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RE: Ronald W. Morgan and Jennifer Morgan v. Dale Callaway, Ron McCabe, John Mills, Jeff Hudson, and William Wheatley, comprising The Board of Adjustment of Sussex County, Delaware, C.A. No. 02A-02-002

Date Submitted: October 7, 2002

Dear Counsel:

This is my decision on the appeal by Ronald W. Morgan ("R.W. Morgan") and Jennifer Morgan of the Sussex County Board of Adjustment's ("Board") finding that a trucking operation on the Morgans' property ("Property") is a non-conforming use and that equipment on the Property that is not related to the Morgans' farming operations would have to be removed. The Board's decision is affirmed in part and reversed in part for the reasons set forth herein.

STATEMENT OF FACTS

The Property is a 44 acre tract of land and is titled in the name of R.W. Morgan, with lifetime rights reserved to R.W. Morgan's grandmother, Marceil Morgan ("M. Morgan").

M. Morgan resides in a farmhouse on the east side of the Property. R.W. Morgan resides with his wife, Jennifer Morgan, in a house on the west side of the Property.

A Sussex County Violation Notice was posted on the Property citing a violation of section 115-191 of the code on July 17, 2000.¹ Lawrence D. Lank, the Director of the Planning and Zoning Department, by letter dated July 31, 2001, notified R.W. Morgan that he was in violation of a County zoning ordinance prohibiting the accumulation of “junk” on the Property. R.W. Morgan appealed this letter determination, arguing that the “junk” was operational farm equipment used on the farm. R.W. Morgan also sought a determination that his trucking business conducted on the Property was a prior non-conforming use.

The Board held a hearing on the matter on October 1, 2001. A number of individuals² testified at the hearing. A summary of their testimony follows.

Marceil Morgan

M. Morgan’s husband, William B. Morgan (“W.B. Morgan”), started a trucking operation on the Property about 1946 or 1947. The trucks were used to haul cattle, lumber and equipment. The trucks were stored and refueled on the Property, and the business office was located in the farmhouse. At some point part of the operation moved across the street, but the rest of the trucking operation continued on the Property. There have been continuous trucking operations on the Property since 1946 or 1947.

¹Section 191 provides: “No more than two automotive vehicles or trailers of any kind or type without current license plates shall be parked or stored on any residentially zoned property other than in completely enclosed buildings.” SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 191 (2001).

²Testimony of some of the individuals has not been summarized. The substance of the testimony involved their opinion on the character of R.W. Morgan.

Ronald W. Morgan

The Property is used to grow corn, soybeans and for pasture land. In addition to his own parcel, R.W. Morgan farms 182 acres as a tenant farmer. He purchased used farm equipment from Craig Hitch in July of 2000. Most of the equipment purchased is operational and used by R.W. Morgan in his farming business. The remainder of the equipment is used for parts. He concedes that the house trailer on the Property is in violation of the zoning ordinance and has found a buyer to take it.

The trailer bodies on the Property all have legal farm tags. Most of the trailer bodies are fully operational and are used to store farm equipment. R.W. Morgan cannot afford to build a storage facility for this equipment. He concedes that three of the trailer bodies are in need of repairs, which he plans on making. He also plans on removing three other trucks that are nonoperational within a short period of time. Another truck was involved in an auto accident and cannot be removed from the Property because it is the subject of litigation.

R. W. Morgan's grandfather, W.B. Morgan, started a trucking business on the Property in the 1940's. The office was located in the farmhouse and the trucks were stored and refueled on the Property. Part of the business occurred on the other side of the road, but trucking operations on the Property continued. When W.B. Morgan died, his son, Ronald J. Morgan ("R.J. Morgan"), continued the family trucking business on the Property. Upon W.B. Morgan's death, R.J. Morgan inherited the Property and W. B. Morgan's son, William H. Morgan ("W.H. Morgan"), inherited the land across the road.

Presently, the trucks are not refueled or loaded on the Property. The trucks are stored on the Property and repairs are also done there. Repairs have been done on the Property since the

1940's. The present repair building was built in 1989 and replaced an older building that had been destroyed by wind damage.

The records show that a number of corporations were formed over the years with the farmhouse listed as the registered office. The names and dates of incorporation are as follows:

Morgan Trucking, Inc., February 9, 1962

Morgan Produce, Inc., January 11, 1971

Morgan Charolais Farms, Inc., December 9, 1977

Morgan Transportation Service Corporation, July 14, 1981

Morgan Potato Service, Inc., September 10, 1985³

Ronald J. Morgan

R.J. Morgan worked in the family trucking business. The trucks were refueled and stored on the Property. In 1989, he ceased to work for the family trucking business, but his son, R.W. Morgan, continued to operate a trucking business on the Property. The trucking business hauls piling and lumber.

