

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: HUDSON FIELDS, LLC

(Case No. 12112)

Hearings were held after due notice on March 5, 2018, and May 21, 2018. The Board members present were: Mr. Dale Callaway, Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman.

Nature of the Proceedings

This is an application for a determination of existing non-conforming uses.

Findings of Fact

The Board found that the Applicant was requesting a determination of existing non-conforming uses. Specifically, the Applicant seeks a determination that the parcels identified below (collectively "the Property") were used prior to the enactment of the Sussex County Zoning Code as an airport and landing field (the "Airport Use") and for hosting various types of special events (the "Special Events Use"). The Applicant has requested that the Board render a determination of these existing non-conforming uses as they pertain to certain real property located on the northwest side of Eagle Crest Road, approximately 495 feet southwest of the intersection of Coastal Highway (Route 1) and Eagle Crest Road. 911 Address: 30045 Eagle Crest Road, Milton; said property being identified as Sussex County Tax Map Parcel Number 2-35-22.00-50.02, 2-35-22.00-50.03, 2-35-22.00-52.00, 2-35-22.00-441.00, and 2-35-22.00-442.00. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a letter from the Applicant's attorney John Paradee, pictures, newspaper articles, a letter from Joe Hudson to Roland Derrickson, Planning & Zoning Director, dated February 1, 1983, a letter with attachments from Craig Hudson dated December 31, 2002, a fax with attachments from Craig Hudson dated July 31, 2003, a letter from Joe Hudson and Christian Hudson to Lawrence Lank, Planning & Zoning Director, dated August 25, 2016, an affidavit of Joe Hudson, documents from the public record for Board Case No. 6459, Ordinance No. 720, an aerial photograph of the Property, and a portion of the tax map of the area.
2. The Board found that the Office of Planning & Zoning received no correspondence in support of or in opposition to the Application.
3. The Board found that Jamin Hudson and Christian Hudson, who are owners of the Property, were sworn in to testify about the Application. John Paradee, Esquire, presented the Application on behalf of the Applicant and he submitted exhibits to the Board. The exhibits provided by the Applicant included pictures, newspaper, magazine, and online articles, letters, a book on the history of Punkin' Chunkin', affidavits and a summary of the affidavits, and a copy of Sussex County Ordinance Nos. 1 & 97.
4. The Board found that the Property consists of five (5) parcels and is commonly referred to as "Hudson Fields" and the Applicant seeks to establish that certain non-conforming uses exist. The basis for the Board's authority to make this determination is derived from Sussex County Zoning Code § 115-202. Non-conforming uses are governed under Article XXVI of the Code and § 115-195 of the Code provides that "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." Accordingly, non-conforming uses which existed prior to the enactment of the Code are grandfathered under the Code provided that certain conditions are met. § 115-198 provides that "no

building, land or portion thereof used in whole or in part for a nonconforming 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.” In other words, if the non-conforming use is not used within two years, the use is deemed abandoned. These Code provisions have remained largely unchanged since the adoption of the Code in 1970. It is the Applicant’s position that the Property was used for the Airport Use and the Special Events Use prior to the enactment of the Sussex County Zoning Code and that there was never a period of time where the Property remained idle or unused for a continuous period of two years for those uses.

5. The Applicant requests that the Board make 6 determinations: 1) that the Property has been used as an airport prior to the enactment of the Sussex County Zoning Code; 2) that the Airport Use of the Property has continued to the present day, without remaining idle or unused for a continuous period of two years or more, and without intention to abandon or discontinue said use; 3) that the Special Events Use of the Property existed prior to the enactment of the Sussex County Zoning Code; 4) that the Special Events Use of the Property has continued to the present day, without remaining idle or unused for a continuous period of two years or more, and without any intention to abandon or discontinue use, 5) that, pursuant to §115-202 of the Code, the Airport Use of the Property be recognized as a legal, nonconforming use of the Property which may continue as provided in §115-195 of the Code; and 6) that pursuant to §115-202 of the Code, the Special Events Use of the Property be recognized as a legal, nonconforming use of the Property which may continue as provided in §115-195 of the Code.
6. The Applicant has identified the following different activities which it claims fall under the Special Events Use and have taken place on the Property. These activities include: church gatherings, Sunday school outings, religious events, horse shows, horse races, horse & pony rides, hay rides, golf-cart rides, barn parties, festivals, amusement and carnival rides, games and midway entertainment, concerts, balloon festivals, helicopter rides, airplane rides, parachuting events, air shows, weddings, dances, receptions, charitable and political fundraising events, athletic team practices, games and contests, speaking engagements, awards presentations, laser light shows, fireworks, camping, barbeque cookouts, auctions, paintball, obstacle courses, driving tours, sales of tickets, merchandise and food and beverage, and other amusements.
7. The Applicant has identified the following different activities as activities which fall under the Airport Use and have taken place on the Property. These activities include use of the Property as an airport and landing field for the arrival and departure of airplanes, airplane storage, automobile storage, golf cart storage, and commercial fuel sales.
8. The Applicant provided a history of the Property. According to the Applicant, the Property has been used for a slew of commercial uses since the 1950s and even the early 1900s. Christian Hudson and Jamin Hudson, who were born in 1980 and 1982 respectively, testified as to their personal knowledge as well as to knowledge of the Property gleaned from their conversations with family members and their review of family archives. Christian Hudson noted that many of the uses arose prior to his birth. Their grandfather is Joe Hudson and their father is Craig Hudson, who was born in 1952. Christian Hudson testified that he, his brother, father, and grandfather always tried to promote activity on the site. Jamin Hudson echoed similar sentiments. Christian Hudson has spoken with his father, grandfather, and neighbors and he believes that there has not been a time since December 29, 1970 when the Property has sat idle or unused for the Airport Use or the Special Events Use for a period of more than two years. According to Mr. Hudson, the

