

Tax Map/Block/Parcel
No. 50-9-38

Building Permit/Zoning
Certificate No. 91-2526

Case 3623

**OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND**

APPELLANT: David T. Duree
1318 New Windsor Road
New Windsor, Maryland 21776

APPEAL: An appeal of the Zoning Administrator's decision
pertaining to use of the property of Howard
Williams and Margaret Williams as a contractor's
equipment storage facility, classified as a
nonconforming use

**APPELLEES:
(PROTESTANTS)** Howard Williams and Margaret Williams
3727 East Joppa Road
Baltimore, Maryland 21236

ATTORNEY: Colleen Clemente, Esquire
8 North Court Street
Westminster, Maryland 21157

LOCATION: Easterly side of New Windsor Road (Md. Rt. 31)
about 1,000 feet southeast of Coe Drive
intersection in Election District 11

BASIS: Article 17, Section 17.4. (The Carroll County
Zoning Ordinance)

HEARING HELD: October 22, 1991; Continued October 24, 1991

On October 22 and 24, 1991, the Board of Zoning Appeals heard testimony and received evidence concerning the appeal of the Zoning Administrator's decision pertaining to use of the property of Howard Williams and Margaret Williams as a contractor's equipment storage facility, classified as a nonconforming use, located on the easterly side of New Windsor Road about 1,000 feet southeast of Coe Drive intersection.

The Board visited the site October 21, 1991.

Mr. Duree, who was not represented by an attorney, presented the appeal to the Board.

Mr. and Mrs. Howard Williams, owners of the property, were represented by their attorney Colleen Clemente.

The Notice of Appeal, testimony and evidence comprising the record of this case are hereby included by reference in this decision. Based on the record, the Board will dismiss the appeal.

The pertinent findings determining the Board's decision include the following facts:

FINDINGS OF FACT

The Zoning Administrator testified that the property was known to be a nonconforming use established prior to the adoption of the zoning ordinance in 1965; that Mr. and Mrs. Williams had advised her that equipment had been stored on the site continuously since then; and, that the issue in this appeal is whether the nonconforming use of the property as a contractor's equipment storage facility has been continuous since Mr. and Mrs. Williams purchased it.

This appeal stems from a complaint filed with the Division of Zoning Enforcement March 9, 1990, by Mr. Gary Shields. (Appellant's Exhibit 2.) The complaint was investigated by a Zoning Inspector and two Notices of Violation were issued March 27, 1990. One Notice of Violation was issued for maintaining three railroad cars and a construction office trailer on the property. (Appellant's Exhibit 5.) During the public hearing it was established that the railroad cars were actually flatbed trailers, used to transport equipment, but were misidentified. The second Notice of Violation was issued for maintaining a junkyard as defined in Section 20.23 of the zoning ordinance by storing untagged vehicles on the property. (Appellant's Exhibit 12.) Mr. and Mrs. Williams complied with the notice and removed the untagged vehicles from the property.

On November 19, 1990, the Zoning Inspector reinspected the property and found that by maintaining two cranes, believed to be broken and inoperable, the property was being used as a junkyard. (Appellant's Exhibit 7.) Neither the first inspection report or first Notice of Violation, Appellant's Exhibits 2 and 5 respectively, listed the cranes as junk or advised Mr. Williams that they had to be removed from the property.

In a Consent Order, with the date corrected apparently to also read November 19, 1990, Mr. Williams agreed not to operate or maintain a junkyard as defined in Section 20.23 of the zoning ordinance, or to store mobile homes as defined in Section 20.26 on the property. (Appellant's Exhibit 16.) The Board presumes that the agreement not to illegally store mobile homes on the premises pertains to construction office trailers as noted above as there is no evidence of other mobile homes being stored on the property. However, in the opinion of the Board construction office trailers are customarily incidental in the operation of contractors' businesses.

In a letter dated March 18, 1991, Mr. and Mrs. Shields complained to the Zoning Administrator about use of the property contending that the use is no longer nonconforming because the equipment that had been kept on the property is inoperable and therefore is junk; use of the property has not been continuous;

and, the property is overgrown with weeds and vines.
(Appellant's Exhibit 9.)

Mr. and Mrs. Duree also complained to the Zoning Administrator in a letter March 26, 1991, contending that the old cranes, flatbed trailers and office trailer kept on the property were never moved or used; that the property has been used as a junkyard, not as an equipment storage yard; and, that the property is overgrown with weeds, vines and shrub trees.
(Appellant's Exhibit 10.)

