



FAIRFAX COUNTY

BOARD OF ZONING APPEALS

PUBLIC HEARING DATE: October 21, 2008

TIME: 9:30 a. m.

V I R G I N I A

October 10, 2008

STAFF REPORT

APPEAL APPLICATION A 2008-MA-041

MASON DISTRICT

APPELLANT: Sohail Cheema

LOCATION: 5273 Canard Street

TAX MAP REF: 71-4 ((7)) 1

ZONING DISTRICTS: R-2

SITE AREA: 14,140 Square Feet

NATURE OF APPEAL: Appeal of a determination that the appellant has established a storage yard, erected a six foot high stockade fence and constructed a cement pad on vacant property which has no principal use in the R-2 District, all in violation of Zoning Ordinance provisions.

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For information, contact the Zoning Administration Division, Department of Planning and Zoning, 12055 Government Center Parkway, Suite 807, Fairfax, Virginia 22035-5505, 703-324-1314.

DESCRIPTION OF APPEAL

- Appellant:** Sohail Cheema
- Issue:** Appeal of a determination that the appellant has established a storage yard, erected a six foot high stockade fence and constructed a cement pad on vacant property which has no principal use in the R-2 District, all in violation of Zoning Ordinance provisions.
- Property Description:** The property is a corner lot located at 5273 Canard Street in the Indian Spring Subdivision, northwest of the Edsal Road exit from I-395, at the intersection of Edsal Road and Canard Street. The property is zoned R-2 Residential District, Two Dwelling Units/Acre. The property contains a lot area of 14,140 square feet and is developed with accessory structures consisting of a cement pad parking area encompassing over 2,500 square feet and a six foot high fence. A copy of the Fairfax County zoning map showing the subject property is provided on the previous page.
- Appellant's Position:** The appellant's application and basis for appeal are set forth in Attachment 1.

ZONING ORDINANCE PROVISIONS

The provisions of the Zoning Ordinance which are germane to this appeal are listed below. The complete text of these provisions is enclosed as Attachment 2.

- Par. 5 and 6 of Sect. 2-302, Permitted Uses (General Regulations)
- Sect. 10-101 (Authorization)
- Lead-in Paragraph and Par. 1, 2 and 3 of Sect. 2-601, Limitations on the Removal and Addition of Soil
- Definition of Storage Yard, Nonconforming Building or Use and Lot

BACKGROUND

- On June 27, 1947, the Fairfax County Planning Commission approved the Indian Spring subdivision. The subject property was shown on a plat recorded in Deed Book 574, Page 522 as Lot 1 of the Indian Spring subdivision, and consisted of 22,457 square feet of land. The 1941 Zoning Ordinance was in effect at the time, and the property was zoned Agricultural District. A copy of the plat is enclosed as Attachment 3.

- On December 11, 1959, Building Permit #P110 was issued for a 1,152 square foot, one story, single family detached dwelling on Lot 1. When the building permit was issued, the 1959 Zoning Ordinance was in effect and the property was zoned RE-0.5. On October 10, 1960, a Certificate of Occupancy was issued for the dwelling on Lot 1. A copy of Building Permit #P110 and the related plat is enclosed as Attachment 4.
- According to Fairfax County land records, the Virginia Department of Transportation (VDOT) acquired a portion of Lot 1 in 1965 to accommodate the widening of Edsal Road. It appears that the dwelling on Lot 1 was removed from the property when VDOT constructed the Edsal Road improvement in 1965.
- With the adoption of the current Zoning Ordinance, effective August 14, 1978, the subject property was rezoned to the R-2 District.
- In 1986 a complaint was received regarding the parking of numerous vehicles on the subjected property in conjunction with the service station on adjoining lot. At that time, the property owner was Mr. Sung-Kul Choi. The vehicles were removed and the violation was resolved.
- From 1991 to 1994, at least four (4) zoning complaints were investigated regarding the storage of vehicles and other miscellaneous items on the subject property. The owner of the property during this time was James Bevins. Every time Mr. Bevins was issued a Notice of Violation for such storage, he cleared each violation by removing the items cited.
- On August 1, 1996, a complaint was received regarding the parking of commercial vehicles on the subject property. On November 18, 1996, a Notice of Violation was issued to Mr. Koo Hyung Kim, the property owner. On December 12, 1996, he filed an appeal of the Notice of Violation.
- On December 17, 1996 the appeal was accepted and the public hearing was scheduled for March 11, 1997. At its scheduled meeting, the Board of Zoning Appeals granted the appellant's request to withdraw the appeal based on testimony by the Appellant's agent that the use would be discontinued.
- On April 29, 2003, a request for lot validation was submitted to the Zoning Administration Division and in a letter dated June 27, 2003, the property was deemed to be a legally created lot, under the Zoning Ordinance provision applicable at that time, even though it did not meet current lot area and lot width requirements. Therefore, the lot may be developed with a single family detached dwelling provided all applicable County regulations, with the exception of the lot area and lot width requirements, are met, to include the minimum yard requirements. A copy of Buildable Lot determination letter is provided as Attachment 5.
- On October 30, 2007, the property was conveyed from Koo Hyung Kim to Sohail Cheema, the current owner. A copy of the deed conveying the ownership is provided as Attachment 6.
- In May and June of 2008, complaints were received regarding the parking of multiple commercial vehicles (limousines) on a large cement pad. A subsequent site inspection