Property has been used for the airport and special events since December 29, 1970.

9. It is the Applicant's position that the Property was used for special events when the Sussex County Zoning Code was adopted in 1970 and that the non-conforming uses in effect as of December 29, 1970, may remain in effect so long as the Property is not idle or unused for a period of two continuous years. The Applicant alleged that there was no intent to discontinue or abandon those uses and that the Property has not remained idle or unused for a period of two continuous years. According to Christian Hudson, neither he, his father, nor his grandfather have had or expressed an intent to discontinue any of the uses nor does he believe that he, his father, or grandfather have taken any measures to express a manifest intent to cease any of the uses on the Property.
10. The Applicant argued that, as long as the Property was used for any special event, such as a festival, wedding, concert, or any of the other enumerated uses listed in Mr. Paradee's letter, at least once every two years, the Applicant retains the right to continue using the Property for all of the enumerated uses. The Applicant's position is that the types of special events and uses which can occur on the Property are not limited to the uses identified in the letter but there are limitations. The Applicant believes that uses which are similar to the historical uses of the Property should be permitted but the types of uses which are so dissimilar to the historical uses of the Property would not be permitted.
11. Mr. Christian Hudson testified that his grandfather Joe Hudson purchased the Property where the airstrip is located in 1948 and that the airport was started in 1953. Signage on the Property states that Hudson Fields was established in 1952. According to the Applicant, the site was used for commercial aviation, parachuting, air shows, balloon rides, Tuskegee airmen, and similar activities after the airport opened. Jamin Hudson also testified that the Property has been used for fuel sales, pilot lessons, and Tuskegee air shows. Jamin Hudson showed a photo of a Joseph R. Hudson Aerial Spraying truck. He noted that the phone number on the truck displays a 4-digit phone number and that phone numbers in the area did not switch to 7-digit numbers until the early 1950s. Jamin Hudson testified that the planes were outfitted for crop dusting and that an aerial spraying operation was in place in the early 1950s and he recalls the business in operation until the late 1980s. He also reviewed a photograph from 1962 showing that the spray plane operation was in effect at that time as well. Jamin Hudson also testified that the Property was leased for airplane storage and photographs show that fuel tanks were also on the Property. According to Christian Hudson, the airport, hangars, and airplane tie-downs are on multiple parcels.
12. The Board found that a conditional use was granted in 1990 with stipulations (Ordinance 720) for a portion of the Property regarding the airport and related uses.
13. According to the Applicant, the Property has been used for horse racing, athletic events, weddings, camping, outdoor events, and concerts. Christian Hudson testified that the horse track use dates back to the 1940s and 1950s. He recalled horse shows and pony rides when he was young.
14. According to the testimony of Christian Hudson, the Property was later used for events such as Punkin' Chunkin' – which was an event that started at the Property in 1989 and ended in 1998 because the technology used in the event outgrew the size of the site.¹ Punkin' Chunkin' drew 17,000 to 20,000 attendees. The Punkin' Chunkin' event had pony rides, balloon rides, camping, food and beverage sales, amusement activities, and concerts. He believes that Punkin' Chunkin' received

¹ According to Christian Hudson, the affidavit of Joe Hudson incorrectly states that Punkin' Chunkin' was held on the site from 1992-1998.

