

1 THE PRINCE GEORGE'S COUNTY PLANNING BOARD OF
2 THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

3
4
5 E&K INTERNATIONAL FOOD MARKET, LLC
6 Certificate of Non-Conforming Use, CNU-26029-2019

7
8 T R A N S C R I P T
9 O F
10 P R O C E E D I N G S

11
12 COUNTY ADMINISTRATION BUILDING

13 Upper Marlboro, Maryland

14
15 April 2, 2020

16 VOLUME 1 of 1
17

18
19 BEFORE:

20 ELIZABETH M. HEWLETT, Chair

21 DOROTHY F. BAILEY, Vice-Chair

22 MANUEL R. GERALDO, Commissioner

23 WILLIAM M. DOERNER, Commissioner

24 A. SHUANISE WASHINGTON, Commissioner

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OTHERS PRESENT:

EDDIE DIAZ-CAMPBELL, Staff, Subdivision & Zoning Section

SHERRI CONNOR, Staff, Subdivision & Zoning Section

TOM MASOG, Staff, Transportation Section

PETER GOLDSMITH, Senior Counsel

DERRICK BRULAGE - Acting Deputy Planning Director

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1 P R O C E E D I N G S

2 MADAM CHAIR: 26029-2019, E&K International Food
3 Market, LLC. Mr. Diaz Campbell?

4 MR. DIAZ-CAMPBELL: Present.

5 MADAM CHAIR: Okay. Jill Kosack?

6 UNIDENTIFIED SPEAKER: Maybe some --

7 MADAM CHAIR: I'm just checking in. Jill Kosack,
8 you're on?

9 MS. CONNOR: Madam Chair, this is Sherri Connor,
10 I'm here for this case.

11 MADAM CHAIR: Okay. Okay. Also, okay, let me
12 change that. Megan Riser?

13 MS. RISER: Present.

14 MADAM CHAIR: Okay. Tom Masog?

15 MR. MASOG: Present.

16 MADAM CHAIR: Ebrima Jallow?

17 MR. JALLOW: Present.

18 MADAM CHAIR: Kaleen Jallow?

19 MS. JALLOW: Present.

20 MADAM CHAIR: Thank you. That concludes the sign
21 up list for this particular case. Okay. Mr. Diaz-Campbell,
22 you're on.

23 MR. DIAZ-CAMPBELL: Thank you, Madam Chair. Once
24 again for the record I am Eddie Diaz-Campbell, Senior
25 Planner with the Subdivision and Zoning Section. Item 9 on

1 the agenda is a certification of a non-conforming use for
2 the E&K International Food Market at 9315 and 9317
3 Livingston Road in Fort Washington. Application CNU-26029-
4 2019 proposes certification for a food or beverage store
5 occupying the ground floor unit at each address. Only one
6 application has been filed but because each of the two
7 addresses has its own permitting history staff performed a
8 separate analysis for each address and ultimately came to a
9 different recommendation for each.

10 In this presentation, I will first give background
11 on the site as a whole. I will then explain why staff is
12 recommending the Board approve certification for the 9317
13 Livingston Road. Lastly, I will explain why staff is
14 recommending the Board deny certification for the 9315
15 Livingston Road. Next slide, please.

16 The site is located in the southwestern part of
17 Prince George's County within Planning Area 80 and Council
18 District 08. Next slide, please.

19 More specifically, the site is located on the west
20 side of Livingston Road approximately 0.3 miles north of
21 Oxon Hill Road. Next slide, please.

22 The subject site is located in the commercial
23 miscellaneous or C-M Zone. To north and south of the
24 property are commercial uses in the C-M Zone. To the west
25 is an automotive center in the light industrial and open

1 space zones. To the east is Livingston Road, the commercial
2 uses in the commercial shopping center and commercial office
3 zones beyond. Next slide, please.

4 The aerial photograph shows the building and site
5 as well as the surrounding uses. Next slide, please.

6 The Site Map shows that the topography on the site
7 is generally flat though there are steep slopes just
8 offsite. Next slide, please.

9 The Master Plan Right-of-way Map shows Livingston
10 Road, a collector road, and Maryland 210 a freeway. No
11 impact to the Master Plan Roadways beyond that existing is
12 proposed for this application. Next slide, please.

13 This photo shows the bird's eye view of the site.
14 From this point of view you can see 9315 Livingston Road
15 which is the right or northern half of the building. You
16 can also see 9317 Livingston Road which is the left or
17 southern half. The food or beverage store is supposed to
18 occupy the whole ground floor of the building. The second
19 floor of the building is not included in the applicant's
20 proposal. Next slide, please.

