

DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND

OFFICE OF THE ZONING HEARING EXAMINER

ERR 279

DECISION

Application: Validation of Permit Issued in Error
Applicant: Thomas Koudellou
Opposition: None
Hearing Date: August 7, 2019
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Condition

NATURE OF PROCEEDINGS

(1) ERR-279 is a request for validation of Permits No. 5777-U/16153-U and 16151-U/5780-U¹ issued in error in 1962 by the predecessor to the Department of Permitting, Inspections and Enforcement (“DPIE”) to allow the Applicant to operate a warehouse and incidental office space within an 18,800-square-foot building located on a 20,400-square-foot site in the U-L-I (Urban Light Industrial) Zone, and identified as 4315 41st Street, Brentwood, Maryland. The subject property is located within an area governed by the Gatewood Arts Development District Overlay Zone (“DDOZ”). A portion of the subject property lies within the municipal boundaries of the Town of Brentwood.

(2) No one appeared in opposition to the request at the hearings held by this Examiner. The Town of Brentwood has indicated its support of the request.

(3) At the close of the hearing the record was left open to allow Applicant to submit a revised Use and Occupancy Plat with Notes, prepared in accordance with applicable State law, describing the current conditions on site. The Plat was submitted on September 5, 2019 and the record was closed at that time.

FINDINGS OF FACT

(1) Applicant purchased the subject property on August 21, 2003. (Exhibit 23) It does not appear that a Use and Occupancy Permit was issued at that time. However, Applicant filed applications for Use and Occupancy Permits as required. He learned that the building initial permits for the construction circa 1962 were issued in error.

(2) Representatives of DPIE and the Maryland-National Capital Park and Planning Commission (“MNCPPC”) provided comment after reviewing the available zoning history for the property. (Exhibits 8 and 9) Michelle Hughes, a Principal Planning Technician for

¹ Exhibits 5 and 6 are the copies of the permits in question, and for some unknown reason each permit is marked with the numbers coupled above.

MNCPPC, provided two explanations of the zoning history of the subject property. On May 16, 2018, Ms. Hughes provided the following comment:

This permit is for warehouse, storage, distribution. The property is zoned U-L-I and is located within the Gateway Arts DDOZ, Arts and Production Character Area. Per the use tables in the Gateway Arts Plan, a warehouse requires a special permit. Prior to the adoption of the Gateway Arts DDOZ on 11/30/04, the property was zoned U-L-I. Prior to that the property was zoned I-1 per ZMA #9047. Permit 26628-2004-CU and 24939-2008-U were placed on hold for inadequate off-street parking for a warehouse. Permit 53639-79-U was also placed on hold for the same reason. The building was apparently constructed in 1962 when the property was zoned R-55. Zoning Map Amendment #9047 was approved on 11/19/76 which rezoned the property to the I-1 Zone. In the text of the case it was noted that... permits were issued in error for the construction of the building. Per the applicability section of the Gateway Arts Plan all uses that were lawful or could be certified as a legal nonconforming use on the date of the SMA approval are exempt from the development district standards and from site plan review and are not nonconforming. Since the building was constructed without adequate parking there is no grandfathering under the applicability section of the Gateway Arts Plan. Detailed site plan approval to use the building for warehouse/storage will be required. With regards to the interior parking, would not be reviewed under the detailed site plan process....

(Exhibit 10)

(2) On July 16, 2018 Ms. Hughes offered further clarification:

On June 20, 1962, the Maryland-National Capital Park and Planning Commission recommended approval of permit 16153 U and 16151 U to operate an office and warehouse for smoke distribution at 4315 41st Street, Brentwood. The property was zoned R-55. ZMA #9047 was approved on November 19, 1976, to rezone the property to I-1 which permitted warehouse. In the text of the ZMA #9047 case it was noted that permits were issued in error for the construction of the building. The building was also constructed with inadequate off-street parking. The property is currently zoned U-L-I and is located within the Gateway Arts District Development District Overlay Zone adopted November 30, 2004. A warehouse requires Special Permit approval in the Gateway Arts District Development Overlay Zone.