In letters dated May 14, 1991, the Zoning Administrator advised Mr. and Mrs. Shields and Mr. and Mrs. Duree that she had notified Mr. Williams that they had challenged the nonconforming use of the property, and that Mr. Williams had been requested to substantiate the continuous nonconforming use of the property.
(Appellant's Exhibits 9 and 10.)

Mr. Williams responded in a letter dated July 23, 1991, stating that the crane was old but usable, and that welding machines and supplies, small tools, and scaffolding, when not in use, were stored continuously within the building on the property. (Appellant's Exhibit 8.)

After considering the complaints and the information provided by Mr. Williams and the previous owner of the property, the Zoning Administrator determined in a letter dated August 1, 1991, to Mr. Williams that the use of the property as a contractor's equipment storage facility is a legal nonconforming use. The Zoning Administrator also informed Mr. and Mrs. Duree and Mr. and Mrs. Shields of the determination by forwarding them copies of the letter. (Appellant's Exhibit 11.)

On August 30, 1991, Mr. Duree filed the appeal of the Zoning Administrator's determination.

In presenting the appeal to the Board, Mr. Duree relied extensively on the Division of Zoning Enforcement's file regarding use of Mr. and Mrs. Williams' property and on observations of the premises to substantiate that the property is being used as a junkyard, not as a contractor's equipment storage facility. Except for Appellant's Exhibit 1, Sequence of Events, and Appellant's Exhibits 6a through 6i, nine photographs taken by Mr. Shields, all other exhibits are from the file. However, the entire file was not introduced into the record.

Mr. Shields, a fleet maintenance director, testified that he had not seen one of the cranes operated or moved on the site for 10 and 1/2 years, and that in his opinion, the cranes did not appear to be operable. Although Mr. Shields admitted during cross examination that he had observed both the chassis and crane being moved on the site after being worked on by employees of Mr. and Mrs. Williams, he felt that a demonstration of its capabilities should be required. Mr. Shields presented nine

photographs in substantiation of his testimony. (Appellant's Exhibits 6a-6i.)

Ms. Burleson, an adjoining property owner, also testified that she had not observed any movement of equipment since purchasing adjacent property in 1983.

As Mr. Duree, Mr. Shields and Ms. Burleson have been, and continue to be employed full time, their surveillance of the property and activities there has been limited, and, at best, casual. In fact, they substantiate that contractor's equipment has been stored on the property continuously.

In 1983 Mr. and Mrs. Williams purchased Weller Brothers Construction Company, Inc. Mrs. Williams is president of the company. Mr. Williams owns and is president of a separate crane service known as Williams Crane Service, located elsewhere. The companies may occasionally share employees and equipment.

Although Mrs. Williams has maintained electric and telephone service to the premises since purchasing Weller Brothers Construction Company and the property in 1983, the business office has been located elsewhere. The facility and equipment kept on the premises have been used, when appropriate due to the proximity of the facility to job sites and the particular need for equipment.

In the past, a major contractor has been Lehigh Portland Cement Company, but due to the recession no work has been conducted lately. Invoices of various types of construction work performed by Weller Brothers Construction Company, Inc., Protestants' Exhibits 1a through 8b, dating from September 14, 1983, through July 9, 1990, document operation of the business during that period of time. Mrs. Williams verified that equipment parked or stored on the site was used to perform the work. As the company accepted emergency calls for work, the proximity of the property to Lehigh facilitated responses in emergencies. Calls for work, whether emergencies or not, did not necessarily occur during usual business hours.

All of Weller Brothers Construction Company, Inc. equipment is parked or stored on the premises, including but not limited to cranes, a job trailer used to store tools and materials, a construction office trailer, dump trucks, a backhoe, a Clark 825 Bobcat, flatbed transportation trailers, a 175 loader, electric welding machines, oxygen and acetylene tanks and torches, air compressors, a generator, cribbings, scaffolding, pumps, concrete blocks, and small tools. One crane, owned by Williams Crane Service, has been, or is, parked or stored on the premises. The crane may be used for a variety of work.

Mrs. Williams stated that there was never any intention to stop using the site to store construction equipment, and that equipment has always been stored on the site. Mr. William Perry, testified on behalf of Mr. and Mrs. Williams, and substantiated that use of the property as a contractor's equipment storage

facility was established prior to 1965 and has continued to the present time.

Mr. Tom Malatt, a mechanic and crane operator employed by Weller Brothers Construction Company, Inc. since 1983, testified on behalf of Mr. and Mrs. Williams, and confirmed that construction equipment has been continuously stored there. He also indicated that regardless of its appearance, the crane portrayed by several of Mr. Shields' photographs is usable, even though it has not been used for several years and would require repair work to enable its use.