21 The Site Plan shows existing conditions on the
22 property. The use is non-conforming because a grocery store
23 is only permitted in the C-M Zone by special exception and
24 this site has never had a special exception approved.
25 Approval of a special exception requires certain criteria in

1 the Zoning Ordinance to be met, which this site currently
2 does not. Therefore, the applicant has requested
3 certification of a non-conforming use in order to be able to
4 use the existing building and site design. Next slide,
5 please.

6 The next two slides include photos previously
7 provided by the applicant showing the food or beverage store
8 which is on the property until approximately September 2018,
9 known as C&C Groceries. More than 180 days have elapsed
10 between the closure of C&C Groceries and the present.
11 However, the applicant asserts that they were unable to
12 establish their own business within that 180 window for
13 reasons beyond their control. Next slide, please.

14 Now you have some background, I will go through
15 each address individually. In 1980, Permit 4577-80-U was
16 issued for a general store at 9317 Livingston Road. This
17 permitted the establishment of C&C Groceries. No other use
18 and occupancy permits have been issued for this address
19 since then, and the documentary evidence provided by the
20 applicant shows the use continued, uninterrupted between
21 1980 and September 2018. At this address only, the use
22 became non-conforming in 1984, when the property was rezoned
23 from the general commercial or C-2 Zone to the C-M Zone. A
24 food or beverage store is a permitted use in the C-2 Zone.

25 Certification of a non-conforming use requires

1 that certain financing made in accordance with Section 27-
2 244 of the Zoning Ordinance. Because the applicant could
3 not submit documentary evidence which demonstrates
4 continuity of the use between September 2018 and the
5 present, a hearing before the Planning Board is required.
6 Based on the documentation and timeline provided by the
7 applicant it does appear that the break in continuity was
8 beyond the applicant's control. The documentation also
9 shows that a food or beverage store was legally established
10 at 9317 Livingston Road before the use became non-
11 conforming. For these reasons, staff recommends approval of
12 the request for a certification of 9317 Livingston Road.

13 The history is different at 9315 Livingston Road.
14 Unlike its neighbor, this address has had several use and
15 occupancy permits issued and several different uses since
16 1980. However, none of the previous uses before 1984 and
17 the reason they occurred are for a food or beverage store.
18 It was not until 1992 that Permit 3489-92-U that a permit
19 was issued for and I quote, tapes, video, movie rental,
20 bakeries, wholesale fish and seafood.

21 Since a food and beverage store is not allowed in
22 1992, these limited uses may not have been considered to be
23 a food or beverage store when the permit was issued.
24 However, when C&C Groceries closed in 2018, it was operating
25 a full food or beverage store out of 9315 Livingston Road.

1 Based on the documentary evidence, staff has
2 concluded that the food or beverage store operating at 9315
3 Livingston Road was never lawfully established. For this
4 reason, staff recommends denial of the request for
5 certification of 9315 Livingston Road. Staff would note
6 that denial of their request for certification at this
7 location will not prevent the applicant from seeking
8 approval of a food or beverage store through the special
9 exception process.

10 In conclusion, the Subdivision and Zoning staff
11 recommend that the Planning Board adopt the findings of the
12 Technical Staff Report and partially certify it as non-
13 conforming the food or beverage store use requesting
14 certification under application CNU-26029-2019, E&K
15 International Food Market. This concludes staff's
16 presentation.

17 MADAM CHAIR: Thank you, Mr. Diaz-Campbell. Let
18 me see if the Board has any questions of you. Madam Vice
19 Chair?

20 MADAM VICE CHAIR: No questions. No questions.

21 MADAM CHAIR: Okay. Commissioner Washington?

22 COMMISSIONER WASHINGTON: No questions.

23 MADAM CHAIR: Commissioner Doerner?

24 COMMISSIONER DOERNER: Yes, just a quick question.

25 So the difference between the 9315 and the 9317 is that in,

1 I think it's the slide right before that, Slide 10 showing,
2 are both of those sitting next door, is one 9315 and one's
3 9317, right?

4 MR. DIAZ-CAMPBELL: That's correct. You can see
5 that the, well it's considered one building at one point
6 there was a party wall between them and they were considered
7 two buildings. So the two story portion you can see in this
8 photo on the left is 9315 Livingston Road and the one story
9 portion is 9317 Livingston Road.

10 COMMISSIONER DOERNER: Okay. And when was that
11 wall put up between the two of them, do you know?

12 MR. DIAZ-CAMPBELL: The wall would have been put
13 up at the time of the building's construction which was in
14 the 1920's, I believe.