revealed that the property was being used for storage of ten commercial limousines, Lincolns, and other types of passenger for hire vehicles. Photographs taken during the inspection are provided as Attachment 7.

- On May 29, 2008, the appellant obtained a Home Occupation Permit for an office use, doing business as “All American Black Car Service.” A copy of the Home Occupation Permit is provided as Attachment 8.
- By Certified Mail letter dated June 11, 2008, a Notice of Violation was issued to the appellant citing him for establishing a storage yard in violation of Par. 5 of Sect. 2-302 of the Zoning Ordinance and constructing accessory structures on a vacant lot without a principal use in violation of Par. 6 of Sect. 2-302. A copy of the Notice of Violation is included in the appellant’s application, provided as Attachment 1.
- On July 11, 2008, the subject appeal was filed. On July 23, 2008, the appeal was accepted and scheduled for public hearing on October 7, 2008.
- On August 28, 2008, a Notice of Violation was issued by the Department of Public Works and Environmental Services (DPWES) for conducting land disturbance activity in excess of 2500 square feet without a permit and an approved conservation plan. A copy of the Notice of Violation is provided as Attachment 9.
- On September 20, 2008, the appellant’s representative requested the public hearing be rescheduled because he would be out town on October 7 and it would afford the appellant more time to resolve the zoning violations. The public hearing was therefore rescheduled to October 21, 2008. A copy of the request to move the public hearing is provided as Attachment 10.

ZONING ADMINISTRATOR’S POSITION

It is the Zoning Administrator’s position that the Appellant has established a storage yard and constructed accessory structures on a lot that does not contain a principal use on property in the R-2 District, all in violation of Fairfax County Zoning Ordinance provisions.

As defined in relevant part in Article 20 of the Zoning Ordinance, a storage yard is the use of any space, “...for the storage or keeping of construction equipment, machinery, vehicles or parts thereof, boats and/or farm machinery.” As previously noted, an inspection of the property revealed that the appellant is storing commercial limousines, Lincolns, and other types of vehicles, all of which are registered as vehicles for hire with the Department of Motor Vehicles. In addition, land disturbance in excess of 2,500 square feet, construction of a cement pad and erection of a 6 foot fence on a lot without principal use also are violations of Zoning Ordinance provisions.

Given the nature of the storage, staff believes the storage or keeping of vehicles on this property constitutes a storage yard. A storage yard is not a permitted use in the R-2 District. Under the provision of the Zoning Ordinance, a storage yard is permitted in the I-5 and I-6 Districts.

Consequently, it is staff's determination that the storage yard activity is in violation of Par. 5 of Sect. 2-302 which provides "no use shall be allowed in any districts which is not permitted by the regulations for the district." In addition, it is also staff's determination that the fence and cement pad constitute accessory uses on the property, which have no principal use; therefore, these uses are in violation of Sect. 10-101 of the Zoning Ordinance which states "Accessory uses and structures are permitted in any zoning district, unless qualified below, but only in connection with incidental to, and on the same lot with a principal use or structure which is permitted within such district." Par. 6 of Sect. 2-302 of the Zoning Ordinance states that "No accessory structure or use, as defined in Article 20, shall hereafter be built, moved remodeled, established, altered or enlarged unless such accessory structure or use complies with the provision of Part 1 of Article 10."