Bradley Morgan Johnson

Bradley Morgan Johnson ("Johnson") worked for the family trucking business as a truck driver. The trucks were stored and fueled on the Property and the office was located in the farmhouse. Repairs on the trucks were also done on the Property. Johnson was also familiar with the farm equipment on the Property and had used it in the past.

John Sapp

³Various records exist that deal with these corporations. However, there is little documentation covering the years 1991-1997.

John Sapp (“Sapp”) has been a friend of R.W. Morgan for 15 years. Sapp visits the farm frequently and is familiar with the equipment on the Property. He also works for J.W. Morgan on the weekends as a mechanic. The farm equipment is either operational or useful for obtaining parts. He has borrowed the farming equipment in the past. There has always been a working trucking operation on the Property.

Vaughn H. Morgan

Vaughn H. Morgan’s (“V.H. Morgan”) land borders the Property. R.W. Morgan did not purchase the equipment, but rather is allowing Craig Hitch to store his “junk” on the Property. The storage of the “junk” on the Property has adversely affected the value of V. H. Morgan’s land. The “junk” being stored is unsightly and the Property is unkempt. He has been trying to clean up his own land in order to improve the value of his land. The trucking operation was located on the other side of the road, not on the Property. Trucks only parked on the Property occasionally.

Harvey Kenton

Harvey Kenton (“Kenton”) is a licensed realtor who evaluated V.H. Morgan’s land two or three years ago. At the time of the evaluation, “junk” was not being stored near the property line between V.H. Morgan’s and R.W. Morgan’s properties. The “junk” being stored there has adversely affected the value of V.H. Morgan’s land. The trucking operation was mainly run from the other side of the road, not from the Property. Trucks only stopped there from time to time.

William H. Morgan

Although the trucking operation started in the 1940's, there was only one truck until the first business was first incorporated in 1962. The trucking business mostly operated on the other

side of the road, not on the Property. The maintenance of the trucks was performed on the other side of the road. The office moved out of the farmhouse in 1971 or 1972. Trucks were not stored on the Property. The only truck on the Property was a house trailer that used to be located there, but has since been removed. Some of the “junk” stored on the Property is useful for parts. However, R.W. Morgan has too much equipment stored on the Property.

Robert Moore

Robert Moore (“Moore”) lives across the street from the Property. He has been living there for six or seven years and there have not been any trucks parked on the Property until the last year or so. R.W. Morgan works on the trucks late at night. The noise created by the work on the trucks disturbs Moore and his three-year-old daughter while they are trying to sleep.

At the conclusion of the hearing the Board did not decide the matter, but voted to table the issue until its next meeting. The Board denied the application on November 5, 2001. The Board noted that there seemed to be a lot of farming equipment on the Property and questioned whether it was all necessary for farming. The Board concluded, based upon a termination of lease notice in the record, that the trucking operation on the Property terminated in 1973. The Board issued its written decision on January 4, 2002. The Board held that the trucking operation was not a legal non-conforming use because it had not been carried out continuously on the Property since the enactment of the zoning ordinance. The Board further held that only the equipment necessary for farming operation would be permitted to remain on the Property.

ISSUES PRESENTED⁴

The first issue is whether the Board's determination that the prior non-conforming use had lapsed is supported by substantial evidence. The second issue is whether the Board exceeded its jurisdiction in limiting the amount of farm equipment used on the Property.

DISCUSSION

A. Standard of Review

The standard of review on appeal from a decision of the Board of Adjustment is limited to correction of errors of law and to determinations of whether substantial evidence exists in the record to support the Board's findings of fact and conclusions of law. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241 (Del. Super. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977). Substantial evidence is evidence from which the Board reasonably and fairly could reach its conclusion. *Miller v. Bd. of Adjustment of the Town of Dewey Beach*, Del. Super., C.A. No. 93A-02-009, Lee, J. (Feb. 16, 1994). It is more than a scintilla but less than a preponderance. *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). The burden of persuasion is on the party seeking to reverse the Board's decision. *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947 (Del. Super. 1988), *aff'd*, 567 A.2d 422 (Del. 1989). If the Board's decision is fairly debatable, there is no abuse of discretion. *Id.* at 956. When substantial evidence exists, the appellate court may not reweigh the evidence and substitute its own judgment for the Board's.

