

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

**CERTIFICATION OF NONCONFORMING USE
CNU-34763-2011**

DECISION

Application: Certification of a Non-Conforming Use
Applicant: Eberwein Group, LLC t/a Merlin Auto Club
Opposition: None
Hearing Dates: June 4, 2014
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval

NATURE OF PROCEEDINGS

- (1) CNU-34763-2011 is a request for the certification of a Nonconforming Used Auto Lot and office, on approximately 0.987 acre in the R-18 (Multifamily Medium Density Residential) Zone, located at 5603 Marlboro Pike, District Heights, Maryland.
- (2) The Planning Board did not elect to consider this Application and the Technical Staff recommended approval of the request for certification. (Exhibit 2)
- (3) No one appeared in opposition to the request at the hearing held by this Examiner.

FINDINGS OF FACT

Subject Property

- (1) The subject property is Parcel 95, Tax Map Grid 81, A-2 and recorded in the Land Records of Prince George's County at Liber 32427, Folio 192. It is located approximately ½ mile west of Silver Hill Road.

Master Plan and Sectional Map Amendment

- (2) The subject property was rezoned from the C-M (Commercial Miscellaneous) Zone to the R-18 Zone/D-D-O (Development District Overlay) Zone on November 17, 2009, upon the District Council's adoption of the 2009 Marlboro Pike Sector Plan and Sectional Map Amendment ("SMA"). The DDOZ does not permit the existing use of the subject property.

(Exhibit 13) Thus, the use became nonconforming upon adoption of the DDOZ (Exhibit 16(a))

General Plan

(3) The October 2002 General Plan placed the subject property in the Developed Tier. It also lies within Planning Area 75A of Subregion IV. (Exhibit 14) The Plan Prince George's 2035 General Plan places the site in the Established Communities.

Applicant's Request

(4) On March 9, 2009 a Use and Occupancy Permit was issued to Said Zaatra (property owner) and The Eberwein Group, LLC t/a Merlin Auto Club(occupant) to permit a Used Car Sales business at the subject property. (Exhibit 8) Applicant submitted a copy of the site plan that was approved for the use in 1996 and 2008 showing a 1938 square foot office area, a garage used for storage, and a 1400 square foot outdoor display area. (Exhibit 23)

The site plan indicates that 9.2 parking spaces are required for the buildings and sales lot and 10 are provided.

(5) Applicant filed an application for certification of the nonconforming use. (Exhibit 5) The Planning Board staff reviewed the request administratively, pursuant to Section 27-244(d) of the Zoning Ordinance, and recommended approval. (Exhibit 13) On March 26, 2012 the District Council elected to review the application. On April 4, 2012 it requested the Office of the Zoning Hearing Examiner to hold a hearing on the Application. (Exhibit 1)

(6) Applicant submitted copies of utility bills, sale invoices, and the affidavit of the prior owner. (Exhibits 7, 21, 22, 33, 34, 35 and 36) This evidence reveals in that the property was legally and consistently used as a Used Car Sales prior to the change in law in 2009 until the present.

(7) An owner of the property and the Used Auto Sales business testified that he has been operating the use since 1996 and there has not been any period of 180 consecutive days in which the business has not operated at the site. (T. 7, 10)

LAW APPLICABLE

(1) Pursuant to Section 27-107.01(a)(166) of the Zoning Ordinance, a nonconforming use is defined as follows:

(A) The "Use" of any "Building," "Structure," or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), provided that:

(i) The requirement was adopted after the "Use" was lawfully established; or

(ii) The "Use" was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.

(B) The term shall include any "Building," "Structure," or land used in connection with a "Nonconforming Use," regardless of whether the "Building," "Structure," or land conforms to the physical requirements of the Zone in which it is located.

(2) Pursuant to Sections 27-107.01 (a)

(3) A Nonconforming Use may be certified if it satisfies the provisions of Section 27-244 of the Zoning Ordinance. That section provides as follows:

Sec. 27-244. Certification.

(a) **In general.**

(1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).

(b) **Application for use and occupancy permit.**

(1) The applicant shall file for a use and occupancy permit in accordance with Division 7 of this Part.