Based on the above information, permit 5777 U and 5780 U were erroneously recommended for approval by this office and should not have been issued by the County. We have instructed the Applicant to ... pursue "Validation of Permit Issued in Error"....

(Exhibit 9)

(3) Applicant submitted copies of the prior permits issued that allowed the construction of the building in 1962. (Exhibits 5 and 6) Applicant provided a Use and Occupancy plat for the subject property that shows that the building was constructed with 11 and 9-foot setbacks from 41st Avenue and Pennwood Road, respectively. (Exhibit 28) Applicant also submitted photographs of the site and an aerial that indicate that the other buildings in the block have similar setbacks and most of the parking in that area is off-site. (Exhibits 21 (b) and 22 (a)-(g))

(4) Mr. Koudellou also noted the subject property is well maintained and blends in well with the surrounding block of commercial uses which he owns with his business partner, Charles Tippet. Applicant has never heard of any complaints about the property, noting that he has been "babysitting the whole block with my business partner for the last

15, 20 years so I ... don't have [any] issue with anybody in the neighborhood or anywhere." (T. 20)

(5) Applicant testified that he is unaware of any appeals, controversies or fraud occurring at the time of the permit's issuance. (T. 19-20)

(6) Applicant explained that since his purchase he has paid property insurance of approximately \$6,000 per year and a mortgage of approximately \$3,000 per month. (T. 12-13, 51) Applicant also provided records of the moneys spent in reliance upon the permits issued by the County. (Exhibits 19,20, and 29(a)-(h)) These records indicate moneys were expended on:

- Property taxes in the amount of approximately \$9,000 for the most recent assessment and over \$200,000 since purchase; and
- Utility bills for the building that has remained vacant while Applicant seeks U&O approval.

(7) Applicant believes that validation of the permits will not be against the public interest since there is sufficient parking off site for this use, and there can also be shared parking with surrounding uses since all of the block is owned by Applicant and/or his business partner, Charles Tippet. (T.39-47) Moreover, Applicant takes care to be a good neighbor, reporting illegal dumping in the area, cleaning the area and paying to have trash taken to the dump--- just being " an excellent landlord," as noted by the Town of Brentwood's Administrator. (T.48,52-53)

(8) Representatives from the Town of Brentwood appeared at the hearing in support of the request. The Mayor, Rocio Treminio-Lopez, submitted a letter that noted in pertinent part, as follows:

The Mayor and Council take great pleasure in preparing this letter of support to assist with obtaining your Occupancy Permit for 4315 41st Street Brentwood, Md....

The Council and I appreciate and welcome your interest to remain a truly dedicated and supportive business owner in the Town of Brentwood.

Our Code Enforcement [D]epartment speaks highly of your willingness to ensure the property in question does not present any code violations and you consistently take extra measure to maintain the grounds of your properties....

(Exhibit 26)

APPLICABLE LAW

(1) The Application can be approved if it satisfies the applicable provisions of Section 27-244 and all of Section 27-258 of the Zoning Ordinance. Section 27-244 of the Zoning Ordinance provides as follows:

Sec. 27-244. - Certification.

