

IN THE MATTER OF
RICHARD NIEHAUS – LEGAL OWNER
7525 Belair Road
Nottingham, MD 21236

RE: Petition for Special Hearing and/or Variance
To approve grandfathered location of existing
Tattoo and Body Piercing Establishment within
2500 ft. of another Tattoo and Body Piercing
Establishment

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
*
* Case No. 14-015-SPHA

* * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Administrative Law Judge granting a Petition for Special Hearing to approve the grandfathered location of an existing Tattoo and Body Piercing Establishment at 7525 Belair Rd. within 2,500 ft. of another Tattoo and Body Piercing Establishment at 7554 Belair Rd. and denying a Petition for Variance to permit the same establishment to be located within 2,500 ft. of 7554 Belair Rd.

A public hearing was held on May 29, 2014. The Petitioner was represented by Jason Vettori, Esquire and Smith, Gildea and Schmidt. The Protestants, Robert A. Smith and Denise Smith, his wife, were represented by John W. Conrad, Esquire. Public Deliberation was held on August 7, 2014.

Factual Background

On March 4, 1974, the Niehaus brothers purchased the property located at 7525 Belair Rd. (the "Property"). The Property is split zoned Business, Major ("BM") and Density Residential 3.5 ("DR 3.5"). In 1995, a tenant, Bruce Benkert ("Mr. Benkert"), rented the property and began to operate a Tattoo and Body Piercing Establishment known as "Mister B's Tattoo." At that time, the operation of tattoo businesses was not regulated in Baltimore County. In short, they were illegal.

In 1996, the Niehaus brothers and Mr. Benkert filed a Petition for Special Hearing seeking approval to use the Property as a tattoo business. The Zoning Commissioner dismissed the Petition on the basis that a tattoo business was not permitted use in a BM zone nor was it permitted by special exception. In an order dated December 12, 1996, this Board affirmed the Zoning Commissioner's decision. The Circuit Court denied a Petition for Judicial Review in an Order dated July 30, 1997 as well as a Motion for Reconsideration in an Order dated November 21, 1997. Notwithstanding the decisions, Mr. Benkert continued to operate the tattoo business at 7525 Belair Rd., and the County took no action to terminate the use.

On March 20, 1998, the County Council enacted Bill 29-98 which permitted new tattoo businesses in M.H. zones. It also exempted those tattoo businesses which had been in existence for 12 months before March 20, 1998, and which were located in a business or commercial zone, to remain in that business zone, as long as the business did not relocate. Section 6 of Bill 29-98 read as follows:

SECTION 6. AND BE IT FURTHER ENACTED, that this Act does not apply to a massage establishment or tattoo or body piercing establishment ~~lawfully established in existence in a business or commercial zone for at least 12 months~~ prior to the effective date of this Act except if a massage establishment or tattoo or body piercing establishment relocates. This Section is not intended to waive any other provision or requirement of state or county law in effect prior to the effective date of this Act.

According to the testimony of Mr. Niehaus at the hearing, he personally advocated for the enactment of Bill 29-98 to be passed so that his tattoo business would become legal.

In 2005, Mr. Benkert sold only the name "Mister B's Tattoos" as well as the telephone number associated with the name, to Protestant, Robert A. Smith ("Mr. Smith"). The art supplies used in the tattoo business were not sold to Mr. Smith nor were any other assets of the business, including tenant improvements to the Property. According to Mr. Smith, the sale of the name and telephone number was memorialized by a 1-page document. That document was not offered into

evidence. The testimony was clear however, that this document did not contain a non-compete agreement. For the next 7 years, Mr. Smith continued to operate a tattoo business from 7525 Belair Road under the name “Mister B’s Tattoos” until 2012.