Mr. Glen Williams, son of Mrs. Williams and equipment foreman and general foreman with both Williams Crane Service and Weller Brothers Construction Company, Inc., testified on behalf of Mr. and Mrs. Williams regarding work performed using equipment parked or stored on the premises. (Protestants' Exhibits 1a-8b.) Mr. Williams, in testifying as general foreman of the companies and on behalf of Mrs. Williams, expressed particular opposition regarding being restricted from parking or storing equipment used to move earth, or being prohibited from engaging in earth moving work. As indicated by Mr. Perry, a crane was used most recently in January near completion of the relocation of Medford Road by Genstar. Mr. Williams further explained that as foreman, he wishes to be able to perform general contracting work, including excavating or earth moving work, particularly when the magnitude of the job would not justify hiring a contractor specializing solely in the movement of earth.

APPLICABLE LAW

Articles and Sections cited below are of Ordinance 1E.

Article 17, Board of Appeals; Section 17.2, General Powers, paragraph (a) and Section 17.4, Appeals and Applications to Board (Amended 12/1/89), govern the Board in this case.

The property is zoned "R-40,000" Residence District as depicted on zoning map 50A. The land use provisions for the district are expressed in Article 5C. The provisions do not allow storage or parking of contractor's equipment, or storage of construction materials or supplies as either a principal permitted use, conditional use, or accessory use.

Article 4, General Provisions; Section 4.3, Nonconforming Uses (Amended 3/17/81) reads in relevant part:

Any building, structure or premises lawfully existing at the time of the adoption of this ordinance is amended, may continue to be used even though such building, structure or premises does not conform to use or dimensional regulations of the zoning district in which it is located; subject, however, to the following provisions:

For purposes of clarification and explanation, the provisions of paragraphs (a), (b), (c) and (e) are not issues in this case.

Paragraph (a) pertains to requests to the Board to allow structural alterations or enlargement of nonconforming uses.

Paragraph (b) provides the Board with authority to authorize changing a nonconforming use to another nonconforming use, if in the opinion of the Board the new use would be the same or a more appropriate use.

Paragraph (c) specifies that if a nonconforming use is changed to another nonconforming use in accordance with paragraph (b), the use shall not be changed to a less appropriate use.

Paragraph (e) required owners or operators of used car lots, service garages or junkyards to file certifications of such nonconforming uses with the Zoning Administrator, but no certification was required for the storage or parking of contractor's equipment, materials or supplies.

Paragraph (d) specifies:

No building, structure or premises where a nonconforming use has ceased for six (6) months or more shall thereafter be used except in conformance with this Zoning Ordinance.

REASONING

A nonconforming use is defined by its particular characteristics when the zoning ordinance was adopted or amended, legislatively excluding that use from the respective zoning district. In this case, use of the premises prior to the adoption of the zoning ordinance involved the storage and parking of contractor's equipment, materials and supplies. The business apparently involved general construction work, including excavation and grading or moving of earth.

Although Board authorization is required to change one nonconforming use to another more appropriate nonconforming use, the zoning ordinance does not prohibit altering a particular operation, provided that it is within the characteristics of the original operation. For example, equipment may be changed or be replaced, the type of construction work may vary, and the number of employees and business hours may fluctuate.

The zoning ordinance, as adopted August 17, 1965, did not include a definition of a contractor's equipment storage facility. Section 20.10 was amended by Ordinance T-76 April 18, 1988, adopting the definition which reads:

Property used for the parking or storage of equipment, vehicles or machinery used in construction; including equipment, vehicles or machinery used in excavating, earth moving, paving or in the hauling of earth and building materials.

Since the provisions of the zoning ordinance are not retroactive, the definition is not applicable in this case. However, it does serve as a convenient description of the nonconforming use.

Neither the perceptions and conclusions of the appellant and witnesses testifying on behalf of the appeal, or the exhibits chosen from the file of the Division of Zoning Enforcement provide probative evidence to substantiate that the Zoning Administrator erred; that the property is now a junkyard; or, that the use is no longer a lawful nonconforming use.

Although the photographs taken by Mr. Shields and presented as Appellant's Exhibits 6a-6i depict used equipment that appears to be damaged and unusable, the photographs are insufficient to prove that the equipment is junk, or that the use of the property has become a junkyard.

In fact, the appellees have proven the appellant's perceptions, including those thought to be documented by the photographs, to be invalid and conclusions to be error.

CONCLUSION

In accordance with the above findings, applicable law, and reasoning expressed above, the Board is convinced that the appeal of the Zoning Administrator's decision is without merit and hereby dismisses the appeal.

Nov. 21, 1991
Date

John Totura
John Totura, Chairman