(a) **In general.**

- (1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming is not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division). Any person making use of or relying upon the certification that is violating or has violated any conditions thereof, or that the use for which the certification was granted is being, or has been exercised contrary to the terms or conditions of such approval shall be grounds for revocation proceedings in accordance with this Code.
- (b) **Application for use and occupancy permit.**
 - (1) The applicant shall file for a use and occupancy permit in accordance with Division 7 of this Part.
 - (2) Along with the application and accompanying plans, the applicant shall provide the following:
 - (A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;
 - (B) Evidence that the nonconforming use has not ceased to operate for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;
 - (C) Specific data showing:
 - (i) The exact nature, size, and location of the building, structure, and use;
 - (ii) A legal description of the property; and
 - (iii) The precise location and limits of the use on the property and within any building it occupies;
 - (D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.
 - (E) In the case of outdoor advertising signs, the requirements of Section 27-244(b)(2)(B) are not applicable. Documentary evidence, including, but not limited to deeds, tax records, business records, approved plats or development plans, permits, public utility installation or payment records, photographs, and sworn affidavits, showing that the outdoor advertising sign was constructed prior to and has operated continuously since January 1, 2002.
- (c) **Notice.**
 - (1) Notice of the proposed application shall be provided by the applicant in accordance with Section 27-125.01 of this Subtitle.
 - (2) The following notice provisions shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.
 - (3) The Planning Board shall post the property with a durable sign(s) within ten (10) days of acceptance of the application and accompanying documentation. The signs(s) shall provide notice of the application; the nature of the nonconforming use for which the permit is sought; a date, at least twenty (20) days after posting, by which written comments and/or supporting documentary evidence relating to the commencing date and continuity of such use, and/or a request for public hearing from a party of interest will be received; and instructions for obtaining additional information. Requirements regarding posting fees, the number, and the location of signs shall conform to the requirements set forth in Subsection (f), below.

(d) **Administrative review.**

- (1) Except for outdoor advertising signs, if a copy of a valid use and occupancy permit is submitted with the application, where applicable a request is not submitted for the Planning Board to conduct a public hearing, and, based on the documentary evidence presented, the Planning Board's authorized representative is satisfied as to the commencing date and continuity of the nonconforming use, the representative shall recommend certification of the use as nonconforming for the purpose of issuing a new use and occupancy permit identifying the use as nonconforming, upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property other than failure to have a use and occupancy permit. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.
- (2) For outdoor advertising signs, if satisfactory documentary evidence described in Section 27-244(b)(2)(E) is received, the Planning Board's authorized representative shall recommend certification of the use as nonconforming for the purpose of issuing applicable permits and certifying the use as nonconforming. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.
- (3) Following a recommendation of certification of the use as nonconforming, the Planning Board's authorized representative shall notify the District Council of the recommendation. Electronic notice of the recommendation for certification shall also be made by the Planning Board's authorized representative not later than seven (7) calendar days after the date of the recommendation. The Planning Director shall also publish the development activity report on the Planning Department's website.
- (4) If the District Council does not elect to review the recommendation within thirty (30) days of receipt of the recommendation as authorized by Subsection (e), below, the representative shall certify the use as nonconforming.
- (5) Subsections (3) and (4), above, and Subsection (e), below, shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(e) **District Council review.**

- (1) The District Council may, on its own motion, vote to review the Planning Board representative's recommendation, for the purpose of determining whether the use should be certified as nonconforming, within thirty (30) days of receipt of the recommendation.
- (2) If the District Council decides to review the proposed certification, the Clerk of the Council shall notify the Planning Board of the Council's decision. Within seven (7) calendar days after receiving this notice, the Planning Board shall transmit to the Council all materials submitted to it in connection with the application.
- (3) The Zoning Hearing Examiner shall conduct a public hearing on the application. The Zoning Hearing Examiner shall make the same findings required for Administrative review or approval by Planning Board required in this Section, as well as any other applicable prescriptions regulating the proposed use specified within any other applicable Subtitle of this Code.
- (4) The Zoning Hearing Examiner shall file a written recommendation with the District Council within thirty (30) days after the close of the hearing record.
- (5) Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council.