15 COMMISSIONER DOERNER: Okay. All right. Thank
16 you.

17 MADAM CHAIR: Was that it for you, Commissioner
18 Doerner?

19 COMMISSIONER DOERNER: Yes, ma'am.

20 MADAM CHAIR: Commissioner Geraldo?

21 COMMISSIONER GERALDO: Yes, Madam Chair, thank
22 you. Mr. Diaz-Campbell, with these two buildings, is there
23 access between them within the confines of the building
24 itself? In other words, if I go into 9315 can I just walk
25 right into 9317?

1 MR. DIAZ-CAMPBELL: That's correct.

2 COMMISSIONER GERALDO: So what we're saying --

3 MR. DIAZ-CAMPBELL: Because the party wall was
4 taken down eventually.

5 COMMISSIONER GERALDO: So what we're saying then
6 is that we could give the certified non-conforming use to
7 one side of the building but not the other?

8 MR. DIAZ-CAMPBELL: That is what we are saying,
9 yes.

10 COMMISSIONER GERALDO: Okay.

11 MADAM CHAIR: Okay.

12 COMMISSIONER GERALDO: No further questions, Madam
13 Chair.

14 MADAM CHAIR: Thank you. I will now turn to the
15 applicant, Ebrima Jallow.

16 MR. JALLOW: Good morning, Madam Chair --

17 MADAM CHAIR: Good morning.

18 MR. JALLOW: -- good morning members of this
19 Planning Board. I hope you and your family are all coping
20 during this health crisis.

21 MADAM CHAIR: Thank you.

22 MR. JALLOW: Thank you for organizing this
23 hearing. When this process of getting the permit was not
24 going as smooth as I expected, I was advised to get an
25 attorney. I wanted, I wanted to but unfortunately I,

1 unfortunately, I could not afford it because I'm currently
2 unemployed with seven dependents. This has not been an easy
3 process, but I would like to take this opportunity to thank
4 Ms. Andree Checkley, your Planning Director, Ms. Sarah
5 Simalin (phonetic sp.) and her staff. Also Mr. Eddie
6 Campbell and also the Council Member Turner, who basically
7 willing, was willing to support by answering my questions
8 and guiding me through this process. I have reached out to
9 other individuals outside Parks and Planning and have also
10 been, have also assisted, who have also assisted me. Thank
11 you for those individuals. I will turn it over to my wife.

12 MS. JALLOW: Okay. So I think --

13 MADAM CHAIR: Please --

14 MS. JALLOW: -- that we are in agreement --

15 MADAM CHAIR: Excuse me.

16 MS. JALLOW: -- with the recommendation --

17 MADAM CHAIR: Excuse me. Please identify --

18 MS. JALLOW: -- to have --

19 MADAM CHAIR: Excuse me. Please identify yourself
20 for the record. Okay. Thank you.

21 MS. JALLOW: Kaleen Jallow.

22 MADAM CHAIR: Okay. Thank you.

23 MS. JALLOW: Right. So in terms of building 9315,
24 I'm sorry, so please be advised that I am in agreement with
25 the recommendation to have building 9317 be approved for a

1 use and occupancy permit. But in terms of building 9315,
2 the staff recommended that building 9315 be denied for a use
3 and occupancy permit due to inconsistency with evidence.

4 I respectfully disagree with that decision. Based
5 on the report, evidence has been provided for the following
6 and the conditions have also been met. We have provided
7 documentary evidence and sworn affidavits showing commencing
8 date and continuous use. We, we have also provided
9 justification that the building non-operation beyond 180
10 days was beyond our control.

11 Now according to the report, the issue is that the
12 permit issues to building 9315 indicate various uses, which
13 did not include a grocery or a retail store. The report
14 also cited that a permit was issued to building 9315 in 1992
15 for a wholesale meat food market retail and (indiscernible)
16 tapes, video, including tapes, videos and movies. To me
17 that can be interpreted as a food market because store, meat
18 and fish are considered part of a grocery store. I've also
19 submitted yesterday a photo showing that, showing building
20 9317 and 9315, they both had groceries in them.

21 Now the question is not whether the evidence is
22 inconsistent, but whether there is evidence to support that
23 there was a grocery store occupied the entire building. The
24 answer is yes. There is evidence to support that a grocery
25 store occupied the entire building based on the permit

1 issued. There are no other documentary evidence. As the
2 report also cited, the entire information was either purged
3 or archived, therefore not available. So we cannot get
4 additional beyond this permit that we have, we cannot find
5 any other additional permits. We've reached out to other
6 people that shared with us that they don't, they no longer
7 have those permit. They've either purged or they sent to
8 the archive and they're unavailable.

