

**BOARD OF ADJUSTMENT
CITY OF DELAWARE CITY**

IN RE: :
APPEAL OF CITY MANAGER’S DECISION :
PSC PROPERTIES, LLC, Appellant :
119 & 0 Fifth Street :
Delaware City, Delaware 19706 :
TMP Nos. 22-009.00-129 & 22-009.00-130 : **BOARD’S DECISION**

NATURE OF THE PROCEEDINGS

The matter before the City of Delaware City Board of Adjustment is an appeal by PSC Properties, LLC (hereinafter “PSC” or “Appellant”) of a determination made by the City Manager of Delaware City, Richard Cathcart, finding that Appellant’s current use of the property identified as 119 & 0 Fifth Street, Delaware City, tax map parcel numbers 22-009.00-129 & 22-009.00-130 (“Property”) does not qualify as a legal nonconforming use under the Delaware City Zoning Code. Mr. Cathcart’s determination was made on July 8, 2015, and Appellant timely filed a written appeal within thirty days of Mr. Cathcart’s decision. Notice of the appeal hearing was posted on July 27, 2015 at the Town Hall, the Post Office, Sunset Market, Valero Gas Station, the Library, on the Delaware City website, and at 119 & 0 Fifth Street. Notice was mailed on July 27, 2015 to PSC and to all abutting property owners. (City Exhibits A & B) A list of all exhibits introduced at the hearing is attached hereto.

PUBLIC HEARING BEFORE THE BOARD

The public hearing before the Delaware City Board of Adjustment was called to order on August 12, 2015 at 7:00 p.m. Board Chairman Paul L. Parets and Board Member Andrea M. Nolan were in attendance, along with Barrett Edwards, Esq. representing the Board. Max Walton, Esq. appeared on behalf of the City. Preston Carden appeared on behalf of PSC. Kathy Clifton, assistant City Clerk for Delaware City, was duly sworn and testified that the meeting was properly noticed as required by the City Code.

SUMMARY OF THE EVIDENCE PRESENTED

Max Walton began by briefly summarizing the history behind the appeal. In a letter dated June 19, 2015, attorney Daniel Losco petitioned the City on behalf of PSC to confirm that the current use of the Property for storage purposes was a legal nonconforming use. (Appellee Exhibit A) In response to Mr. Losco’s letter, City Manager Richard Cathcart investigated the situation and issued a letter on July 8, 2015 finding that the use of the Property for commercial storage did not qualify as a nonconforming use. (Appellee Exhibit B)

Mr. Walton presented evidence that the Property was zoned R-2 on the 1973 Delaware City Zoning Map (Appellee Exhibit D), which zoning district specifically permits substations since the R-2 zoning district expressly allows “[a]ll uses permitted in the R-1 district.” *See Delaware City Zoning Code*, §§ 46-17(a) & 46-16(h). Mr. Walton stated that since the Property

was being used in 1973 by Delmarva Power and Light Company,¹ it was the City's position that a substation was a permitted use in 1973 when the Delaware City Zoning Code ("Zoning Code") was adopted.

Section 46-3 of the Zoning Code defines a nonconforming use as "[a] use of land or use of a building lawfully existing at the time these regulations, or subsequent amendments hereto, became effective which does not conform to the use requirements of the district in which it is located." Mr. Walton argued that because the Property was being used for a permitted use in 1973, it was never a nonconforming use under the Zoning Code. Photos of the site being used as of July 7, 2015 for commercial storage purposes were introduced into the record. (Appellee Exhibit G) In conclusion, Mr. Walton argued that even if the substation had been a nonconforming use, the use could not be lawfully changed from a substation to a commercial storage use based on § 46-54 of the Zoning Code which states, "No nonconforming use may be changed to another nonconforming use."

Preston Carden, after being duly sworn, presented evidence on behalf of PSC. Mr. Carden testified that the Property had been used for storage purposes since 1991 without any problems. Mr. Carden indicated a desire to have the Property rezoned as commercial, which would be similar to other rezonings that had recently occurred in Delaware City. He testified that his desire was to better the community and that he thought seeking confirmation of the existence of a nonconforming use on the Property would be an appropriate way to resolve the matter. Mr. Carden testified that approximately 75% of the equipment being stored on the Property was actually his own equipment.

