

R E S O L U T I O N

WHEREAS, the Prince George’s County Planning Board has reviewed CNU-32917-10, Convenience & Dollar Plus Market requesting certification of a nonconforming use for a convenience/retail store in the R-T Zone in accordance with Subtitle 27 of the Prince George’s County Code; and

WHEREAS, after consideration of the evidence presented at the public hearing on June 6, 2013, the Prince George's County Planning Board finds:

A. **Location and Field Inspection:** The subject property, 4119 Southern Avenue, is located on the southeast side of Southern Avenue, approximately 1,240 feet northeast of Pennsylvania Avenue (MD 4). The square-shaped property consists of a single lot, Lot 3-A, and is improved with an 800-square-foot single-story building and requisite parking. Access to the development is provided via ingress/egress on Southern Avenue. The property is one of four businesses operating on Lot 3-A.

B. **Development Data Summary:**

	EXISTING	APPROVED
Zone	R-T	Unchanged
Acreage	0.043	Unchanged
Use(s)	Retail	Unchanged
Lot(s)	1	Unchanged

C. **History:** The subject property was originally constructed in 1960. Eagle Management Company has owned the subject property since August 2005. The property is currently used as a convenience store and has operated with a variety of retail uses since 1982. On June 1, 2010, the property became nonconforming when the property was rezoned to Townhouse (R-T) via the 2010 *Approved Subregion 4 Master Plan and Adopted Sectional Map Amendment* (Subregion 4 Master Plan and SMA). The subject property has a history of use as a retail/variety store. A prior certificate of occupancy was issued on July 19, 1982 to James Palm for a variety store. The last two permits issued (Permit 29088-2007-UW on October 1, 2007 and Permit 37095-2008-UW on March 4, 2009) were both issued for beauty services located at the subject property. According to the applicant, the subject property continuously operated as a retail/variety store, while also providing space for beauty services. At the time the rezoning occurred, the property was in use as a convenience store. The current zoning requires that the property obtain certification as a nonconforming use for a retail sales use.

D. **Master Plan Recommendation:** The Subregion 4 Master Plan and SMA placed this property in Living Area D, with a designation of Residential Townhouse development. The area was

determined to be too dense outside of a center or corridor node. Townhouse (R-T) zoning is more compatible with the adjacent single-family neighborhoods.

E. **Request:** The applicant requests certification of an existing convenience store. Because zoning regulations were changed or adopted after the permitted use was lawfully established, the use became nonconforming. The nonconforming status began June 1, 2010 when the Subregion 4 Master Plan and SMA was adopted by the District Council. The property was rezoned from Commercial Shopping Center (C-S-C) to R-T by the Subregion 4 Master Plan and SMA. The R-T Zone prohibits retail sales and consumer service establishments as a land use.

F. **Surrounding Uses:**

North and South— Residential property zoned Townhouse (R-T) improved with the Penn Southern Apartments, 4107 Pennsylvania Avenue.

East— Residential property zoned One-Family Detached Residential (R-55).

West— Southern Avenue and residential property located in the District of Columbia.

G. **Certification Requirements:** Certification of a nonconforming use requires that certain findings be made. First, the use must either predate the pertinent zoning regulation or have been established in accordance with all regulations in effect at the time it began. Second, there must be no break in operation for more than 180 days since the use became nonconforming.

Section 27-244 of the Zoning Ordinance sets forth the following specific requirements for certifying a nonconforming use:

(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 and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).**

(b) **Application for use and occupancy permit.**

(1) **The applicant shall file an application 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 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 between the time the use became nonconforming and the date when the application is submitted, or that conditions on 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.**

Analysis—According to the applicant's documentation, the subject property has continuously operated as a retail/variety store prior to and subsequent to the zoning change that became effective June 1, 2010 with the adoption of the 2010 *Approved Subregion 4 Master Plan and Adopted Sectional Map Amendment*. A prior certificate of occupancy was issued on July 19, 1982 to James Palm for a variety store. The last two permits issued (Permit 29088-2007-UW on October 1, 2007 and Permit 37095-2008-UW on March 4, 2009) were both issued for beauty services located at the subject property. According to referral comments from the Permit Review Section, affidavits were submitted indicating that a braid shop (beauty service) occupied the front of the store from March 2007 through September 2010. A second affidavit was submitted indicating the braid shop occupied the structure with the convenience store from March 2007 through May 2010. The subject property has continued to operate as a convenience store since 1982. When the applicant applied for a use and occupancy (U&O) permit in 2010, the Planning Information Services staff could not verify that 4119 Southern Avenue operated in accordance with the requirements of the

Zoning Ordinance because it could not be determined that the convenience store occupied the entire property or a portion of the property per the affidavits submitted to the Permit Section. Therefore, in accordance with Section 27-244(f) of the Zoning Ordinance, the Planning Board must determine whether, in fact, the use was legally established prior to the date it became nonconforming and that it has been in continuous operation since that time.

