

VIRGINIA

BEFORE THE BOARD OF )  
ZONING APPEALS ) Appeal Number BZA 15-02  
OF THE TOWN OF PURCELLVILLE, VIRGINIA )  
)

**ZONING ADMINISTRATOR'S MEMORANDUM**  
**IN SUPPORT OF DETERMINATION**

COMES NOW, Patrick Sullivan, Zoning Administrator for the Town of Purcellville, by counsel ("Mr. Sullivan"), and submits this response to the written statement of James Alfred and Barbara T. Mason ("Mason") specifying grounds of Mason's appeal of the Zoning Administrator's determination dated May 14, 2015 (the "Determination").

**I. FACTS AND NATURE OF CASE**

**A. Facts**

The property is a 3.55-acre parcel that Mason purchased from Southern States Cooperative in 1982. Following the purchase, Mason began using the property as a construction storage yard under L.B. Mason & Son, Inc. ("L.B. Mason"). Mason began to liquidate some of the assets of L.B. Mason in January 2008. Heritage Site Development, Inc. ("Heritage") purchased some of the equipment and leased the premises from Mason. Heritage continued the contractor storage yard use. Heritage continued this use less than two years after the Town of Purcellville rezoned the property from M-1 to C-1 in 2008. (The Town rezoned the property on August 12, 2008, and Heritage continued the nonconforming contractor storage yard by July 27, 2010).

Heritage was the only party using the property for contractor storage yard use. Green Acres Lawn Care ("Green Acres") began operating a contractor storage yard on the property sometime prior to January 7, 2015. The Town has no record of Green Acres operating a

contractor storage yard on the property before January 7, 2015. The Town received a complaint about the Green Acres' use of the property on January 7, 2015. The complaint recited noise, dust and heavy equipment fumes. In investigating the complaint, the Town determined that Green Acres had added its contractor storage yard use to that of Heritage that was still operating on the property. As of April 21, 2015, there existed two contractor storage yard uses on the site, one belonging to Heritage and one belonging to Green Acres.

On April 7, 2015, Counsel for Mason provided an affidavit by Barbara Mason that is part of the record. In the affidavit, Ms. Mason stated that Heritage leased the premises from Mason following liquidation of assets by Mason in 2008 and that Heritage moved its clerical activities to Mason's former office. Ms. Mason continued that "Heritage continued the same use of the premises (as L.B. Mason & Son, Inc.) by becoming our major tenant." Mason also stated that "Green Acres Lawn Care, Inc., likewise became our tenant, using the premises as we did, i.e., storing equipment, vehicles and materials."

On May 14, 2015, Counsel for Mason wrote to Counsel for Mason in response to Green Acres' request for a commercial occupancy permit (the "Determination"). Mr. Sullivan adopted findings of fact consistent with what is set forth herein and concluded that, while Heritage was entitled to continue the nonconforming use that Mason had started, the addition of Green Acres' use onto the site some time prior to January 7, 2015, was "an additional use on the site and therefore did not replace an existing business Heritage." Sullivan continued that Green Acres' use "is an additional non-conforming use and as such is not allowed in this zoning district."

Based on the above findings of fact and conclusions, Mr. Sullivan determined that the Green Acres' use "is an additional non-conforming use on the property" that would not be

allowed pursuant to Article 5 Section 2 – “Nonconformities” and that Green Acres and its associated storage yard is an illegal use of the site and must vacate immediately.<sup>1</sup>

## II. Argument

### **Mason does not have Standing to Appeal the Determination Because it is not Aggrieved.**

Appeals to a Virginia board of zoning appeals are governed by Virginia Code § 15.2-

2311. This Code provision states, in pertinent part, that

A. An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article, any ordinance adopted pursuant to this article, or any modification of zoning requirements pursuant to § 15.2-2286.

Mason must, therefore, be "aggrieved" before she can appeal the Determination to the BZA.

According to the Supreme Court of Virginia,

[t]he term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order to be "aggrieved," it must affirmatively appear that such person has some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest. Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some public injury when the only wrong he has suffered is in common with other persons similarly situated. The word "aggrieved" in the statute contemplates a substantial grievance and means a denial of some personal or property right, legal equitable, or the imposition of a burden upon the petitioner different than that suffered by the public at large.

*Virginia Beach Beautification Commission v. Board of Zoning Appeals*, 231 Va. 415, 419-20 (1986) (internal quotations omitted).