9 Now the building is conjoined. There is evidence
10 to suggest that the building has been operating as one
11 single unit for many years. I believe that if it is all
12 right to operate a grocery store on one side of the
13 building, then it should be all right to put grocery store
14 on the other side, as this would not negatively impact the
15 community or the neighborhood. Now just bear with me for a,
16 for a second, many years ago --

17 MADAM CHAIR: I have to ask you a question. I
18 have to ask you a question.

19 MS. JALLOW: Yes.

20 MADAM CHAIR: When you said it's been operating a
21 single unit for one time, has that been --

22 MS. JALLOW: No. I'm sorry, go ahead.

23 MADAM CHAIR: -- was that since, what year was
24 that? Since what year?

25 MS. JALLOW: Ever since they've been operating

1 this unit, it has always been one. It's just that they have
2 different things on different side of the building.

3 MADAM CHAIR: Okay. And then I have another
4 important question for you. I see the permits that came in
5 and I'm just double checking, I'm confirming with my staff
6 and I see they're giving me the answer that it came in prior
7 to 12:00 noon on yesterday because as you know we can only
8 consider evidence that came in prior to 12:00 noon on
9 yesterday. But I see our, I have our Deputy Planning
10 Director here with me confirming that this did come in
11 before 12:00 noon. Okay. I just wanted to double check.
12 Thank you.

13 MS. JALLOW: Okay. All right. So and this is
14 just a little bit of background information. So 10 years
15 ago my husband was diagnosed with ALL, which is acute
16 lymphoblastic leukemia, while he was getting ready to join
17 the police academy. Five of those years he received
18 aggressive treatment. Now while we were happy that he
19 survived this deadly disease, our lives have not been the
20 same. These medications left him partially disabled. He
21 has limited range of motion in his hands, which means that
22 he's unable to move his hands past his shoulder. Both hips
23 have collapsed, which makes it difficult for him to stand or
24 walk for 10 or more minutes. This halted the dream of
25 becoming a police officer.

1 Now he is limited in what he can do and so we've
2 decided to start our own business, with confidence that we
3 will succeed, we have used up our savings for rent, building
4 and equipment in addition to a great deal of time in the
5 pursuit of starting this business. I have mentioned that
6 the process has not been very easy. I thought that since
7 the grocery store occupied the building a few months before
8 I leased it, it would have been an easy process.
9 Unfortunately, I was wrong but I've learned a lot during
10 this process.

11 I respectfully ask the Board to err on the side of
12 the person who has a lot more to lose. That person is me
13 and my husband.

14 MADAM CHAIR: Okay.

15 MS. JALLOW: So I respectfully ask for approval to
16 use this building for food and beverage store.

17 MADAM CHAIR: Okay. Ms. Jallow, Ms. Jallow, let
18 me, a couple of things first. Thank you for your
19 presentation, it was quite eloquent and you've shared the
20 story of your family's history and the illness that your
21 husband has suffered from and thwarting his dreams of
22 becoming a police officer. And we are sorry to hear that
23 part of it, but we are glad to hear that he survived and is
24 surviving. And that is very moving, it cannot influence our
25 decision here because we have to make our decisions in

1 conformance with the law. So I have to, what I will need
2 from our staff and from our attorneys and then ultimately
3 the Board will have to make the final determination is
4 whether or not the use was legal when it commenced, number
5 one. And you also address the fact that it has not ceased
6 to operate for more than 180 days due to, you know, well
7 that it has ceased to operate for a series of more than 180
8 days, but it was beyond the owner's control.

9 UNIDENTIFIED SPEAKERS: (Indiscernible).

10 MADAM CHAIR: We have too many people talking. It
11 was beyond the owner's control. So you've already passed
12 that part of the 180 day test, so we're in agreement there.
13 So what we have to figure out now is whether it was legal at
14 the time it commenced and in hearing your testimony and
15 reviewing this, it seems debatable to me. Commissioner
16 Geraldo asked the question whether you can go back and
17 forth, it's conjoined but you can go back and forth
18 internally without exiting either building and you said the
19 answer is yes to that. And so then the question is about
20 that 1992 permit for 9315 for tapes and videos and things
21 like that. Can I hear the exact language, Mr. Diaz-Campbell
22 of what that permit says? I think we have the exhibit, but
23 it's hard to read.

24 MR. DIAZ-CAMPBELL: Yes. Yes, Madam Chair. The
25 exact uses that were permitted were tapes, video, movie

1 rental, bakeries, wholesale fish and seafood.