The applicant submitted the following documentary evidence in support of the application:

1. Cash register receipts from May 30, 2010 to March 3, 2011.
2. Purchase Order Receipts from 2010, 2011, and 2012.
3. An Affidavit of Continuous Use providing evidence of the property being used as a convenience store from the following:
 - a. Joann Brow, manager Johnny Boys Carry Out
 - b. Stacey Street, Edge Barber Shop
 - c. Kevin White, New Life Christian Church
4. An affidavit from Ababas Beseremo, validating the collection of signatures for a petition to maintain the variety store.
5. A U&O permit application for 4119 Southern Avenue.

DISCUSSION

There is evidence of a prior permit being issued for a retail/variety store at the subject location in 1982. According to the applicant, the property has maintained this use for over 30 years. However, the last two permits issued in 2007 and 2009 for the subject property were for beauty services. Initially, the evidence submitted by the applicant which included cash register tape receipts, purchase order receipts, affidavits from local businesses, and other such evidence that documented the existence of a fully functioning business, in support of the applicant's claim that 4119 Southern Avenue has been in continuous operation as a variety store since the zoning changed from C-S-C to R-T on June 1, 2010 with the adoption of the 2010 *Approved Subregion 4 Master Plan and Adopted Sectional Map Amendment*. The documentation initially provided all had consecutive calendar day gaps since the property became nonconforming. Subsequently the applicant submitted additional documentation as noted below.

CONCLUSION

Section 27-244(b)(2)(A) of the Zoning Ordinance provides examples of documents that should be presented to demonstrate that the use has not ceased operation for more than 180 days from the time the use became nonconforming (June 1, 2010) and the date when the application was submitted

(November 9, 2010). These documents include tax records, business records, public utility bills, and sworn affidavits. During the March 21, 2013 and April 18, 2013 Planning Board hearings the applicant's attorney was able to demonstrate the continuous use and operation as a variety/retail store in the subject property via the explanation of the previously submitted cash register receipts dated May 30, 2010 through March 3, 2011. The property owner provided testimony which explained that he continued a variety/retail use at the subject property prior to and during the time the property became non-conforming on June 1, 2010, while he sought a tenant to operate the property with a variety/retail store use.

In preparation of the April 18, 2013 Planning Board hearing, the applicant submitted additional documents in response to questions raised by the Planning Board during the March 21, 2013 hearing:

1. A net lease dated October 20, 2010, with a copy of a security deposit check
2. Articles of Incorporation for Lbabe, Inc.
3. Corporate sales tax returns, and the corporate charter approval sheet
4. Zoning violation notices from the Prince George's County Department of Environmental Resources dated October 29, 2008 through December 27, 2012
5. Purchase order receipts from 2010, 2011, and 2012.
6. Monthly calendars dated May 2010 through January 2013 detailing specific dates of previously submitted documents demonstrating continuous use and operation of a retail/variety store use at the subject property.
7. Sales and Use Tax Return payment receipts for LBABE, Inc. dated May 2011 through June 2011, September 2011 through November 2011, and February 2011 through March 2013.

The submission of the additional documentation noted above combined with the testimony heard during the March 21, 2013 and April 18, 2013 Planning Board hearing supports the applicant's claim that 4119 Southern Avenue has been in continuous operation as a variety/retail store since the zoning changed from C-S-C to R-T on June 1, 2010 with the adoption of the 2010 *Approved Subregion 4 Master Plan and Sectional Map Amendment* (SMA). While it remains unclear as to how much of the property was occupied by the convenience store, there is nothing in the Zoning Ordinance that indicates that a use must occupy 100 percent of the property. This supplemental information closes the 180-day gap.

NOW, THEREFORE, BE IT RESOLVED, that pursuant to Subtitle 27 of the Prince George's County Code, the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission adopted the findings contained herein and APPROVED the above-noted application.

BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council for Prince George's County, Maryland within thirty (30) days of the final notice of the Planning Board's decision.

* * * * *

This is to certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Geraldo, seconded by Commissioner Bailey, with Commissioners Geraldo, Bailey, Washington, Shoaff and Hewlett voting in favor of the motion at its regular meeting held on Thursday, June 6, 2013, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 27th day of June 2013.

Patricia Colihan Barney
Executive Director

By Jessica Jones
Planning Board Administrator

PCB:JJ:IT:arj