shipman and Mr. Wilkens was formalized as an April 12, 2002 agreement between and signed by Gloria Shipman, Julianne Jenny and Shmaya Estrogano as the owner of Miles Towing/Montgomery Firestone Service Center. It states:

This is an agreement between Gloria Shipman and Miles Towing/Montgomery Firestone Service Center to use 6177 Pine Avenue, Elkridge, Md. 21075 as an "Overflow Parking Lot for employee and customer parking, storage and truck parking. Miles Towing agrees to keep the lot clean at all times, maintain the yard (cutting grass, trimming bushes) and snow removal.

Miles Towing will be responsible for insurance for the lot.

Mr. Estrogano testified that he did not begin to use the Property until 2006 when he took over Miles Towing. In his affidavit, he attests that when he "entered into a rental agreement with Miles Towing for the South Hanover property, I assumed the rental agreement with Miles Towing for the South Hanover property, I assumed the rental agreement for and the use of the Pine Avenue property" for the overflow parking of commercial, employee and customer vehicles and the outdoor storage of commercial products by the abutting South Hanover Road towing and auto repair company. In her affidavit Ms. Jenny attested to Mr. Estrogano renting Miles Towing and the 6205 South Hanover property in 2006 and purchasing it in 2013. In that affidavit, Statement No. 10 attests to this agreement having been "also later signed by Mr. Estrogano when he took over use of Mr. Wilkens property."

This document is central to Appellant's effort to legitimize the date of the parking and storage use as nonconforming and has considerable import to the outcome of this case. Mr. Estrogano having been neither a renter nor owner of the South Hanover Road property in 2002 and possessing no legal control over any business operating there, he had no legal authority to bind Miles Towing/Montgomery Firestone Service Center to such an agreement, which in Document #2 is identified as "rental agreement." Thus, this document can be accorded no evidentiary weight, bearing as it does Mr. Estrogano's signature when he had no leasehold or ownership control over the business operations at 6205 South Hanover Road.

DPZ Case No. NCU 09-001 (Document #9) found that 6205 South Hanover Road since around 1998 had been leased to a company, E. G.W., LLC, which operated a motor vehicle repair use on this property called Miles Towing and Montgomery Service Center. Around February 2006 its interests and assets for the motor vehicle repair use were sold to Mr. Estrogano. In this 2009 case, the Pine Avenue Property was described as an apparently residential use with a single-family detached dwelling. There was no evidence of Pine Avenue being used for the parking and storage of vehicles for the confirmed use.

3. Affidavit of Shmaya Estrogano, August 25, 2015. See the discussion re: Document #5. Statement no. 9 attests: "It is my desire to allow Ms. Jenny to remain residing in the residential home on the property at least through the end of 2015." Ms. Jenny testified that she still lives on the Property based on an agreement when the Property was sold that allowed Ms. Jenny and Mrs. Shipman to stay there two years after the sale, until October 2016.

4. Affidavit of Julianne Jenny, August 25, 2015. See the discussion re: Document #5. Ms. Jenny testified to not knowing when he purchased this property. Mr. Estrogano testified to purchasing this property in 2013 and renting the property and taking over the towing company in 2006.

With the 2002 overflow parking agreement excluded as credible, substantial evidence, the primary documents intended to prove the existence of the use at the critical time are these two affidavits. The Maryland Court of Appeals has found voluntary affidavits submitted in support of confirmation of non-conforming use petition to be 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).

Although hearsay is permitted in evidence in Hearing Examiner cases, it is evident these affidavits are not credible, pierced as they are with inconsistencies with other documents. Consequently, the facts alleged in them, which are repeated in witness testimony, preclude the Hearing Examiner from making the essential findings as to Appellant's burden of proof, which is to establish, through substantial evidence, the lawful existence of the use.

10. DPZ NCU Case No. 15-002, July 30, 2015. In this case, from which Appellant has taken the instant appeal, DPZ found that the 2003 Land Use Map depicts the land use for the Property as a single-family detached residential use, as does the current map. Odunlami Aromire, who became the adjoining property owner of 6157 Pine Avenue in 2012, testified to there being no evidence of the alleged use of the Property until March 2015.

9. DPZ NCU Case No. 09-001, July 28, 2009. As set forth above in Finding #5, this decision and order granted Appellant Shmaya Estrogano's petition for confirmation of a nonconforming use for a motor vehicle repair facility at 6205 South Hanover Road, the site of a multi-bay industrial building used as an auto body shop and auto mechanic's shop with towing operations and vehicle storage (the Motor Vehicle Use). Finding #5 of this case describes adjacent properties and states "[t]o the northeast of the Property is Parcel 220, which is apparently used residentially with a single-family detached dwelling that has a long driveway access to US 1." The 2009 decision and order makes no reference to any use of 6177 Pine Avenue as a parking and storage area for the South Hanover Property. Mr. Estrogano had leasehold control over 6205 South Hanover Road and owned the businesses there in 2006, three years prior to submitting this confirmation of nonconforming use petition, which made no reference to or sought to include the parking and storage use of Pine Avenue within the bounds of the nonconforming use.
6. Excerpt from Gloria Shipman's 1964 deed for 6177 Pine Avenue. This document establishes the long-term residency of Mrs. Shipman.
7. Shmaya Estrogano, 2014 deed for 6177 Pine Avenue. This document establishes the September 23, 2014 purchase date of 6177 Pine Avenue.
8. 2002 joint tenancy deed, Gloria Shipman and Julianne Jenny. This document establishes Ms. Jenny's legal control over the Property.
11. July 17, 2015 comments on the NCU 15-2015 petition from Jeff Williams, Program Supervisor, Well & Septic Program, and Bureau of Environmental Health.