Kathy Wisowaty was duly sworn and testified that she was the previous owner of the Property and was under the impression at the time of purchasing the Property that the Property was zoned M-1 and used for farm storage purposes. She testified that Mr. Carden was a great asset to Delaware City, and the use of the Property by PSC had not negatively impacted her property located adjacent to the Property.

The last person to testify was City Manager Richard Cathcart. After being duly sworn, Mr. Cathcart testified that he had met with Mr. Carden to discuss the situation and even sent Mr. Carden a letter indicating storage would not be allowed on the Property. (Appellant Exhibit I) Mr. Cathcart clarified that there was no intent to personally attack Mr. Carden.

At the conclusion of the presentation of evidence by the parties involved, the public record was closed.

DECISION OF THE BOARD

Mr. Edwards instructed the Board that the issue before the Board was whether or not a legal nonconforming use existed on the Property pursuant to the standards outlined in the Zoning Code. The Chairman indicated that this was one of the more difficult cases the Board had ever dealt with. Based on a review of the evidence presented, the Board found that the Zoning Code

¹ Appellant's June 19, 2015 letter acknowledges Delmarva Power & Light Company was using the Property as a power substation prior to 1973. (Appellee Exhibit A)

EXHIBITS PRESENTED AT HEARING

City Exhibits

City Exhibit A – Notice of Public Hearing

City Exhibit B – Certified Mailing List

Appellant Exhibits

Appellant Exhibit A – July 28, 2015 letter from Preston Carden/PSC requesting appeal

Appellant Exhibit B – Illustrative Master Plan (Ft. DuPont)

Appellee Exhibits

Appellee Exhibit A – June 19, 2015 letter from Daniel Losco, Esq. to Richard Cathcart

Appellee Exhibit B – July 8, 2015 letter from Richard Cathcart to Daniel Losco, Esq.

Appellee Exhibit C – Delaware City Zoning Code (selected sections)

Appellee Exhibit D – Delaware City Zoning Map, 1973

Appellee Exhibit E – Delaware City Zoning Map, 1996

Appellee Exhibit F – Delaware City Zoning Map, present day

Appellee Exhibit G – Photographs of Property, July 7, 2015

Appellee Exhibit H – Selected cases regarding nonconforming uses

Appellee Exhibit I – January 27, 2015 letter from Richard Cathcart to Preston Carden

Appellee Exhibit J – February 26, 2015 letter from Max Walton to Preston Carden

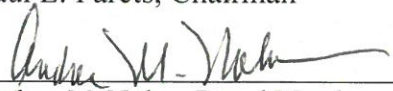
was adopted in 1973, and at the time of adoption the Property was being used as a substation by Delmarva Power and Light. The Board discussed how a substation was in fact allowed on this Property in accordance with the regulations outlined in the Zoning Code at the time of its adoption, and the Board discussed how the evidence indicated the Property was no longer being used as a substation but was being used for storage of equipment and vehicles. The Board discussed how nonconforming uses are intended to be phased out over time, and the spirit of the law is to phase out that which does not comply with the Zoning Code in favor of that which does comply. The Board discussed how it was clear for many years that the Property had either been zoned R-1 or R-2.

At the conclusion of the discussions, Chairman Parets entertained a motion to affirm the decision of Delaware City finding that the Property did not qualify as a nonconforming use, which motion was made by Board Member Nolan. Due to the fact that a nonconforming use cannot be changed under § 46-54 of the Zoning Code, and based on the other reasons articulated in this opinion, Board Member Nolan vote in favor of the motion. In addition to the reasons previously mentioned herein, Chairman Parets voted in favor of the motion because Mr. Carden acknowledged that he knew the Property was zoned for residential uses at the time of purchase. Additionally, Chairman Parets voted in favor of the motion because sections 46-53 and 46-54 of the Zoning Code made it clear the Property did not qualify as a nonconforming use.

Pursuant to the factual findings made by the Board based on the evidence presented at the public hearing, and for the reasons outlined herein, the Delaware City Board of Adjustment hereby affirms the decision of Delaware City finding that the Property does not qualify as a nonconforming use.



Paul L. Parets, Chairman



Andrea M. Nolan, Board Member

NOTICE: Pursuant to 22 Del. C. § 328(a), this decision may be appealed to the Superior Court of the State of Delaware within thirty (30) days from the date of filing of the Board's written decision with the office of Delaware City.

Date of filing the Board's written decision with the office of Delaware City and mailing the Decision to PSC Properties: August 19, 2015