2 MADAM CHAIR: Okay. Thank you.

3 MR. DIAZ-CAMPBELL: That's the complete list.

4 COMMISSIONER GERALDO: Madam Chair?

5 MADAM CHAIR: Bakery --

6 COMMISSIONER GERALDO: Madam Chair?

7 MADAM CHAIR: Bakeries --

8 COMMISSIONER GERALDO: Commissioner Geraldo.

9 MADAM CHAIR: Hold it. Okay. Commissioner
10 Geraldo?

11 COMMISSIONER GERALDO: I'm sorry, yes, I just
12 want, so bakeries were allowed, and fish was allowed?

13 MADAM CHAIR: And seafood.

14 COMMISSIONER GERALDO: And seafood, right?

15 MADAM CHAIR: Well, wholesale fish and seafood it
16 says.

17 COMMISSIONER GERALDO: So what I would like to
18 hear I guess from our counsel, you know, at times we talk
19 about, we had a case last week, I believe, where we talked
20 about commonsense. And I'm looking at this case and to me
21 it seems kind of commonsense that one side of the store we
22 can grant a non-conforming use but the other side we can't.
23 But on the side that we can't they're selling groceries
24 anyway under the permitted use. So I'm having a hard time
25 understanding why it can't be granted. Maybe counsel --

1 MADAM CHAIR: Okay.

2 COMMISSIONER GERALDO: -- could educate me a
3 little more.

4 MADAM CHAIR: Well it's not that it, let me start
5 off here. It's not that it can't be granted, because
6 ultimately --

7 COMMISSIONER GERALDO: Okay.

8 MADAM CHAIR: -- we are the finders of fact here.

9 COMMISSIONER GERALDO: Okay.

10 MADAM CHAIR: But we have to do so based on the
11 evidence and that's why I was trying to elicit some of this
12 information on, so you were right in terms of the fish and
13 the bakeries and the seafood, and you were right in that you
14 could traverse from one building into the other. It seems
15 to be two buildings that sort of operate as one, maybe. So
16 the applicant has endeavored to make their case. I don't
17 think, you know, Mr. Diaz-Campbell can chime in and then we
18 will need in fact need to hear from counsel and I guess
19 that's Peter Goldsmith, this time, but we will need to hear
20 from you counsel. But it looks like in my opinion, it's
21 fairly debatable either way, so I think the --

22 MADAM VICE CHAIR: Madam --

23 MADAM CHAIR: Yes? Commissioner --

24 MADAM VICE CHAIR: Madam Chair?

25 MADAM CHAIR: Yes?

1 MADAM VICE CHAIR: You referenced a document that
2 was submitted yesterday before noon.

3 MADAM CHAIR: Yes.

4 MADAM VICE CHAIR: What was that item? I don't
5 seem to have that item.

6 MADAM CHAIR: It's a permit, it's a Prince
7 George's County permit and I think, do we have this? It's
8 not on the, okay, okay, so anyway it's a permit that was
9 issued for the other address, for the 9415 Livingston Road
10 address.

11 Anyway, so I guess what I'd like to hear again
12 because you passed the 180 day test. The question is was it
13 legal when it commenced and that's what seems to be
14 debatable. So Mr. Diaz-Campbell can you add to that and
15 then Mr. Goldsmith, can you chime in as well?

16 MR. DIAZ-CAMPBELL: So Madam Chair, part of the
17 difficulty we have here is that we can't know what the
18 intention of the permit granter was in 1992. We know that
19 in 1992 a food and beverage store was not a permitted use in
20 the C-M Zone and the property had already become part of the
21 C-M Zone in 1984. So it's possible that because the
22 applicants at the time couldn't do a food and beverage store
23 that they agreed to a permit which allowed them to do a more
24 limited range of uses that were permitted. The other
25 possibility is simply that the permit was issued in error

1 but we, let's start by assuming that it was not.

2 If the owners of the property at the time, C&C
3 Groceries, got their permit for a limited range of new uses
4 and put those in at 9315 Livingston Road, I would think it
5 unlikely that they would seek future, that they would seek
6 additional permits to simply add additional things being
7 sold on that side of the store over time. I think that is
8 the most likely explanation for why at the most recent time
9 that C&C was open in 2018, that I think that's why in 2018
10 you see the same groceries, you see a sign food and beverage
11 store use on both sides of the store. Just because you have
12 a permit that limits the things that are being sold, doesn't
13 mean that anybody is going to stop you from simply moving
14 things from one side of the store to the other.

15 MS. CONNOR: Madam Chair, this is Sherri Connor,
16 for the record, if I could just add some information to
17 that. Those specific uses listed on the permit in 1992, I
18 believe it was --

19 MADAM CHAIR: Yes.

20 MS. CONNOR: -- were permitted uses and I think
21 this gets at Commissioner Geraldo's question, that the
22 wholesale bakery and the fish and seafood market are
23 separate uses in the use table that are permitted, aside
24 from the use of a food or beverage store. And as Mr. Diaz-
25 Campbell indicated earlier in his presentation, a food or

1 beverage store which would allow multiple food products to
2 be sold would have required a special exception in 1992.
3 That was not obtained and so the permit was issued for the
4 uses that would have been allowed without a special
5 exception and that's the wholesale bakery and fish and
6 seafood market, sale of videotapes, et cetera.