This document, about which Appellant provided no testimony as to its relevancy, simply put Appellant on notice that the Property is assumed to be using a private well and septic system, which would need to be abandoned because the Property is connected to public water. It further states: "Prior to any change in use or building permit approval, the existing on-site sewerage disposal system must be properly abandoned . . ." Document #11 is not relevant.

As to additional witness testimony, the Hearing Examiner is not persuaded by and assigns no evidentiary weight to the witness testimony produced about the use of the Property by Miles Towing as early as 2000.

Notably absent in evidence, as the Hearing Examiner informed Appellant at the hearing, are any documents routinely submitted in support of a confirmation of nonconforming use petition: business records (personal property taxes, leases, checks) and licenses. For example, in DPZ NCU Case No. 10-004 (decided January 20, 2011), DPZ confirmed a non-conforming use for motor vehicle sales and service facility on a portion of 6475 Washington Boulevard (at the northeasterly intersection with Pine Avenue). The documents submitted with the petition and which DPZ found to be substantial evidence of the use at the critical date, included an MVA application for a vehicle dealer's license, a commercial lease and personal property tax records.

Even without credible business record documentation going to proof of the use, Appellant still had at his disposal considerable substantive information about the use of the Property over many decades—the county's on-line aerial pictometry and historical area maps. There are aerial pictometry images of the Property from these dates: April 12, 2015; January 16, 2014; December 21, 2013; March 2, 2013; April 5, 2012; March 11, 2012; April 15, 2011; January 19, 2010; December 18, 2009; February 24, 2009; December 12, 2006 and March 20, 2006.¹ The county historical aerials include imagery from 1988, 1993, 1998, 2002 and 2004, much of the period when Miles Wilkens was alleged to have utilized the property for parking

¹ <https://data.howardcountymd.gov/DataExplorer/PictometryConnect.aspx>

and storage.² There is also Google aerial imagery, Google Earth imagery and Bing aerial imagery for much of the time the use was alleged to have been operating on the Property. Certainly, this imagery would have been competent evidence to support Appellant's obligation to clearly demonstrate the continued and uninterrupted use of the Property for the operation from April 13, 2004 to the date Appellant submitted the DPZ confirmation of nonconforming use petition.

II. Applicable Zoning

The preliminary motion filed in this case asserts the "parking and storing of vehicles" is a permissible use under ZR § 122.0.(B)(36) [sic] and was a permissible use between 2000 and 2004. At the time Appellant sought to establish the use as nonconforming, the applicable M-1 (Manufacturing: Light) zoning district regulation § 122.B.38 permitted a "motor vehicle towing and storage facility" use as a matter of right. There was no separate "parking and storing of vehicles" use permitted as a matter of right. For the use to have been eligible for nonconforming use confirmation under Appellant's theory of the case, all of Mr. Estrogano's towing operation was required to have been located on and operating from 6177 Pine Avenue. This was not the case. The Pine Avenue lot was and is used only for outdoor storage of vehicles towed and under the control of the operation at 6205 South Hanover Road.

III. ZR § 129.0.E. Extension, Enlargement or Alteration of Nonconforming Uses

² <https://data.howardcountymd.gov/OLMaps/HistoricAerials.html>

Under this section, 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.

Of potential application to this case is § 129.0.E. b, which prohibits an enlargement of a nonconforming use from exceeding 100% of the gross acreage in the case of nonconforming land, above that which legally existed at the time the use first became nonconforming. Miles Towing is a confirmed nonconforming use operating on a 1.04-acre site at 6205 South Hanover Road, all of which appears to have been confirmed as the non-conforming use area. This site is the boundary of the use. The 6177 Pine Avenue property is 5.27 acres. Assuming arguendo, the use at issue was a physical expansion of the use at 6205 Washington Boulevard, the use area shown on the NCU plan visibly appears to be more than 100% of the gross acreage of the 6205 Washington Boulevard use area.

ORDER

Based upon the foregoing, it is this **3rd day of March 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Shmaya Estrogano for confirmation of a nonconforming use for the parking and storage of vehicles and equipment associated with an auto repair and towing company on portions of 6177 Pine Avenue is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

A handwritten signature in cursive script, appearing to read "Mehul", is written over a horizontal line.

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.