- (6) Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.
- (7) The District Council shall affirm the certification only if it finds that a nonconforming use exists and has continuously operated, and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.
- (8) The District Council shall make its decision within forty-five (45) days from the filing of the Zoning Hearing Examiner's recommendation. Failure of the Council to take action within this time shall constitute a decision to certify the use.
- (f) **Planning Board review.**
 - (1) Required hearing.
 - (A) If a copy of a valid use and occupancy permit is not submitted with the application, if the documentary evidence submitted is not satisfactory to the Planning Board's authorized representative to prove the commencing date or continuity of the use, or if a public hearing has been requested by any party of interest challenging the commencing date and/or continuity of the use, the Planning Board shall conduct a public hearing on the application for the purpose of determining whether the use should be certified as nonconforming.
 - (2) Application for certification.
 - (A) Whenever the Planning Board will hold a hearing on a certification of the use as nonconforming, the applicant shall complete the appropriate form provided by the Planning Board.
 - (3) At least seven (7) calendar days prior to the public hearing, the Planning Board shall send written notice of the date, time, and place of the hearing to the applicant and to all persons of record.
 - (4) Planning Board action.
 - (A) The Planning Board may decide to either grant or deny certification of the use as nonconforming. If it decides to certify that a nonconforming use actually exists and has continuously operated and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.
 - (B) The recommendation of the Planning Board shall be in the form of a resolution adopted at a regularly scheduled public meeting. The resolution shall set forth findings of fact and conclusions of law in support of the Planning Board's recommendation.
 - (C) The Planning Board shall send a copy of the resolution to all persons of record.
 - (5) District Council election to review; Appeal of Planning Board's recommendation.
 - (A) The recommendation of the Planning Board may be appealed by any person of record to the District Council by filing an appeal with the Clerk of the Council. In addition, and notwithstanding any appeal of the Planning Board's recommendation filed by a person of record, the District Council may, on its own motion, vote to review the Planning Board's recommendation for the purpose of making a final decision as to whether the use should be certified as nonconforming.
 - (B) The appeal shall be filed, or District Council vote to review the Planning Board recommendation shall occur, within thirty (30) calendar days after the

resolution of the Planning Board was mailed. If no appeal is filed, and the District Council does not elect to review the recommendation of Planning Board within thirty (30) calendar days after the resolution of the Planning Board is mailed, the Planning Board's recommendation shall become the final decision as to the application to certify the use as nonconforming.

- (C) Before the District Council makes a decision on the application, it shall hold a public hearing.
- (D) The Council may decide to affirm, reverse, or modify the recommendation of the Planning Board. The decision of the Council shall be based on the record made before the Planning Board. No new evidence shall be entered into the record of the case unless it is remanded to the Planning Board and a rehearing is ordered.
- (g) **Applicability.**
 - (1) This Section shall not apply to nonconforming buildings or structures occupied by conforming uses. (See Section 27-243.03.)

(2) Section 27-258 of the Zoning Ordinance provides as follows:

Sec. 27-258. - Validation of permit issued in error.

- (a) **Authorization.**
 - (1) A building, use and occupancy, or absent a use and occupancy permit, a valid apartment license, or sign permit issued in error may be validated by the District Council in accordance with this Section.
- (b) **Application.**
 - (1) An application for the validation shall be filed with the Department of Permitting, Inspections, and Enforcement.
 - (2) The application form shall be provided by the Department of Permitting, Inspections, and Enforcement and shall contain the information which the Director of that Department deems is necessary to meet the provisions of this Section.
 - (3) Along with the application, the applicant shall submit the following:
 - (A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the subject property;
 - (B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors;
 - (C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);
 - (4) For the purposes of (A), (B), and (C) above, the term "owner" shall include not only the owner of record, but also any contract purchaser.
- (c) **Transmittal.**
 - (1) The application and accompanying material shall be forwarded by the Department of Permitting, Inspections, and Enforcement to the Office of the Zoning Hearing Examiner.
- (d) **Zoning Hearing Examiner hearing procedures.**