7 MADAM CHAIR: So --

8 COMMISSIONER DOERNER: So, I have a question.
9 This is Commissioner Doerner.

10 MADAM CHAIR: Commissioner Doerner?

11 COMMISSIONER DOERNER: So then would it be our
12 position, even if we're denying the 9315 in terms of the use
13 of food and beverage store, would we support it if they
14 wanted to do fish and bakery and the other things that's on
15 the permit from 1982? Because I'm not sure, I'm not totally
16 convinced that this is a case that we need to outright deny
17 the food and beverage because it looks like just on the
18 picture that you've got in the slides right now, that it's
19 going back and forth and I realize that there were specific
20 things from the permit that are called out in terms of
21 bakery, wholesale fish and seafood. I don't know if there's
22 that much of distinction with that wall right open. It
23 doesn't look like it's two separate units to me. It looks
24 like it's operating as one and it's always been operating as
25 one and they're just divvying up the kinds of produce or the

1 kinds of items that they have on one side versus the other.
2 So I'm kind of having a little bit of difficulty of
3 understanding why would we just have an outright denial
4 versus at least offer up the ability to continue the same
5 kind of activities on the 9315 side if they wanted to do
6 wholesale fish, bakeries and those kinds of items as well.

7 MS. CONNOR: Yes, Sherri Connor again. They could
8 in fact get a permit for those specific uses today, which
9 are still listed as separate uses in the use table permitted
10 in the C-M Zone.

11 MADAM CHAIR: Well, let me say this, Ms. Connor,
12 Commissioner Doerner seemed to be saying two things. One,
13 he wasn't sure that this wasn't operating as, he's saying it
14 seems as though it was operating as one store and he's not
15 convinced that the whole thing couldn't operate as one
16 store. But at a minimum, he's saying why couldn't they go
17 forward to get permits for these particular uses that are
18 set forth in the 1992 permit. So he tossed out two options,
19 as I understand it, am I correct, Commissioner Doerner?

20 COMMISSIONER DOERNER: Yes, like on the outside it
21 looks like there are two separate stores in that picture on
22 the left right now. But when you go back to the prior slide
23 it looks like, as Madam Chair said, that it actually is
24 operating on the inside like it is a single unit. I mean to
25 me that doesn't seem --

1 UNIDENTIFIED SPEAKER: Right.

2 COMMISSIONER DOERNER: -- division in terms of the
3 operation from the business, it just seems like they decided
4 to separate what they were putting on one side of the store
5 versus the other.

6 MS. CONNOR: Yes. I don't disagree with the
7 photographic evidence provided and staff does not contest
8 the fact that it may have in fact been physically operating
9 as a food or beverage store between the two units entirely.
10 But part of our analysis is you know, establishing that it
11 was legally operating and was legally established prior to
12 becoming non-conforming. And the permit evidence put forth
13 shows that permits were issued for everything but a food or
14 beverage store and then after a certain amount of time a
15 special exception would have been required for the food or
16 beverage store. And in fact, after that time they did
17 proceed to get additional permits but a special exception
18 was not filed so the permit was limited to the sales of
19 wholesale bakery, fish and seafood market, videotape sales.

20 MADAM CHAIR: Let me say this. I mean typically
21 we know ignorance of the law is no defense, but a lot of
22 people are not, they don't have an attorney, number one. A
23 lot of people don't know about the special exception process
24 and that is one way to deal with it. It is typically an 18-
25 month process and is extraordinary expensive.

1 COMMISSIONER GERALDO: Uh-huh.

2 MADAM CHAIR: So that's one issue and not to say
3 that people who absolutely require a special exception don't
4 have to get one because when it's absolutely required, you
5 do have to get a special exception. But in this case it
6 seems to me it's fairly debatable.

7 COMMISSIONER GERALDO: Madam Chair, and I just
8 wanted to add that the market is in my neighborhood in Fort
9 Washington. I pass by it frequently and since I've been
10 living here since in 2000 I've always known it as a grocery
11 store. And I have in fact been in the grocery store. So I
12 kind of agree with you it's kind of debatable. But I would
13 like to hear from our counsel.