⁴Petitioners were originally issued a notice of violation of Section 115-191 of the Sussex County Code prohibiting the storage of more than two untagged vehicles on the property. SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 191 (2001). At the hearing, Petitioner presented undisputed evidence that the vehicles were all legally tagged. In its written decision, the Board did not base its decision on a violation of this section. The Court will not address this issue since it was not addressed below.

Janaman v. New Castle County Bd. of Adjustment, 364 A.2d at 1242. In the absence of substantial evidence, the Superior Court may not remand the Board’s decision for further proceedings, but rather, may only “reverse or affirm, wholly or partly, or may modify the decision brought up for review.” *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d at 950 (citing 9 Del. C. § 1353(f), which is identical to 9 Del. C. § 6918).

B. Prior Non-Conforming Use

The Board’s determination that the prior non-conforming use had lapsed is supported by substantial evidence of record and is not legally erroneous. Non-conforming use is defined in Section 6901 of Title 9 as: “a use . . . which does not comply with the applicable use provisions in a zoning regulation or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or code or amendment, or prior to the application of such ordinance or code or amendment by reason of its location.” 9 Del. C. § 6901. The Sussex County Code further defines non-conforming use as “[a] building or land which does not conform to the height, area, or use regulations of the district in which it is located.” SUSSEX COUNTY, DEL., CODE ch. 115, art. I, § 4(B) (2001). Commercial trucking operations are not a permissible use in an agricultural residential district. SUSSEX COUNTY, DEL., CODE ch. 115, art. IV, § 20 (2001). Thus, since the Property is zoned agricultural, R.W. Morgan’s trucking operation violates existing zoning regulations.

However, the trucking operation is not a violation if it qualifies as a prior non-conforming use. Section 195 permits a preexisting use to continue despite its nonconformity with current

zoning regulations.⁵ SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 195 (2001).⁶ However, the non-conforming use lapses upon a discontinuance of the use for a period of two years.⁷ SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 198 (2001). The rationale behind the non-conforming use exception is that “once a landowner has begun to use his property for a particular purpose, a restriction preventing such use would cause substantial hardship.” *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d at 954. The non-conforming use doctrine operates as a balance between the preexisting use of the property by the owner and the public interest in discontinuing such use. *Kirkwood Motors, Inc. v. Bd. of Adjustment of New Castle County*, Del. Super., C.A. No. 99A-12-009, Quillen, J. (May 16, 2000) (Letter Op.). Generally, provisions continuing a non-conforming use are strictly construed, while provisions limiting a non-conforming use are liberally construed. *New Castle County v. Harvey*, 315 A.2d 616, 618 (Del. Ch. 1974).

⁵Section 115-195 provides: “Except as otherwise provided herein, the lawful use of land or buildings existing at the effective date of this chapter may be continued although such use does not conform to the provisions hereof. If no structural alterations are made, a non-conforming use of a building may be changed to another non-conforming use of the same or of a more-restricted classification. Whenever a non-conforming use of land or buildings has been changed to a more-restricted use or to a conforming use, such use shall not hereafter be changed to a less-restricted use. The non-conforming use of a building may be hereafter extended throughout those parts of a building which were lawfully and manifestly arranged or designed for such use at the time of the enactment of this chapter. SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 195 (2001).

⁶*See also* 9 Del. C. § 6920 (permitting the continuance of non-conforming uses).

⁷Section 115-198 provides: “No building, land or portion thereof used in whole or in part for a non-conforming use in any district which remains idle or unused for a continuous period of two years, whether or not the equipment or fixtures are removed, shall again be used except in conformity with the regulations of the district in which such building or land is located.” SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 198 (2001).

The non-conforming use must be in existence at the time the applicable zoning ordinance is passed. *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d at 955. In order to vest, the use must be more than occasional or casual. *York Beach Mall, Inc. v. Bd. of Adjustment of the Town of S. Bethany*, Del. Super., C.A. No. 98A-03-001, Graves, J. (Aug. 9, 2001) (ORDER).⁸

A non-conforming use may exist even if the use consists of an accessory⁹ commercial use. *Id.* The non-conforming use exception should be “interpreted to allow normal growth and extension of that which the owner already legally possessed.” *New Castle County v. Harvey*, 315 A.2d at 619. However, the non-conforming use must be a continuation of the use that existed at the time of the ordinance; other uses differing in quality or character are not permissible. *Id.* at 618 .

