

IN THE MATTER OF	:	BEFORE THE
DARRYL A. HILL, T/A	:	HOWARD COUNTY
HESS FAMILY TRUST, LLC	:	
Appellant	:	BOARD OF APPEALS
Vs.	:	HEARING EXAMINER
HOWARD COUNTY	:	BA Case No. 687-D
DEPARTMENT OF PLANNING	:	
AND ZONING	:	
Appellee	:	

:.....:

DECISION AND ORDER

On April 16, 2012, 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 Darryl A. Hill, trading as Hess Family Trust, LLC (Appellant). Appellant is appealing a January 9, 2012 Decision and Order of the Department of Planning and Zoning (DPZ) in Non-Conforming Case No. 11-008, wherein DPZ denied confirmation of a nonconforming use for a dwelling and/or confirmation of a nonconforming residential use, including sanitation use (a full bath and shower), of a detached accessory garage at 11008 Harding Road (the "Property"), which is located in an R-20 (Residential: Single) Zoning District. The appeal is filed pursuant to Section 129.D.4 of the Howard County Zoning Regulations (the "Regulations").

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

Sean P. Hughes, Esquire, represented the Appellant. Darryl A. Hill testified in support of the petition. No one appeared in opposition to the petition.

Appellant introduced into evidence the exhibits as follows.

1. Howard County Department of Inspections, Licenses & Permits (DILP) Rental License for 11008 Harding Road
2. Letter to Bob Lalush, Howard County Department of Planning and Zoning (DPZ), from Stephon Moore, President, Moore and Moore Contractors, February 1, 2012
3. Letter to Bob Lalush, DPZ, from Harvest Hartsfield, February 1, 2012
4. Letter to DPZ from James Hess, February 10, 2012

A Preliminary Matter

At the outset of the hearing, Appellant counsel Sean Hughes informed the Hearing Examiner that Appellant was withdrawing his request for confirmation of the nonconforming use of a second dwelling unit (the detached accessory garage). As he explained, Appellant was unable to establish the lawful dwelling use of this structure prior to October 1977, when the Zoning Regulations were amended to prohibit two dwelling structures on a lot.

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 1.556-acre subject property is situated on the north side of Harding Road, about 58 feet east of Scotts Landing Road. It is identified as Tax Map 46, Grid 17, Parcel 168, Lot 2 and is also known as 11008 Harding Road (the Property).
2. Property Description. The Property is improved with two buildings. The principal building is a single-family detached dwelling located about 80 feet from Harding Road. To this

dwelling's west and north is a two-story, stone and wood building with two bays and a side carport (the detached accessory garage). The second story of the accessory garage is a residential living space that includes a full bath and kitchen area.

3. Zoning History. On September 15, 2011, the Hearing Examiner conducted a hearing on a DPZ civil citation for violations of Sections 108.B and 101.0 of Zoning Regulations, continuing to have two single-family dwellings on R-20 zoned property known as 1100 Harding Road. Howard County Code Sec. 16.1605(d) provides in pertinent part that it is the alleged violator's burden to provide all affirmative defenses, including the defense of nonconforming use. Because Appellant alleged the residential use of the detached accessory garage is a lawful nonconforming use, the Hearing Examiner issued a Preliminary Order on September 22, 2011, wherein she instructed the Hess Family Trust, LLC, to submit a nonconforming use petition to the county no later than fifteen calendar days from the date of the preliminary order. Appellant timely submitted a nonconforming use petition to DPZ.¹ DPZ denied the nonconformance confirmation request on January 9, 2012.

4. The Nonconforming Use Confirmation Request. Appellant is seeking confirmation of a nonconforming residential use of the detached accessory garage, including cooking (kitchen) and sanitation uses (a full bath and shower). The Appellant gives January 4, 2005 as the date the residential use of the detached garage became nonconforming.

5. In support of the nonconformance confirmation request, Appellant introduced into

¹ Pursuant to Zoning Regulations Section 129.D.1, DPZ may confirm the factual existence of a nonconforming use upon review of a petition filed by the property owner.

evidence four exhibits intending to prove the presence of a full bath and kitchen in the detached accessory garage prior to January 4, 2005. Exhibit 1 is a copy of the computer database for a DILP rental license issued for 11008 Harding Road on January 21, 2005. Exhibit 2 is a February 1, 2012 letter to Bob Lalush, DPZ, from Stephon Moore, President, Moore and Moore Contractors. This letter informs DPZ that Mr. Moore had inspected the "apartment above the garage" in late November and December 2004, when he observed a full bath and bathroom. Mr. Moore recently inspected the fixtures in the bathroom and it was his opinion that the bathroom fixtures are at least 10 years old, noting the low toilet had not been generally used in many years.

6. Exhibit 3 is a February 1, 2012 letter to Bob Lalush, DPZ, from Harvest Hartsfield, who informs Mr. Lalush that he observed a rental unit on the Property in 2004 and that the rental unit included a kitchen and full bath. Exhibit 4 is a February 10, 2012 letter to DPZ from James Hess. According to Mr. Hess, the "apartment above the garage" was a licensed rental property with a full bath and shower/tub, which was installed prior to January 5, 2005 and has been used continually as a rental unit. According to the operating agreement attached to the administrative appeal petition, Mr. Hess is a member of the Hess Family Trust, LLC (as amended on June 14, 2010). Appellant testified that Mr. Hess is the former full property owner of the Property.

7. Appellant Hill testified to becoming a renter at 11008 Harding Road in late 2004, prior to becoming a member of Hess Family Trust, LLC. The LLC first amended operating agreement made him a 50 percent owner of the Property, with an option to purchase the Hess

interest in the LLC.