(2) Along with the application and accompanying plans, the applicant shall provide the following:

(A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;

(B) Evidence that the nonconforming use has not ceased to operate for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;

(C) Specific data showing:

(i) The exact nature, size, and location of the building, structure, and use;

(ii) A legal description of the property; and

(iii) The precise location and limits of the use on the property and within any building it occupies;

(D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.

(c) **Notice.**

(1) The following notice provisions shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(2) The Planning Board shall post the property with a durable sign(s) within ten (10) days of acceptance of the application and accompanying documentation. The signs(s) shall provide notice of the application; the nature of the nonconforming use for which the permit is sought; a date, at least twenty (20) days after posting, by which written comments and/or supporting documentary evidence relating to the commencing date and continuity of such use, and/or a request for public hearing from a party of interest will be received; and instructions for obtaining additional information. Requirements regarding posting fees, the number, and the location of signs shall conform to the requirements set forth in Subsection (f), below.

(d) **Administrative review.**

(1) If a copy of a valid use and occupancy permit is submitted with the application, where applicable a request is not submitted for the Planning Board to conduct a public hearing, and, based on the documentary evidence presented, the Planning Board's authorized representative is satisfied as to the commencing date and continuity of the nonconforming use, the representative shall recommend certification of the use as nonconforming for the purpose of issuing a new use and occupancy permit identifying the use as nonconforming. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.

(2) Following a recommendation of certification of the use as nonconforming, the Planning Board's authorized representative shall notify the District Council of the recommendation.

(3) If the District Council does not elect to review the recommendation within thirty (30) days of receipt of the recommendation as authorized by Subsection (e), below, the representative shall certify the use as nonconforming.

(4) Subsections (2) and (3), above, and Subsection (e), below, shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(e) **District Council review.**

(1) The District Council may, on its own motion, vote to review the Planning Board representative's recommendation, for the purpose of determining whether the use should be certified as nonconforming, within thirty (30) days of receipt of the recommendation.

(2) If the District Council decides to review the proposed certification, the Clerk of the Council shall notify the Planning Board of the Council's decision. Within seven (7) calendar days after receiving this notice, the Planning Board shall transmit to the Council all materials submitted to it in connection with the application.

(3) The Zoning Hearing Examiner shall conduct a public hearing on the application.

(4) The Zoning Hearing Examiner shall file a written recommendation with the District Council within thirty (30) days after the close of the hearing record.

(5) Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council.

(6) Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.

(7) The District Council shall affirm the certification only if it finds that a nonconforming use exists and has continuously operated.

(8) The District Council shall make its decision within forty-five (45) days from the filing of the Zoning Hearing Examiner's recommendation. Failure of the Council to take action within this time shall constitute a decision to certify the use.

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CONCLUSIONS OF LAW

(1) The proposed use is generally in conformance with the requirements of Section 27-244(b) of the Zoning Ordinance. The Applicant has filed for certification of a Use and Occupancy permit, and submitted a copy. (Section 27-244(b)(1)) Applicant has submitted copious documents, including sales invoices, and utility bills showing that the property was used prior to 2009 (when the use became nonconforming) and continuously since that time, as a used car sales business. (Section 27-244(b)(2)(A)) This same evidence indicates that the nonconforming use has not ceased to operate since 2009. (Section 27-244(b)(2)(B)) Applicant submitted a legal description of the property, and a Site Plan approved in 2008 in tandem with approval of Permit #35447-2008-U, that shows the precise location and limits of the uses on site. (Section 27-244(b)(2)(C)) Finally, Applicant has submitted a copy of Use and Occupancy permits issued to its predecessor prior to the adoption of the Sector Plan that rendered the use nonconforming. (Section 27-244(b)(2)(D))

(2) Accordingly, the District Council has sufficient evidence to support a finding that the use existed prior to the law that rendered it nonconforming, that it has continuously operated since that time, and that it should be certified as nonconforming pursuant to Section 27-244 of the Zoning Ordinance.

RECOMMENDATION

CNU-34763-2011 is recommended for Approval, certifying the Site Plan submitted in the record, subject to the condition that it be revised to reflect the exact number of parking spaces – either the 10 noted for the parking schedule or the 12 noted on the drawing of the uses on the Site Plan. (Exhibit 23)