14 MADAM CHAIR: Okay. And I'd like to hear from
15 them too but the question is, you said since 2000, the
16 question is it became non-conforming in 1984 --

17 COMMISSIONER GERALDO: I understand.

18 MADAM CHAIR: -- and the 1992 permit, you know,
19 the applicant has the burden of proving their case and we,
20 and to us they may have proved it or not proved it, you
21 know, because in addition to what we have in the Technical
22 Staff Report we now have the testimony of the owners, so you
23 know that's helpful too. And Ms. Jallow made a compelling
24 case and I think what I heard from Mr. Diaz-Campbell was it
25 was not in no way do they meet this but they were unable to

1 draw the conclusion that it was legally established prior to
2 the date it became non-conforming and so it sounds to me
3 like they wrestled with it. But I'd like to turn to our
4 counsel too, Mr. Goldsmith, are you on?

5 MR. GOLDSMITH: Good morning, Madam Chair, this is
6 Peter Goldsmith, Senior Counsel. Can you hear me?

7 MADAM CHAIR: Yes. Can you tell us what our
8 parameters are and what the findings we would have to make
9 if we disagreed with the --

10 MR. GOLDSMITH: I caught part of that. I think
11 what you said was explain what non-conforming use is and
12 what findings you have to make?

13 MADAM CHAIR: No. No, I mean I want what our
14 Planning Board parameters are in this matter because to me
15 it seems fairly debatable but we're turning to you to, you
16 know, to guide us as the finders of fact in this particular
17 matter.

18 MR. GOLDSMITH: Okay.

19 MADAM CHAIR: And if we support the staff
20 recommendation, you know, we can approve the recommendation
21 as set forth in the Staff Report. If we do not support the
22 staff recommendation because we interpret the evidence
23 differently, as enhanced by Ms. Jallow's testimony as well,
24 then we would need different findings that it was legal when
25 commenced and that it was used as one store. So we're

1 turning to you for guidance as to what our legal parameters
2 are.

3 MR. GOLDSMITH: Okay. I think the first thing
4 that we need to determine is whether the use as a food and
5 beverage store was legal at the time the food and beverage
6 store became non-conforming. And I think what staff has
7 determined here is that the food and beverage store was in
8 existence prior to, at least with respect to 9317, the
9 single story building that it was in existence before it
10 became non-conforming in 1984 and it continued up until the
11 applicant or up until the current owner owned the building
12 and the applicant has continued to pursue and the applicant,
13 the lessee has begun starting to pursue reopening the food
14 and beverage store.

15 As for the 9315 we are talking about the 1992
16 permit. I'm looking at how that store was used in 1982
17 according to Mr. Diaz-Campbell's outline it says there was a
18 permit issued as an office. And so the way I understand
19 what staff is saying, what's staff's position is, is that it
20 was an office at the time --

21 MR. DIAZ-CAMPBELL: Peter, if I may interrupt?

22 MR. GOLDSMITH: Yes.

23 MR. DIAZ-CAMPBELL: The use as an office was
24 permitted in 1982, it was and it remained an office until
25 1990, when it became an electrical repair services. Then it

1 was in 1992 that the tapes, video, movie rental, bakeries
2 and fish were permitted.

3 MR. GOLDSMITH: Right. So then in 1992 we're
4 saying that a tape, video, movie rental, bakery, wholesale
5 fish and seafood and that and Mr. Diaz-Campbell, you said
6 that that is a separate, or maybe Ms. Connor mentioned that
7 this is a separate use in the use table from a food and
8 beverage store, right.

9 MR. DIAZ-CAMPBELL: That's correct.

10 MR. GOLDSMITH: So if a food and beverage store
11 opened --

12 MR. DIAZ-CAMPBELL: Both are, each of those uses
13 were listed in they use table separately at the time.

14 MR. GOLDSMITH: Right. So if a food and beverage
15 store had opened in 1992, then it would have needed a
16 special exception and if it had opened up without one it
17 would have been an unlawful non-conforming use, right?

18 MR. DIAZ-CAMPBELL: That's correct. If a permit
19 had been issued for a food or beverage store specifically in
20 1992 and they did not have a special exception then the use
21 would have been unlawful and the permit issued in error.

22 MR. GOLDSMITH: Okay.

23 MADAM CHAIR: Okay. Also we have with us our
24 acting Deputy Planning Director, Derrick Brulage and I'm
25 going to turn to you as well.