Once a non-conforming use is vested and continues, it runs with the land. *Kirkwood Motors, Inc. v. Bd. of Adjustment of New Castle County*, Del. Super., C.A. No. 99A-12-009, Quillen, J. (May 16, 2000) (Letter Op.). Absent specific statutory authority, a Board may not impose restrictions contrary to the general law. *Kirkwood Motors, Inc. v. Bd. of Adjustment of New Castle County*, Del. Super., C.A. No. 99A-12-009, Quillen, J. (May 16, 2000) (Letter Op.). The non-conforming use continues until terminated by the owner’s conduct through voluntary change or abandonment. *Mayor & Council of New Castle v. Rollins Outdoor Adver., Inc.*, 459 A.2d 541, 546 (Del. Ch. 1983) *rev’d on other grounds*, 475 A.2d 355 (Del. 1984)..

⁸*See also* SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 201 (2001) (stating that casual use is insufficient to establish a non-conforming use).

⁹Section 115-4 defines an accessory use as: “[o]ne which is clearly incidental to or customarily found in connection with and, except as otherwise provided in this chapter, is located on the same lot as the principal use of the premises. When the term “accessory” is used in this chapter, it shall have the same meaning as “accessory use.” SUSSEX COUNTY, DEL., CODE ch. 115, art. I, § 4(B) (2001).

The question of whether a non-conforming use has been abandoned is determined by looking at the facts and circumstances of the particular case. *Auditorium, Inc. v. Bd. of Adjustment of Mayor & Council of Wilmington*, 91 A.2d 528, 534 (Del. 1952).¹⁰ Generally, abandonment requires “more than a mere temporary suspension of the use and requires the concurrence of an intention on the part of the owner to abandon or relinquish the use with an overt act, or failure to act, showing the consummation of that intention.” *Auditorium, Inc. v. Bd. of Adjustment of Mayor & Council of Wilmington*, 91 A.2d at 534.

In reaching its determination denying the existence of a legal non-conforming use, the Board made findings of fact that are not supported by the record.¹¹ In its first finding, the Board stated: “The director had determined that the subject property had not been used continually for a trucking operation, and that as a result, the use of the property for that purpose at the present time was in violation of the zoning ordinance.” This finding is not supported by the record. The Director’s letter determination of July 31, 2001 found that there was an accumulation of “junk” on the property and did not address the existence of a trucking operation. Letter from Lank to R.W. Morgan dated 7/31/01.

The Board’s fourth finding is also contrary to the record. The Board stated: “Marceil Morgan, the Applicant’s grandmother and spouse of the originator of the business, testified that there came a time when the business moved across the road.” Marceil Morgan testified that part of the operation moved across the road, but that trucking operations continued on the disputed

¹⁰See also SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 202 (2001) (providing that the existence of a non-conforming use is a question of fact).

¹¹It should also be noted that the aerial photographs presented by W.H. Morgan and mentioned by the Board in its eighth finding are not a part of the record.

parcel. Tr. at 26-27. The Board's seventh finding is also inaccurate. The Board stated: "He personally did not remember the junk being located on the property, nor does he recall trucking operations being located there." Harvey Kenton testified that the majority of the trucking operation was run from the parcel across the road, but conceded that some trucking operations were conducted on the disputed parcel. Tr. at 39.

Once these erroneous factual findings are removed, the Board's decision contains three factual findings that are supported by the record and relevant to the determination of the existence of the prior non-conforming use. The Board found that Petitioner's grandfather started a trucking business on the property in 1946. Under the regulations, the trucking business would qualify as a non-conforming use since it was in existence prior to the adoption of the zoning regulations in 1976. *See* SUSSEX COUNTY, DEL., CODE ch. 115, art. XXVI, § 195 (2001).

However, the question before the Board was whether or not the trucking operation occurred continuously on the Property since that time, or had lapsed. In its findings, the Board accepted the testimony of W.H. Morgan that Morgan Trucking, Inc. went out of business in 1972. The Board also noted that an individual residing across the street did not recall trucks operating on the Property until a year ago. The question for this Court to determine is whether these findings amount to substantial evidence that the trucking operation was not carried on continuously, as required by the regulations. From these findings, the Board could reasonably reach the conclusion that the trucking business was not continuously in operation. *Miller v. Bd. of Adjustment of the Town of Dewey Beach*, Del. Super., C.A. No. 93A-02-009, Lee, J. (Feb. 16, 1994). Although in this case, the Board's decision is probably fairly debatable, the Board did not abuse its discretion in denying the existence of a non-conforming use. *Mellow v. Bd. of*

Adjustment of New Castle County, 565 A.2d at 956. Accordingly, the decision of the Board that the trucking operation is not a legal non-conforming use is supported by substantial evidence and must be affirmed. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d at 1242.