- (1) The Zoning Hearing Examiner shall conduct a public hearing on the matter in accordance with Part 3, Division 1, Subdivision 2 of this Subtitle.
- (2) The Zoning Hearing Examiner shall review the application for conformance with subsection (g) of this Section.
- (e) **Notice of public hearing.**
 - (1) The Zoning Hearing Examiner shall designate a date for the public hearing and shall notify the applicant of the date.
 - (2) The Clerk of the Council (or the office of the Zoning Hearing Examiner) shall publish a notice of the hearing at least thirty (30) days prior to the hearing date, at least one (1) time in the County newspapers of record.
 - (3) The notice shall contain:
 - (A) The date, time, and place of the hearing;
 - (B) A description and location of the property; and
 - (C) A description of the nature of the request.
- (f) **District Council hearing (oral argument) procedures.**
 - (1) The District Council shall decide upon the application, in accordance with the procedures for oral argument and Council hearings contained in Part 3, Division 1, Subdivision 3 of this Subtitle.
- (g) **Criteria for approval.**
 - (1) The District Council shall only approve the application if:
 - (A) No fraud or misrepresentation had been practiced in obtaining the permit;
 - (B) If, at the time of the permit's issuance, no appeal or controversy regarding its issuance was pending before any body;
 - (C) The applicant has acted in good faith, expending funds or incurring obligations in reliance on the permit; and
 - (D) The application meets the criteria of Section 27-244 of this Subtitle; and
 - (E) The validation will not be against the public interest.
- (h) **Status as a nonconforming use.**
 - (1) Any building, structure, or use for which a permit issued in error has been validated by the Council shall be deemed a nonconforming building or structure, or a certified nonconforming use, unless otherwise specified by the Council when it validates the permit. The nonconforming building or structure, or certified nonconforming use, shall be subject to all of the provisions of Division 6 of this Part.

CONCLUSIONS OF LAW

(1) The Application satisfies all applicable provisions of Section 27-244 and Section 27-258 of the Zoning Ordinance since most of the provisions in Section 27-244 simply cannot be retrofitted to address this request. Requests to validate permits issued in error (“ERRs”) are not nonconforming uses; rather they are uses that do not comply with all of the regulations for the particular zone in which the land is located but have been issued a permit that allows them to operate. Since ERRs involve uses that were not legal at the time of the issuance of the permit/license there is no documentary evidence “showing the commencing date and continuous existence of the nonconforming use”, and the Planning Board or District Council cannot certify that the use “is not illegal”. (Sections 27-244 (a) and (b))

(2) Section 27-244 (c)'s requirement that notice of the Application be provided in accordance with Section 27-125.01 of the Zoning Ordinance requires the Applicant to send "an informational mailing to all adjoining property owners, including owners whose properties lie directly across a street, alley or stream" and "notice of application filing to every person of record in a previous zoning, site plan or other application [not at issue in this case]...." An applicant would not know that he needs to apply for a permit issued in error until he learns from DPIE that an error occurred, and therefore cannot meet these pre-application notice requirements. Sufficient notice was provided as soon as Applicant became aware that a new Use and Occupancy permit would not be issued and that Applicant would need to file a request for Validation of Permit Issued in Error – the property was posted (as required in Section 27-244(c)(3), but for 30 days, not 10), and notice of the hearing was inserted in the applicable newspapers of record. There is no administrative review of the request by the Planning Director, nor is there a hearing by the Planning Board. (Sections 27-244 (d) and (f)) Finally, the District Council will make the final determination on the request, but in accord with Section 27-258, not 27-244(e).

(3) The instant Application is in accordance Permit Section 27-258(a) of the Zoning Ordinance, since the request is to validate Use and Occupancy permits for a commercial business that were issued in error during the early 1960's. (Section 27-258 (a))

(4) The record reveals that no fraud or misrepresentation was practiced in obtaining the permits as noted by sworn testimony, and as reasonably inferred by the lack of testimony to the contrary. (Section 27-258(g)(1)(A))

(5) There is no evidence that any appeal or controversy regarding the issuance of the permit was pending before any administrative body at the time of its issuance. (Section 27-258(g)(1)(B))

(6) The Applicant has acted in good faith, expending over \$200,000 since his purchase of the subject property in reliance on these permits. (Section 27-258 (g)(1)(C))

(7) The Application meets the spirit of the applicable provisions of Sections 27-258 (g)(1)(D), and 27-244, as noted above.

(8) Finally, the validation will not be against the public interest as the instant Application validates a use that has existed over fifty years, that does not detract from the character of the surrounding area, and is supported by the municipality in which a portion of the site lies. (Section 27-258 (g)(1)(E))

RECOMMENDATION

It is recommended that the District Council validate the permits issued in error in 1962 that allowed the construction of an office and warehouse on site (Exhibits 5 and 6), in accordance with the Use and Occupancy Plat (Exhibit 28), with the condition that the warehouse and incidental office be Certified as a Non-Conforming Use.