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<sup>1</sup> Mason is incorrect in stating that “the Determination is based on the conclusion that [Mason] did not renew their business license, which expired in 2007...” while Mr. Sullivan recites this finding of fact, the Determination is not based on it. It is, rather, based on violation of Article 5, Section 2 of the Zoning Ordinance, *infra*. Indeed, Mason’s failure to renew its business license in 2007 is not relevant in light of Mr. Sullivan’s finding that Heritage continued Mason’s nonconforming use.

### **Mason Does not Have a Direct Interest in Green Acres' Occupancy Permit**

The Determination only pertains to the application of Green Acres for an occupancy permit. Mason is not Green Acres and Ms. Mason states in her affidavit that Mason has not operated a contractor storage yard on site since approximately 2008. Therefore, Mason is not directly interested in an occupancy permit for operation of a contractor storage yard by someone else. Mason's indirect interest (as Landlord) in Green Acres' use of the site for a contractor storage yard is insufficient because the required interest must be "direct." Mason's interest is also not "substantial" because Mason can continue to lease the property to Heritage for a contractor's storage yard, as it has done since 2010, regardless of any inability to also lease to Green Acres for an additional contractor storage yard. Therefore, the harm to Mason flowing from any denial of occupancy permit to Green Acres is insubstantial, as well as indirect. Mason cannot, therefore, demonstrate that it has standing as party aggrieved file this appeal.

### **Mason has Failed to Present a Preponderance of Evidence to Rebut the Determination's Presumption of Correctness**

In recent legislation, the General Assembly has specified that Virginia boards of zoning appeals must give deference to the zoning determinations.

The determination of the administrative officer shall be presumed to be correct. At a hearing on an appeal, the administrative officer shall explain the basis for his determination after which after which the appellant has the burden of proof to rebut such presumption of correctness by preponderance of evidence.

Va. Code § 15.2-2309. In determining a preponderance of evidence, that BZA should consider that evidence which it finds most convincing which is not necessarily based upon the quantity of evidence provided. See C. Friend, The Law of Evidence in Virginia 5-7. Virginia Model Jury Instruction 3.100.

All available evidence is that Green Acres *added* its use to the nonconforming use of Heritage some years after Heritage became the sole occupant on the site. As stated by Mr. Sullivan in the Determination, “[t]here are, as of 4/21/2015, two contractors’ storage yard uses (Heritage and Green Acres) occupying the site.”

The Zoning Ordinance in Article 5, Section 2 – “Nonconformities”, provides, in pertinent part, as follows:

Nonconforming uses of land and/or structures that were otherwise legal on the effective date of this ordinance and the amendments thereto, may be continued provided:

- a. No nonconforming use, structure and/or activity shall be enlarged, increased, or extended to occupy a greater area of land than was occupied on the effective date or amendment of this ordinance unless the enlargement, increase or extension does not result in an increase in nonconformity.
- b. No nonconforming use and/or structure shall be moved in whole or in part to any portion of the lot or parcel other than occupied by such use and/or structure on the effective date or amendment of this ordinance unless the move results in decreasing the degree of nonconformity or results in conformity with the requirements of the district. No additional nonconforming structures shall be constructed in connection with any nonconforming use of land. No additional uses which would be prohibited generally in the zoning district involved shall be permitted.

A copy of Article 5, Section 2 is attached for the BZA’s convenience.

Article 5, Section 2 of the Zoning Ordinance is based on Virginia Code § 15.2-2307, which states, in pertinent part, that nonconforming uses “may be continued only so long as the then existing or more restrictive use continues...” In other words, the General Assembly has provided that nonconforming uses may continue at their current or more restricted scale but may not be enlarged, increased or expanded to occupy a greater area. A copy of Virginia Code § 15.2-2307 is also attached for the BZA’s convenience.

According to the Supreme Court of Virginia, the purpose of Virginia Code § 15.2-2307, “is to preserve rights in existing lawful buildings and uses of land, subject to the rule that public policy favors the elimination of nonconforming uses” *City of Chesapeake v. Gardner Enterprises, Inc., et al.*, 254 Va. 243, 248 (1997) (citing 8A Eugene McCullin, Municipal Corporations § 25.184 (3d ed. 1994)). Further, the Supreme Court of Virginia has adopted the rule that “[n]onconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.” *Id.* Based on these principles, the Supreme Court has upheld local zoning ordinances, like Article 5, Section 2 of the Town’s Zoning Ordinance, that regulate changes to nonconforming uses. *Id.* *City of Emporia Board of Zoning Appeals v. Mangum*, 263 Va. 38, 42-43 (2002).