In 2006, the County Council enacted Bill 46-06 which amended Bill 29-98 and provided a second exception permitting tattoo businesses to relocate within a BM-CCC less than 500’ from an earlier location. That Bill took effect on May 23, 2006. On October 16, 2011, the County Council then passed Bill 56-11 which repealed and re-enacted Bills 29-98 and 46-06 to include another exception for a tattoo business that relocates within 1,000 feet of a private or public school as follows:

SECTION 6. AND BE IT FURTHER ENACTED, that this Act does not apply to a massage establishment or tattoo or body piercing establishment in existence in a business or commercial zone for at least 12 months prior to the effective date of this Act except if a massage establishment or tattoo or body piercing establishment relocates other than a tattoo establishment that relocates within a BM-CCC District that is less than 500 feet removed from its earlier location OR THAT RELOCATES FROM A LOCATION WITHIN 1,000 FEET OF A PUBLIC OR PRIVATE SCHOOL TO A LOCATION WITHIN A BL, BM OR BR ZONE WHICH IS FURTHER REMOVED FROM A PUBLIC OR PRIVATE SCHOOL, BUT LESS THAN 1,000 FEET REMOVED FROM ITS EARLIER LOCATION. This section is not intended to waive any other provision or requirement of state or county law in effect prior to the effective date of this Act.

As with Mr. Niehaus, Mr. Smith testified that he was instrumental in supporting the enactment of Bill 56-11 through the County Council because he wanted to move from 7525 Belair Rd.

After the enactment of Bill 56-11, on or about September 30, 2012, Mr. Smith terminated his lease with Mr. Niehaus. He moved to 7554 Belair Road and began operating a tattoo business under the name ‘Mister B’s Tattoo’s.’ Mr. Smith testified that he believed that since 7525 Belair

Rd. was within 1,000 feet of a public school, there would no longer be a tattoo business at 7525 Belair Rd.

Shortly after receiving Mr. Smith's termination notice, Mr. Niehaus contacted Mr. Benkert, who had relocated to Florida, to see if Mr. Benkert would be interested in returning to operate the tattoo business at 7525 Belair Rd. Mr. Benkert agreed to return and Mr. Niehaus began renovations of the space. Those renovations continued from September 30, 2012 through April 1, 2013.

On April 1, 2013, Mr. Benkert resumed the tattoo business at 7525 Belair Rd. and continues to operate it under the name "Tattoos by Bee." Mr. Benkert obtained a trader's license from Baltimore County which license was signed by the zoning office, permitting the use of a tattoo business at 7525 Belair Rd.

Legal Standard

The Baltimore County Charter, Sec. 603, requires this Board to hear requests for special hearing and variances *de novo*. A hearing to request special zoning relief is proper under Baltimore County Zoning Regulations ("BCZR"), §500.7 which reads as follows:

The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property in Baltimore County insofar as they are affected by these regulations.

* * * *

Variance relief can be requested under the Section 307.1 of the BCZR which states, in pertinent part, as follows:

...(T)he County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations...only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship.... Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area...regulations, and only in such manner as to grant relief without injury to public health, safety, and general welfare....

With regard to nonconforming uses, BCZR §101.1 defines a “nonconforming use” as:

NONCONFORMING USE

A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR, §104.1 provides how a nonconforming use can expire:

Continuation of nonconformance; exceptions.

A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever, or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

BCZR 104.1 allows nonconforming uses to continue unless changed, abandoned or discontinued. The burden of establishing a nonconforming use is on the Petitioner. Such burden can be satisfied by showing that the use in question was well known throughout the neighborhood at the pertinent time. *Calhoun v. County Board of Appeals*, 262 Md. 265 (1971). Mere change in ownership does not destroy the nonconforming use. *Green v. Garrett*, 192 Md. 52 (1949). The nature and extent of the use has to have remained unchanged and substantially the same facilities have to be used throughout the years in question. *Kastendike v. Baltimore Association for Retarded Children*, 267 Md. 389 (1974).

In *Arundel Corp. v. Board of Zoning Appeals of Howard County*, 255 Md. 78 (1969), the Court of Appeals held that the use of the subject property as a quarry could not be regarded as a valid nonconforming use, although existing at the time of the adoption of a new comprehensive zoning, where such use prior to the adoption of the comprehensive zoning regulations was neither a legally permitted use nor a valid nonconforming use.

Decision

1. Did a tattoo business become a valid non-conforming use with the enactment of Bill 29-98?

Mr. Niehaus seeks approval that the tattoo business operated at 7525 Belair is grandfathered under Bills 29-98 and as amended by Bill 46-06 and Bill 56-11. Until Bill 29-98 became effective on March 20, 1998, tattoo businesses were not legal uses. Bill 29-98 as set forth above, restricted tattoo businesses to operate only in Manufacturing Heavy (MH) zones. However, it exempted a tattoo business which was located in business or commercial zone and that had been operating for at least 12 months prior to the effective date of [the] Act except if the business relocates.