8. Appellant further testified that he purchased an interest in the Property not knowing the use of the accessory detached garage was unlawful. He has researched construction permits and found that the Property was renovated in 1999. He concluded from this that the kitchen and bath was installed at this time. Other records could not be located because the county did not keep all records from this time. There was a tenant in the space when he rented the principal dwelling.

9. Appellant met Inspector Crawford, whom Appellant stated was aware of the unit when a rental license was issued for a dwelling unit on the Property.

10. It Appellant's intention to use the detached accessory garage as a place for writing, and he needs an office. He would also use the space as a fitness center, explaining that he has disability issues stemming from his days as a college football player who helped to integrate collegiate football in the 1960s and 70s. He is writing a book about this period of sports history.² Appellant understands he would not be able to use the detached accessory garage for sleeping.

11. Because there are no model numbers on the showerhead and fixtures, Appellant contacted Moen and described the equipment. A Moen representative informed him that the company discontinued the showerhead in the late 1990s.

12. Appellant further explained that the county would like him to remove the 220-volt power supply. He cannot do so because the Property has a well pump that uses this power. The

² Mr. Hill played for the University of Maryland and is now a university fundraiser. He also noted that he is featured in the HBO documentary "Breaking the Huddle" a film about the integration of college football.

Property is on private well and septic.

13. The DPZ decision and order found that a 1963 aerial photograph shows the apparent existence of what the Operating Agreement refers to as the "Carriage House."

CONTROLLING LAW

On January 3, 2005, through Zoning Regulation Amendment (ZRA) 53, the County Council amended the Zoning Regulations to control the use of detached accessory garages more strictly. As amended, Zoning Regulations Section 128.A.12.(3)(c) prohibits full baths and commercial or residential uses in detached garages located in the R-20 district. Additionally, the Zoning Regulations define a dwelling unit as "[a] single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation."

Section 129.A of the Zoning Regulations defines a nonconforming use as "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, on the effective date of those regulations or because of any subsequent amendment thereto."

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

Zoning Regulations Section 129.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.

Pursuant to Zoning Regulations Section 129.D.1, Appellant initially sought confirmation of the nonconforming use of the detached accessing garage through DPZ, which held a hearing on Appellant's petition and denied it. On appeal, the original petition was not included with the administrative appeal petition. The appeal petition, however, included in relevant part a copy of the DPZ decision and order, photographs of the kitchen and bathroom, an aerial photograph of the Property, the amended operating agreement, and a September 14, 2011 letter from James Hess to DPZ informing DPZ that Darryl Hill as a 50 percent owner of the Property is authorized to represent all property owners in the zoning matter.

Also included with the petition were copies of two Board of Appeals decisions. In Board of BOA Case No. 09-016N, the Board of Appeals granted petitioner's confirmation of a nonconforming use for a second detached dwelling based in part on testimony that previous owners had constructed an apartment above a garage for their daughter and had subsequently rented out the apartment, as had the petitioners. No evidence of a rental license was admitted into evidence. In BOA Case No. 11-021N&V (decided September 20, 2011), the Hearing Examiner granted the petitioner's request to confirm and expand a nonconforming use (a

detached garage) for residential use subject to the condition that no bathtub or shower be installed and that the garage not be used as a garage. The prohibition against the bathtub and shower was based on Section 128.A.12.(b)(3), which prohibits these sanitation uses in detached garages.

Compliance with Section 129.D.1.a. In this case, Appellant describes the magnitude and extent of the nonconforming use as encompassing the bathroom and kitchen residential use on the second floor of the detached accessory garage.

Compliance with Section 129.D.2.b. Appellant identifies the date the subject use became nonconforming as January 5, 2005, the effective date of ZRA 53, which amended Zoning Regulations Section 128.A.12 to prohibit residential uses and full baths in detached accessory garages.

Compliance with Section 129.D.3. The determinative issue in this case with whether Appellant has met its burden of submitting sufficient documentation to substantiate the continued uninterrupted use of the detached accessory garage on the date the use became nonconforming, and that the use has continued uninterrupted since that date. In this case, "use" means the residential (including cooking and eating) and sanitation use of the detached accessory garage. For the reasons discussed below, I conclude Appellant has proven by a preponderance of the evidence the continued uninterrupted lawful residential (including a cooking and eating use) and sanitation use of the second story of the detached accessory garage prior to and after January 5, 2005.

This documentation includes:

1. The existence of the detached accessory structure in 1963
2. Photographs of the kitchen and bathroom
3. Appellant's testimony that a Moen representative informed him that the bathroom showerhead was discontinued in the late 1990s
4. A letter from Moore and Moore Contractors informing DPZ that a contractor had observed the full bath and kitchen in November and December 2004, including the contractors opinion that the bathroom fixtures were at least 10 years old
5. A letter from a member of the LLC attesting to the residential and sanitation of the use prior to January 5, 2005, including its continual use as a rental unit

ORDER

Based upon the foregoing, it is this **23rd day of April 2012**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

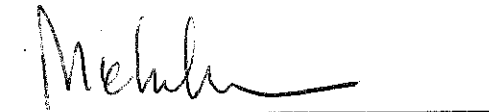
That the Petition of Darryl A. Hill, trading as Hess Family Trust, LLC, to confirm the lawful nonconformance of the detached accessory garage as a second dwelling unit is **DISMISSED**.

That the Petition of Darryl A. Hill, trading as Hess Family Trust, LLC, to confirm the nonconforming residential (including a kitchen) and sanitation (including a full bath and shower) use of the second story of a detached accessory garage on a single lot in an R-20 (Residential: Single Family) Zoning District is **GRANTED**.

Provided, however, that:

1. The residential use of the second story of the detached accessory garage shall not be utilized for sleeping.
2. The second story of the detached accessory garage shall not be utilized as a rental unit.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER



Date Mailed: _____

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