Although not addressed in the Notice of Violation, it is noted that Par. 1 of Sect. 2-601 provides that "sod and soil may be removed from or added to any lot to a depth of not more than eighteen (18) inches but only in an area not exceeding 2500 square feet." The appellant has disturbed land in excess of 2,500 square feet by constructing a cement pad on the subject property. Notwithstanding that the use is not permitted without a principal use, the appellant is required to file a grading plan for such land disturbance in accordance with Par. 3 of Sect. 2-601 of the Zoning Ordinance, which states "Grading of land shall be permitted in accordance with a grading plan approved by the Director. The Director shall determine that the amount of soil removal or fill and proposed grading is necessary for the establishment of a use permitted in the zoning district in which located, and that the grading plan shall provide for even finished grades which meet adjacent properties' grades and do not substantially alter natural drainage, and which plans include siltation and erosion control measures in conformance with the provisions of Chapter 104 of The Code." County records do not indicate that a grading plan was ever submitted or approved for such land disturbance. As such, the appellant is in violation of Par. 1 of Sect. 2-601 of the Zoning Ordinance. With few exceptions, none of which apply to the subject property, Par.1 of Sect. 2-601 of the Zoning Ordinance provides that sod and soil may be removed from and added to a lot to a depth of not more than 18 inches but only in an area not exceeding 2,500 square feet. Par. 2 of Sect. 2-601 provides that the "removal, dumping, filling or excavation necessary for construction shall be permitted when such is in accordance with an approved site plan or approved plans and profiles for a subdivision."

The appellant does not dispute that the property has a fence and a cement pad. Furthermore, he acknowledges that he is using the property for vehicle storage. However, the appellant contends that under the provision of Sect. 3-202 of the Zoning Ordinance, the accessory uses are permitted uses. The appellant acknowledges that there is no principal use on the referenced property, but he believes accessory uses are permitted uses in the R-2 District. With regard to the first claim, although Sect. 3-202 of the Zoning Ordinance lists accessory uses as permitted uses in R-2 District, Part 3 of Article 20 defines accessory use, in relevant part, as "...a use which is clearly subordinate to, customarily found in association with, and serves a principal use...." It is the Zoning Administrator's position that since the property does not have a principal use, accessory uses are not permitted on the property.

Second, the appellant maintains that the property is a reverse frontage lot and that a fence up to eight feet in height is permitted pursuant to Par. 3C of Sect. 10-104 of the Zoning Ordinance, which states "a solid wood fence not exceeding 8 feet in height, located flush to the ground is

permitted in any side or rear yard of a reverse frontage lot.” First and foremost, the fence is an accessory use not permitted without a principal use. If however, a principal use existed on the lot, it is noted that the height determination would be based on the location of that principal use. A reverse frontage lot is defined as “A residential through or corner lot, intentionally designed so that the front lot line faces a local street rather than facing a parallel major thoroughfare.” The referenced property is a corner lot whose front lot line faces a local street that is perpendicular to a major thoroughfare, not parallel to a major thoroughfare. Therefore, the property fails to meet the definition of a reverse frontage lot. Secondly, fence height is determined based on the location of the principal structure. Since there is no principal structure on the referenced property, erecting a fence, regardless of its height, is not permitted.

Third, the appellant maintains that no Zoning Ordinance provision was cited by staff that prohibits the cement pad except in conjunction with the fence. However, the two accessory structures together do not form the basis of the violation; each is a separate accessory structure and all provisions cited to accessory uses apply to the cement pad as well as to the fence.

Finally, the appellant contends that the property is not being used as storage yard; rather, the property is being used as a parking lot for the temporary overnight parking of vehicles. According to the appellant, since the property was used as a parking lot prior to his purchase, the continuance of the use should be permitted. Nevertheless, the definition of storage yard includes the keeping of vehicles on a property, and there is no distinction between temporary overnight parking or any other type of vehicle storage. It is noted that the parking of one commercial vehicle on Lot 2 is permitted as long as the limitations on Par. 16 of Sect. 10-102 are met. The parking of one commercial vehicle will not be permitted on the referenced property until the two properties are combined by a building permit.

With regard to the previous use of the property as a parking lot, County records show that the previous owner, Mr. Kim, claimed a non-conforming right to use the property for vehicle storage. However, Mr. Kim never provided any documentation or evidence to support the claim. As defined in relevant part of Article 20 of the Zoning Ordinance, a nonconforming use is a use that was “... lawfully existing on the effective date of the Ordinance or prior ordinances, which does not conform with the regulations of the zoning district in which it is located...” Despite the fact that Mr. Kim failed to offer documentation supporting his claim to non-conforming rights, staff researched applicable Zoning Ordinance provisions, County files and land records in response to this claim, in conjunction with Appeal A 1996-MA-053. A brief history of the zoning and uses of the property is provided below.