The parties do not dispute that this use was not legal prior to March 20, 1998. In fact, both parties claim that the tattoo business became a legal non-conforming use on March 20, 1998. Mr. Smith contends that a tattoo business may no longer operate at 7525 Belair Rd. because he relocated the business to 7554 Belair Rd. which is within 1,000 of its earlier location per Bill 56-11.

The definition of “non-conforming use” under BCZR §101.1 states that in order to become a ‘non-conforming use’ the use has to first be a ‘legal use.’ In this case, because a tattoo business was not a legal use, Bill 29-98 could not make the use ‘non-conforming.’ Instead, Bill 29-98 made an illegal use one that is now legal.

Based on the evidence and testimony presented, the Board finds as a matter of fact that there has been a tattoo business legally operating at 7525 Belair Rd. since March 29, 1998. The facts also show that for more than 12 months prior to March 29, 1998, a tattoo business had been operating at 7525 Belair Rd. While there may have been different tenants operating the business at 7525 Belair Rd., that business did not relocate and continued to operate without interruption since March 20, 1998. The Board finds that what was relocated by Mr. Smith was the name 'Mister B's Tattoos' and a telephone number. These facts grandfathered the use at 7525 Belair Rd.

In support of this position, we weighed heavily the credible testimony of Mr. Niehaus that upon Mr. Smith's lease termination on September 30, 2012, Mr. Benkert agreed to operate the tattoo business. Renovations were made to the property and Mr. Benkert obtained a trader's license from Baltimore County which was signed off by the zoning office as to the use at that location.

We find this case and our decision to be in keeping with the holding in *Arundel Corp, supra*, when the Court of Appeals held that the use could not be 'non-conforming' if it was not a legally permitted use at the time the regulation was enacted permitting the use. Likewise, in *Lone v. Montgomery County*, 85 Md. App. 477, 496 (1990) quoting *Board of Zoning Appeals of Howard County v Meyer*, 207 Md. 389 (1955), the Court of Special Appeals explained that a nonconforming use is one that *precedes* the implementation of the zoning ordinance:

An owner of land may establish a "lawful nonconforming use" if the evidence conclusively establishes that *before and at the time of adoption of the original zoning ordinance*, he was using substantially all of his tract of land *in a then-lawful manner* for a use which by the later legislative action became nonpermitted.

(Emphasis Added).

In the unreported decision of *James G. Hammond v. Barbara R. Jung*, No. 980, Sept. Term, 2004, the Court of Special Appeals reversed this Board's decision where we found that a lawn

mower operation was a nonconforming use. The Court of Special Appeals held that this Board was clearly erroneous in so finding because that business began after the implementation of the BCZR enacted in 1945. The Court said:

The undisputed evidence established that the Property was not used for a lawn mower business when the zoning classification was enacted by the County in 1945. Indeed, such a use was not implemented until 1972. Because, by definition, a nonconforming use is one that predates the enactment of an applicable zoning ordinance, and is in existence when the zoning law is adopted, see *McKemy v. Baltimore County*, 39 Md. App. 257, 266 (1978), it follows that the lawn mower business could not have been a nonconforming use; it was not a use that existed in 1945. Instead, it was the Store, which dated to 1915, and existed when the zoning regulations were adopted, that was the nonconforming use. Moreover, the use of the Property for the Store was not abandoned, and so the Store remained a lawful nonconforming use when Hammond acquired the Property.

The Board's erroneous determination that the lawn mower business was a nonconforming use is not just an academic point. As noted, having determined that the lawn mower business was the nonconforming use, the Board went on to find that the use had lapsed. On that basis, it then concluded that appellant was not entitled to operate the lawn mower business.

As stated, a tattoo business was not a lawful use when Bill 29-98 became effective on March 20, 1998. However, as set forth above, we find that the tattoo business at 7525 Belair Rd. became a legally permitted use and was grandfathered under the exception in Bill 29-98.

2. In the alternative, is the tattoo business located at 7525 Belair Rd. a valid non-conforming use?

In the alternative, if Bill 29-98 did create a valid non-conforming use, this Board finds that the Petitioner has met the burden of proof under BCZR 104.1 that the tattoo use has continued uninterrupted for a period of one year or more and has not been abandoned or discontinued. The evidence presented reveals that at best, there was 6 months after the lease termination by Mr. Smith in September of 2012 wherein renovations were completed by Mr. Niehaus. The renovations were

complete and Mr. Benkert resumed the business no later than April 1, 2013. We also find that the renovations show an intent by Mr. Smith not to abandon or discontinue the tattoo business use at that location. *Catonsville Nursing Home v. Loveman*, 349 Md. 560, 581 (1988); *McLay v. Maryland Assemblies, Inc.*, 269 Md. 465, 466-67 (1973).