- permits from the County. Jamin Hudson also testified that concerts and performances took place at the Punkin' Chunkin' events.
15. Christian Hudson recalled concerts by Chicago, Hall & Oates, and the Beach Boys. According to Christian Hudson, the Property is now also used for Foodie Fest, athletic events, and Highway One concerts. He noted that, in 2016, the Applicant hosted 33 athletic events, 4 public festivals, and 2 private events including a wedding and, in 2017, the Applicant hosted 4 Foodie Fest events.
 16. Christian Hudson testified that the first concert in the Delaware River & Bay Authority series was the Beach Boys concert in 1996 and it drew 15,000 to 20,000 spectators. There were two concerts in that series. He testified that the Beach Boys concert was not the first concert on the Property and that there were concerts on site long before the Beach Boys concert. The Applicant has 68 affidavits from neighbors and persons familiar with the site and some of those affidavits attest to concerts and festivals happening on the Property before 1970. It is the Applicant's position that concerts and events have taken place on all five parcels which comprise the Property; though recent concerts have taken place on the parcel closest to Route 1. According to Christian Hudson, the latest concert took up approximately 4 acres of the Property but other parcels were used for parking and that the parcels are all tied together. The Applicant has retained Sussex County E.M.S. and police for events.
 17. The Board found that concerts held on the Property last year went through the County's special events process and permits were issued. The County has received requests for concerts this year as well. It was unclear whether permits were issued for prior events; though the Applicant requires its tenant to obtain the necessary permits. According to the Applicant, the tenant for the concert series (Highway One) received permits for the concerts.
 18. Jamin Hudson also provided background as to the history of the use of the site. He recalled alcohol and beverage sales, vendors, amusement park rides, helicopter rides, bonfires, ticket sales and concerts with fireworks shows and laser shows on the Property. Mr. Hudson testified that his grandfather recalled weekly horse races on the Property in the late 1800s to early 1900s. He also testified that athletic events started in 2000 on the Property and that attendance at sporting events ranges from a few hundred to a few thousand depending on the event.
 19. The Board found that a special use exception application submitted to the Board in 1997 for special events on the Property was approved in early 1998. Thereafter, a letter was submitted by the Applicant's then-attorney John Sergovic rejecting the approval. In that letter, Mr. Sergovic stated that the Applicant rejected the approval so that "the land shall revert to any other use available to it under its zoning classification as a matter of right without the offered special use exception". It is the Applicant's position that, from time-to-time, the Applicant attempted to be a good citizen and tried to meet the County half-way even though it believed these uses are grandfathered. The Applicant noted that it has applied for special event permits with no permit being issued but the Applicant still had those events. It is the Applicant's position that it did not abandon or waive its rights to the non-conforming use status. The Applicant acknowledged that it filed this application in order to obtain clarity about its status; particularly in light of the County's consideration of a new special events ordinance.
 20. Mr. Robert McNamara was sworn in to testify against the Application. Mr. McNamara lives near the Property and moved to the area in 2014. He supports events on the Property (particularly Foodie Fest) but he finds the Highway One concerts intrusive and he has concerns about an intensification of the concert use. He did not offer testimony of the history of the Property prior to the enactment of the Code.