“Increase” or “enlargement” of a nonconforming use under Article 5, Section 2(a), above, includes increase in intensity where the physical area of the nonconforming use is not being expanded.<sup>2</sup> The additional of Green Acres’ contractor storage yard use to the Heritage contractor storage yard use is an increase or enlargement that increases the nonconformity in violation of Article 5, Section 2(a). While Mr. Sullivan did not specifically cite this particular violation, it provides an additional basis for in support of the Determination that Green Acres is illegally occupying the property.

Furthermore, Mr. Sullivan was correct in his particular reliance upon Article 5, Section 2(b). This provision states, in pertinent part, that no additional prohibited uses may be added to the legal nonconforming uses. Contractor storage yards are not allowed in the C-1 zoning district. Green Acres is engaged in a contractor storage yard use. Therefore, Green Acres

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<sup>2</sup> Article 5, Section 2(a) uses the terms “enlarged”, “increased” or “expanded to occupy a greater area of land” in the disjunctive such that “enlargement” or “increase” does not necessarily require an expansion of the physical area of the nonconforming use, but can be composed of an increase in the intensity of the use within the same physical area.

contractor storage yard use cannot be added to Heritage's contractor storage yard use to increase the nonconformity without violating Article 5, Section 2(b).

**Conclusion**

For the reasons set forth above, Mr. Sullivan requests that the BZA uphold his the Determination that Green Acres use of the property for contractor storage yard, in addition to the existing contractor storage yard operated by Heritage, is not allowed by the Zoning Ordinance.

RESPECTFULLY SUBMITTED

PATRICK SULLIVAN, ZONING ADMINISTRATOR

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015, a true and correct copy of the foregoing was filed with the Clerk to the BZA and sent via first class mail and email to:

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APPENDIX

**Section 2. - Nonconformities.**

Nonconforming uses of land and/or structures that were otherwise legal on the effective date of this ordinance and amendments thereto, may be continued provided:

- a. No nonconforming use, structure and/or activity shall be enlarged, increased, or extended to occupy a greater area of land than was occupied on the effective date or amendment of this ordinance unless the enlargement, increase or extension does not result in an increase in nonconformity.
- b. No nonconforming use and/or structure shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use and/or structure on the effective date or amendment of this ordinance unless the move results in decreasing the degree of nonconformity or results in conformity with the requirements for the district. No additional nonconforming structures shall be constructed in connection with any nonconforming use of land. No additional uses which would be prohibited generally in the zoning district involved shall be permitted.
- c. A use that is accessory or incidental to a permitted principal use cannot be made the basis for a nonconforming principal use.
- d. A nonconforming use may be extended throughout any portion of a building that was manifestly arranged or designed to accommodate such use at the time of adoption or amendment to this ordinance. However, no such use shall be extended to additional buildings or to land outside the original building.

*(Ord. No. 11.05.01, 6-14-2011)*

OPINIONS OF THE ATTORNEY GENERAL

**Preservation of historical or archaeological resources.** — Section 15.2-2306 allows a locality to require — as a condition of developing property in an area of known historical or architectural significance — documentation, reasonable under the circumstances, that the development will preserve or accommodate historical or archaeological resources. Whether an archaeological survey is necessary to meet the reasonable documentation requirement is a question of fact. See opinion of Attorney General to The Honorable Brenda L. Pogge, Member, House of Delegates, No. 14-062, 2014 Va. AG LEXIS 65 (11/21/14).

§ 15.2-2307. Vested rights not impaired; nonconforming uses.

Nothing in this article shall be construed to authorize the impairment of any vested right. Without limiting the time when rights might otherwise vest, a landowner's rights shall be deemed vested in a land use and such vesting shall not be affected by a subsequent amendment to a zoning ordinance when the landowner (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act, and (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

For purposes of this section and without limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property; or (vii) the zoning administrator or other administrative officer has issued a written order, requirement, decision or determination regarding the permissibility of a specific use or density of the landowner's property that is no longer subject to appeal and no longer subject to change, modification or reversal under subsection C of § 15.2-2311.

A zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever, with respect to the building or structure, the square footage of a building or structure is enlarged, or the building or structure is structurally altered as provided in the Uniform Statewide Building Code (§ 36-97 et seq.). Further, a zoning ordinance may provide that no nonconforming use may be expanded, or that no nonconforming building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such nonconforming use.

Notwithstanding any local ordinance to the contrary, if (i) the local government has issued a building permit, the building or structure was thereafter constructed in accordance with the building permit, and upon completion of construction, the local government issued a certificate of occupancy or a use