

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

ERR-280

DECISION

Application:	Validation of Multi-Family Rental Housing License M-0643
Applicant:	JH Chevet Manor, LLC
Opposition:	None
Hearing Date:	July 31, 2019
Hearing Examiner:	Joyce B. Nichols
Recommendation:	Approval

NATURE OF PROCEEDINGS

- (1) ERR-280 is a request for validation of Prince George's County's Multi-Family Rental Housing License No. M-0643, issued in error on March 10, 2017 (Exhibit 9)¹, for 109 apartment units, on approximately 2.25 acres of land, in the R-10 (Multi-Family High Density Residential) Zone, located on the south side of Wheeler Road and its intersection with Vermillion Avenue, also identified as 4545 Wheeler Road, Oxon Hill, Maryland.
- (2) No one appeared in opposition and the record was kept open for several documents, upon receipt of which, the record was closed August 19, 2019.

FINDINGS OF FACT

- (1) The instant 109 unit apartment building was constructed in 1967 in the R-10 Zone by Lester and Selma Poretsky on the subject property which was purchased by the Poretsky's in 1964. The property remained in the ownership of the Poretsky's until it was sold to the Applicant in 2018. (Exhibit 8)
- (2) The original owner, trading as Chevet Manor Apartment, LLC, most recently obtained Rental Housing License M-0643 for 109 apartments on the subject property on March 10, 2017, which license expired on March 10, 2019. (Exhibit 9)
- (3) All 109 apartment units are either efficiency's (studio) (72) or one (1) bedroom (37) units and are thus in compliance with required bedroom percentages. (Exhibit 10) (CB 22-2019, eliminating bedroom percentages, takes effect September 9, 2019)

¹ A new rental housing license, M-0643, was also issued on March 10, 2019 in the Applicant's name. (Exhibit 13)

(4) The subject property is not in compliance with the maximum allowable density in the R-10 Zone, which is 48 dwelling units per acre (dua), as the subject property is developed at 48.44 dua. (Exhibit 10)

(5) In 1967 when the apartment building was constructed, the green area requirement was 50% or 49,091 square feet. As built, the total green area is 48.4% or 46,520 square feet, 1,570 square feet less than that required. (Exhibit 3)

(6) In 1967 the parking requirement for multi-family dwellings was 1.25 spaces per unit, 137 parking spaces were required. As constructed only 130 parking spaces were provided. Currently 103 parking spaces are provided in the surface parking lot and 17 additional spaces are provided in garages under the apartment structure, for a total of 120 parking spaces. Two of the garage parking spaces originally constructed have been converted into a rental office. (Exhibits 17 and 32) Thus 17 fewer parking spaces are currently provided than were required in 1967, seven (7) of which were not provided in the original construction. (Exhibit 3)

(7) Prior to settlement, on October 23, 2018 the Applicant applied for Use and Occupancy Permit 52198-2018-U, which has not been issued pending the disposition of the instant Application. (Exhibits 10 and 30) On January 15, 2018 the County Department of Permitting, Inspections and Enforcement notified the Applicant of the requirement to obtain a new rental housing license as a result of the change in property ownership. (Exhibit 11)

(8) A new rental housing license was issued in the Applicants name, as required, on March 10, 2019. (Exhibit 13)

(9) The Applicant has expended monies in purchasing the subject property in November, 2018 (Exhibit 15), and in maintaining the subject property and operating the rental units. (Exhibits 16(a) and (b))

(10) The Applicant testified that to his knowledge, no fraud or misrepresentation was practiced in obtaining Multi-Family Rental License M-0643, and that no controversy regarding its issuance is pending before any legal body.

(11) The subject property was developed and operated as a 109 unit apartment building since 1967. It has been operated continuously in this capacity since that date, blending in with the surrounding properties, and not altering the character of the neighborhood. (Exhibit 31)

LAW APPLICABLE

(1) A Use and Occupancy Permit may be validated as issued in error in accordance with §27-244 and §27-258 of the Zoning Ordinance.

(2) §27-244 states as follows:

(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) (i) 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.

(ii) Notwithstanding any provision of this Subtitle to the contrary, in the case of outdoor advertising signs that were in existence as of November 15, 2016, that were certified as nonconforming or could have been certified as nonconforming uses, but were removed prior to December 31, 2018, the owner may be certified pursuant to this Division, provided that the use is accepted as filed through an application for Certification of a Nonconforming Use on or before June 30, 2019.

(iii) Notwithstanding any provision of this Subtitle to the contrary, in the case of outdoor advertising signs that were in existence as of November 15, 2016, that were certified as nonconforming or could have been certified as nonconforming uses, but were removed after December 31, 2018, the outdoor advertising sign may be certified pursuant to this Division, provided that an application for Certification of a Nonconforming Use is filed and accepted for processing no later than 180 days after the outdoor advertising sign is removed. Upon approval of the application, a permit to reconstruct the sign may be issued, including a permit to construct a digital billboard provided that said use conforms with the requirements of Section 27-630.03 of this Subtitle.

(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.)

(3) §27-258 states in pertinent part:

(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.

* * * * *

(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 non-conforming 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) Although required by §27-258(g)(1)(D), most of the provisions in Section 27-244 simply cannot be retrofitted to address this request for validation of an apartment license issued in error. 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 Department of Permitting, Inspections and PIE that an error occurred, and therefore cannot meet these pre-application notice requirements. Sufficient notice was provided as soon as the Applicant became aware that a new Use and Occupancy permit would not be issued and that the 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))

(3) The instant Application is filed in accordance with §27-258 of the Zoning Ordinance. The subject 109 apartments have been licensed by Prince George’s County since its construction in 1967, most recently March 10, 2019. (Exhibit 13) No fraud or misrepresentation was practiced in obtaining Multi-Family Rental License M-0643. §27-258(g)(1)(A) There is no evidence that there is any appeal or controversy regarding the issuance of this Multi-Family Rental License. §27-258(g)(1)(B) The Applicant has acted in good faith, expending funds or incurring obligations in reliance on this License. §27-258(g)(1)(C) The validation would not be against public interest as the instant Application merely validates a use, which has existed on the subject property for over 50 years. §27-258(g)(1)(E)

RECOMMENDATION

It is recommended that the District Council validate Multi-Family Rental License M-0643. The 109 unit apartment building on the subject property shall be declared to be a Certified Non-Conforming Use. The Site and Unit Location Plans are Exhibits 17 and 27.