C. Limitation on Amount of Farm Equipment

The Board exceeded its jurisdiction in holding that only the equipment necessary for farming operations would be permitted to remain on the Property. Article II, Section 25 of the Delaware Constitution permits the General Assembly to empower the County to enact zoning regulations. DEL. CONST. art. I, § 25. Pursuant to this authority, the Legislature conferred upon the county certain specified powers to regulate zoning matters. 9 *Del. C.* § 6902.¹² Although the powers conferred to the county are broad, the county's power may only be exercised in accordance with those powers delegated. *New Castle County Council v. BC Dev. Assoc.*, 567 A.2d 1271, 1275 (Del. 1989). Thus, the county council "lacks authority to alter or disregard applicable statutory law." *Tate v. Miles*, 503 A.2d 187, 191 (Del. 1986). The exercise of zoning authority under these provisions "is designed for the protection of the general welfare and benefit of the entire public." *Hartman v. Buckson*, 467 A.2d 694, 697 (Del. Ch. 1983).

The Director determined that the storage of certain farm equipment and trailers amounted

¹²Section 6902 provides: "The county government may, in accordance with the conditions and procedure specified in this subchapter, regulate the location, height, bulk and size of buildings and other structures, the percentage of lot which may be occupied, the size of yards, courts and other open spaces, the density and distribution of population, the location and uses of buildings and structures for trade, industry, residence, recreation, public activities or other purposes and the uses of land for trade, industry, residence, recreation, public activities, water supply conservation, soil conservation or other similar purposes, in that portion of Sussex County which is not included within the corporate limits of any city or town, unless any territory within such corporate limits is included upon request made by the governing body or authority of such city or town, notwithstanding any provision of other titles or chapters of this Code to the contrary." 9 *Del. C.* § 6902.

to the accumulation of junk on the Property. In its written findings of fact, the Board characterized the used farm equipment and trailers located on the Property as junk. Junk is defined in the county regulations as

“[d]ilapidated automobiles, trucks, tractors and other such vehicles and parts thereof, dilapidated wagons, trailers and other kinds of vehicles and parts thereof, scrap building materials, scrap contractor’s equipment, tanks, casks, cans, barrels, boxes, drums, piping, bottles, glass, old iron, machinery, rags, paper, excelsior, hair, mattresses, beds or bedding or any other kind of scrap or waste material which is stored, kept, handled or displayed.” SUSSEX COUNTY, DEL., CODE ch. 115, art. I, § 4 (B)(2001).

Under the regulations, storage of farm equipment is permitted as an accessory use on a farm five acres or more. SUSSEX COUNTY, DEL., CODE ch. 115, art. IV, § 21 (A)(2)(2001). The regulations also expressly permit the use of heavy cultivating machinery, spray planes or irrigating machinery on a farm five acres or more. SUSSEX COUNTY, DEL., CODE ch. 115, art. IV, § 20 (B)(1)(2001).

In its findings, the Board failed to distinguish between the pieces of farm equipment that it considered “junk” and those pieces that are necessary for farming operations. Although the accumulation of “junk” is a violation under the regulations, the Board failed to make particularized findings as to the equipment deemed “junk”. Without these findings, it is impossible for this Court to adequately perform its role of review. *New Castle County Council v. BC Dev. Assoc.*, 567 A.2d 1271, 1277 (Del. 1989) (holding that the council’s failure to articulate the reasons for its decision provides an inadequate basis for judicial review). Due to the Board’s failure to make these findings, this Court is unable to determine whether substantial evidence supports the Board’s determination of the accumulation of “junk” on the Property.

Moreover, the regulations expressly permit the storage of farm equipment on farms over

five acres, such as the Property in this case. This Court is not permitted to make its own findings of fact on appeal. *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d at 1242. The Board held that only the equipment necessary for farming operations would be permitted to remain on the Property. However, the Board failed to make a finding as to the particular equipment deemed “necessary for farming operations.” The Court cannot uphold such a vague ruling. Accordingly, since this Court may not remand the case to the Board, the Board’s ruling regarding the farming equipment is reversed. *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d at 950.

CONCLUSION

The Board’s determination denying the existence of a legal non-conforming use is supported by substantial evidence and is not legally erroneous. The Board exceeded its jurisdiction in holding that only equipment necessary for farming operations is permitted to remain on the Property. Accordingly, the portion of the Board’s decision relating to the existence of a non-conforming use is affirmed and the portion relating to the farm equipment is reversed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary’s Office