Mr. Smith argues that Bill 29-98 establishes that the non-conforming use is owned by the tattoo business and does not run with the land. This position is contrary to the law on non-conforming uses. We emphasize that Bill 29-98 and thereafter Bills 46-06 and 56-11, did not waive the application of non-conforming use case law:

This Section is not intended to waive any other provision or requirement of state or county law in effect prior to the effective date of this Act.

As the Court in *Kastendike, supra*, held:

The mere change in ownership does not destroy a nonconforming use. Consequently, a use transferred to a successor in interest will continue to be legal so long as the nature and character of that use is unchanged and substantially the same facilities are used.

Id. at 396. An “established nonconforming use runs with the land, and hence a change in ownership will not destroy the right to continue the use.” 8A McQuillin, *The Law of Municipal Corp.* §25.183.50. A “nonconforming use is not personal to the current owner or tenant, but attaches to the land itself.” 83 Am. Jur.2d, *Zoning & Planning*, §587.

Other jurisdictions addressing the relocation of nonconforming uses have similarly held that the nonconforming use may terminate. Relocation to another site or within the site may terminate the nonconforming use status. *Jones v. County of Coconino*, 35 P.3d 422 (Ariz. App. 2001) (within site); *Stuckman v. Kosciusko County Bd. of Zoning Appeals*, 506 N.E.2d 1079 (Ind. 1987) (moving automobile salvage yard to adjacent lots not allowed); *Hurley v. Town of Hollis*, 729 A.2d 998 (N.H. 1999) (relocation to new building with expanded parking lot not natural expansion).

After reviewing all of the testimony and evidence presented, the Board has determined that, if the use is non-conforming, then the Petitioner's Request for Special Hearing relief should be granted and the move by Mr. Smith to 7554 Belair Rd. did not affect the legal status of the real property located at 7525 Belair Rd.

3. Petition for Variance.

Petitioner also sought variance relief as an alternative to the request for special hearing seeking the same relief to permit the tattoo business at 7525 Belair Rd. to be located within 2,500 feet of the tattoo business located at 7554 Belair Rd. The Board finds that there was no evidence presented by the Petitioner upon which the request for variance relief could be considered. As a result, the Board will deny the request for variance relief.

ORDER

THEREFORE, IT IS THIS 6th day of November, 2014 by the Board of Appeals of Baltimore County

ORDERED, that the Petition for Special Hearing to approve the grandfathered location of an existing Tattoo and Body Piercing Establishment at 7525 Belair Rd. within 2,500 ft. of another Tattoo and Body Piercing Establishment at 7554 Belair Rd. be, and the same is hereby **GRANTED**; and it is further,

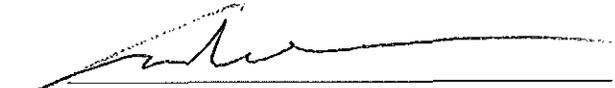
ORDERED, that the Petition for Variance to permit the location of an existing Tattoo and Body Piercing Establishment at 7525 Belair Rd. within 2,500 ft. of another Tattoo and Body Piercing Establishment at 7554 Belair Rd. be, and the same is hereby **DENIED**.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Maureen E. Murphy, Panel Chairman



Andrew M. Belt

Panel Member Wayne R. Gioioso, Jr. resigned effective October 11, 2014.



Board of Appeals of Baltimore County

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November 6, 2014

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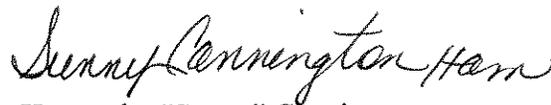
RE: *In the Matter of: Richard Niehaus – Legal Owner*
Case No.: 14-015-SPHA

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review** filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,


Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Donald Hicks/Hicks Engineering Associates, Inc.
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney
Michael Field, County Attorney/Office of Law

Richard Niehaus
Bruce Benkert
Robert A. Smith
Denise Smith
Carroll Pupa
Alfred Smith