21. The Board found that no parties, other than the Applicant, appeared in support of the Application. One (1) party appeared in opposition to the Application.
22. After the March 5th hearing, the Board voted to leave the record open for the limited purpose of providing the Board additional time to review the materials and to ask the Applicant questions. A subsequent meeting was held on May 21, 2018, at which time the Board asked questions of the Applicant. At that hearing, the Board voted to accept into the record additional exhibits from the Applicant, which included proposed Findings of Fact, a transcript of the March 5th public hearing, and letters to the Board from Mr. Paradee.
23. At the May 21st meeting, the Applicant confirmed that it is seeking a determination of the existing of a non-conforming use for a general special events use as defined in the Code under §115-22. The Applicant is not seeking permission for sub-uses. The Applicant made it clear that the special events use does not allow for an “infinite” number of uses. Rather, the Code identifies special events as a use and the Applicant seeks a determination under that use definition. The Applicant proffered that it would be comfortable with the Board determining that the Property can be used as a special events use and the Applicant would live by the definition of special events in the Code. The Applicant noted that, if there was no special events ordinance, it would be more difficult to define the use of the Property but the special events ordinance is broad enough to encompass the use of the Property and the special events definition is a way to define the use of the Property because it suffices to cover what the Applicant’s use is. §115-22 identifies “special events such as circuses or carnival grounds, amusement parks or midways, festivals, concerts, races/walks or any other special event or mass gathering being held outdoors or within a temporary structure or at a site and for a purpose different from the designated use and usual occupancy of the premises and located on unincorporated lands within Sussex County, permanently or for a temporary time period exceeding three days.” The Applicant also acknowledged that there are limitations under the special events use. As previously discussed, the number of uses available under the special events use is finite and uses which are so dissimilar to the historical uses of the Property would not be permitted. Furthermore, as noted by the Applicant, the Applicant would not, for example, be allowed to construct a football stadium on the site. This interpretation is consistent with 9 Del. C. § 6920(a) which provides that “nonconforming uses of land or structure may, except as provided in subsection (b) of this section, be continued although such use does not conform with the provisions of such regulations or change thereof, provided no structural alteration of such structure is proposed or made for the purpose of such continuance.”
24. The Applicant stated that it does not intend to hold as many concerts on the Property as the Freeman Stage, which holds 60 concerts per year. The Applicant noted that it is not always feasible, economically or otherwise, to hold concerts on the Property.
25. The Applicant presented that the Property has been used for special events since prior to the enactment of the Code. The Applicant argued that the site is a festival ground and that, as long as the site was used as a festival ground once every 2 years and the Applicant had no intent to abandon the use, the special event use was not abandoned. The Applicant argued that it should be permitted to continue with the special event uses in a manner which it has used the Property over the past 50 years and that the use of the Property has not changed but the use has evolved over time. According to the Applicant, all 5 parcels of the Property have been used for the special events uses at various times and that the Property never remained idle or unused for 2 years or more.
26. The Board found that that the Applicant admitted that the special events use is subject to “a whole series of regulations” which the Applicant must comply with

such as DelDOT traffic control, police, EMS, and Department of Health regulations just to have any event on the Property. As such, it is clear that there are other agencies which will regulate these events. The Applicant presented that it does not intend to jeopardize the future of the County or public safety.

27. The Applicant also seeks a determination that the Property has been used as an airport. Parcel 442 was approved for a conditional use for a landing strip and runway and Parcel 50.02 is used for overrun. The Applicant presented that the airport is a private, commercial airport use for business with a small number of planes and can easily be closed to accommodate the special events. The airport is not open to the public. Mr. Christian Hudson testified that the airport is subject to looser FAA regulations and is treated by the FAA as a grandfathered airport. There is no control tower and the airport is not constantly monitored. The Applicant noted that commercial uses exist at the airport such as storing planes, storing fuel, and servicing planes. According to the Applicant, when the Property is not used as an airport, all 5 parcels are used for special events and parking and staging are held on all 5 parcels.
28. Based on the findings above and the testimony presented at the public hearing and the public record, the Board makes the following determinations:
 - a. The Property was used for the Special Events Use and the Airport Use prior to the enactment of the Sussex County Zoning Code and that said uses have continued since that time without a lapse of at least two (2) years. As such, the Board determined that the aforementioned uses were pre-existing, non-conforming uses allowable under the Sussex County Zoning Code.
 - b. For purposes of clarity, and as requested by the Applicant, the Special Events Use shall be as defined §115-22 in the Code. Pursuant to §115-22 the special events use is a conditional use in the AR-1 zoning district and the portion of §115-22 regarding special events reads as follows:

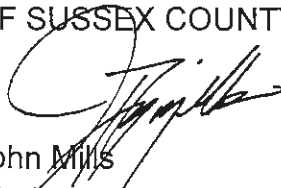
“Special events such as circuses or carnival grounds, amusement parks or midways, festivals, concerts, races/walks or any other special event or mass gathering being held outdoors or within a temporary structure or at a site and for a purpose different from the designated use and usual occupancy of the premises and located on unincorporated lands within Sussex County, permanently or for a temporary time period exceeding three days.”
 - c. As noted by the Applicant, the Special Events Use is subject to “a whole series of regulations” which the Applicant must comply with such as DelDOT traffic control, police, EMS, and Department of Health regulations just to have any event on the Property.
 - d. These uses may continue as non-conforming uses as provided in §115-195 of the Code and in 9 Del. C. § 6920.

The Board determined that the current uses of the Property as an Airport Use and a Special Events Use are pre-existing, non-conforming uses and may continue as provided in §115-195 of the Code and in 9 Del. C. § 6920.

Decision of the Board

Upon motion duly made and seconded, the Application was approved. The Board Members voting to approve the Application were Ms. Ellen Magee, Mr. Bruce Mears, Mr. John Mills, and Mr. Brent Workman. Mr. Dale Callaway voted against the Motion to Approve the Application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY



John Mills
Chairman

If the use is not established within two (2) years from the date below the application becomes void.

Date August 7, 2018.