With the adoption of the County’s first Zoning Ordinance in 1941, the property was zoned Agricultural District. In June of 1947, Lot 1, containing 22, 457 square feet, was created as part of the Indian Spring subdivision and continued to be zoned Agricultural District. Under the 1941 Zoning Ordinance, a junk yard or storage yard use was not permitted in the Agricultural District. When the 1959 Zoning Ordinance became effective on September 1, 1959, the property was zoned RE-0.5 (One Dwelling unit per half acre). Junk yards or storage yards were not permitted uses in RE-0.5 District. It is noted that pursuant to a December 11, 1959 Building Permit, a one story single family detached dwelling was constructed on the original Lot 1. A review of land records indicate that in 1965, VDOT acquired an 8, 317 square foot portion of this lot to accommodate the widening of Edsal Road, and the dwelling on Lot 1 was removed. Since that

time, the residual 14,140 square feet portion of Lot 1 (the subject property) has remained vacant and has always been conveyed in conjunction with adjoining Lot 2. With the August 14, 1978 effective date of the current Zoning Ordinance, the property was rezoned to the R-2 District. As previously noted, storage yards are not permitted in the R-2 District. In order for Mr. Kim's activities or the current activities to be considered a lawful nonconforming use, it would need to be demonstrated that the junk/storage yard activity existed prior to March of 1941.

Furthermore, research indicates that the subject property was part of a larger tract that was subdivided in 1947. Between 1947 and 1959, the lot was vacant. Since 1960 the property was used for residential purposes. A house was built on the lot in 1960, and it was torn down in 1965 when Edsal Road was widened. From 1965 to 1985, the subject property was conveyed in conjunction with adjoining Lot 2, and there is no indication that it was used for junk yard/storage yard activities during that time. It was not until 1986 that the property was used for vehicle storage activity. Mr. James Bevins, the owner before Mr. Kim, was issued several Notices of Violation for the storage of vehicles and other items on the property. In each instance he removed the vehicles and other items and never raised the issue of a nonconforming right to conduct such activity. Although Mr. Kim claimed nonconforming rights, he requested withdrawal of the appeal. The Board of Zoning Appeals granted the appellant's request to withdraw based on testimony of the Appellant's agent that the use will be discontinued. Based on these findings the appellant's claim of a nonconforming use is unsubstantiated.

The appellant can achieve compliance with the Zoning Ordinance provision by doing the following:

- Remove on a permanent basis the storage yard use;
- Submit and obtain approval of a building permit to consolidate Lot 1 with Lot 2, which would established a principal use to the accessory uses;
- Submit and obtain approval of a grading plan for the cement pad;
- Lower a portion of fence along Edsal Road to 3.5 feet for sight distance purposes and to 4 feet per Par. 3B of Section 10-104 of the Zoning Ordinance; or apply and obtain approval of a special permit to allow the fence to remain six feet in height in a front yard. (Please refer to the illustration provided as Attachment 11 which delineates the correct fence heights along the property lines, assuming the parcels are unified as one lot.)

As stated previously, the Zoning Ordinance permits the appellant to have one commercial vehicle per dwelling unit. Provided he consolidates Lot 1 and Lot 2 via building permit, the appellant is allowed to keep one commercial vehicle on the referenced property.

The appellant claims that the property has been used as a parking lot prior to his purchase and that he would therefore like the continuation of that use. Given the facts and findings, it is staff's position that the parking lot activity is deemed to be a storage yard use that began while the current Zoning Ordinance provisions were in effect. Therefore, the use is a violation of the Zoning Ordinance and there are no nonconforming rights to maintain a storage yard on the referenced property. Furthermore, it is a violation of the Zoning Ordinance to erect a fence and

construct a cement pad, both of which are accessory uses, when there is no principal use on the referenced property. For these reasons, staff recommends that the Board of Zoning Appeal uphold the Zoning Administrator's position.

ATTACHMENTS:

1. Appellant's Application and Basis for Appeal
2. Applicable Zoning Ordinance Provisions
3. A copy of a plat recorded in Land records
4. A copy of Building Permit #P110 and related plat
5. A copy of Buildable lot determination letter
6. Deed Book 19637, Page 561
7. Photographs taken during the inspection of the subject property.
8. A copy of the Home Occupation Permit
9. A copy of the Notice of Violation by DPWES
10. A copy of the request to move the public hearing
11. An illustration of permitted fence heights