1 MR. BRULAGE: Madam Chair, it might be useful for
2 the Board to focus on what we, staff believes is the
3 critical issue here and that is was there or was there not a
4 food or beverage store operating at 9315 prior to 1984, when
5 the C-M Zone attached. And based on all that the Board has
6 just heard, there is some evidence that it was, there's some
7 evidence that it wasn't. The evidence that it was includes
8 the testimony of Ms. Jallow, the evidence that there was not
9 a food and beverage store includes the issuance of several
10 use and occupancy permits which indicate other uses,
11 although use and occupancy permits don't always include
12 everything that is happening on the premises, since it's
13 quite common that they single out certain uses and so as the
14 Chair said the evidence is, the question whether it was or
15 was not a food or grocery store prior to 1984 is a question
16 of fact that the Board needs to decide having heard all the
17 evidence that it has heard. But that really is your
18 question is do you believe there's enough evidence that
19 there was a food or beverage store operation in 9315 prior
20 to 1984, or do you believe no, that only happened later in
21 which case you want to go with the staff recommendation.

22 MADAM CHAIR: Thank you, Mr. Brulage and that
23 helps a lot because --

24 UNIDENTIFIED SPEAKER: It does.

25 MADAM CHAIR: -- we have the staff recommendation

1 and I reiterate that Mr. Diaz-Campbell did not say
2 definitively that it was not a legal use, he said that they
3 can't prove that it was a legal use and they didn't have
4 enough evidence to prove that it was a legal use. And the
5 two things you just said which is the same thing I commented
6 on, Ms. Jallow's testimony and also the issue of the permits
7 because we have seen this many, many times with the permits
8 issued by the county that they do not, nor are they expected
9 to list every single use that is permitted. Very often they
10 highlight some uses and not the whole gambit and then we
11 find ourselves in this kind of quandary which is where have
12 found ourselves in other instances. So the question finally
13 is up to the Board whether we feel the evidence in the
14 record addresses that threshold question as to whether the
15 use was legal when it commenced, because that is the test
16 that we're left with now because the 180 day test has
17 already been addressed. So the test the threshold issue
18 that we have to address now is whether it was legal when
19 commenced and that's up to this Board as the finder of
20 facts.

21 COMMISSIONER GERALDO: Madam Chair?

22 MADAM CHAIR: Yes?

23 COMMISSIONER GERALDO: I'm ready to make a motion
24 if there's no other questions.

25 MADAM CHAIR: Okay. Make your motion.

1 COMMISSIONER GERALDO: My motion is that we grant
2 certification of non-conforming use in CNU-26029-2019 and
3 for both 9315 and 9317 Livingston Road in Fort Washington.
4 And the basis is I believe that given Ms. Jallow's testimony
5 as well as the permit that was issued that said that they
6 could sell seafood and bakery products, I believe that in
7 fact it's always been operated as a grocery store.

8 MADAM CHAIR: Wait a minute, was that last part
9 your third rationale that you believe it was always operated
10 as a grocery store?

11 COMMISSIONER GERALDO: Right.

12 MADAM CHAIR: Is there a second?

13 COMMISSIONER DOERNER: This is Commissioner
14 Doerner, and I'll second the motion with the additional,
15 just clarification that that's, it's not just that we
16 believe that, that was actually written into the certificate
17 of occupancy with (indiscernible) 489-92-U that was issued
18 in August 21, 1992, specifically for 9315 Livingston Road,
19 with the understanding that not every actual use is always
20 written into the permits. We've heard that in prior cases
21 in the past even when DPIE has come in here and testified
22 that they just literally in the size of the space that they
23 have to write down all of the uses, they don't have enough
24 space in there. And it seems like the testimony that we've
25 gotten from the owners as well as all the backup there's no

1 distinction between this store from sides 9315 to 9317.
2 It's always been viewed as almost just one unit and there's
3 nothing to make us think otherwise in the evidence that's
4 been submitted going back to 1992 for those two places.

5 MADAM CHAIR: So we have a motion and a second. I
6 would add to that, our two eloquent motion maker and
7 seconder, a fact that you could easily traverse inside from
8 one side to the other which connotes one distinct grocery
9 store. So that would be my additional finding. All in
10 favor of the motion, I'm going to start with Madam Vice
11 Chair.

12 COMMISSIONER WASHINGTON: Madam Chair, are you
13 going to entertain discussion before you do the vote?

14 MADAM CHAIR: I'm sorry. I'm sorry, yes, more
15 discussion? I'm sorry. Commissioner Washington?

16 COMMISSIONER WASHINGTON: Yes. Commissioner
17 Washington, I absolutely concur with my colleagues, the
18 motion maker as well as the seconder. I would just ask that
19 we augment the motion to include approval or adopting the
20 findings in support of the approval of CNU for 9317 but not
21 the findings, staff findings which are outlined to
22 disapprove 9315 and that staff and counsel ensure that based
23 on the applicant's testimony, permits issued as well as the
24 other comments made ensure that the appropriate findings are
25 incorporated in the resolution.

1 COMMISSIONER GERALDO: I accept that.

2 MADAM CHAIR: Secunder?

3 COMMISSIONER GERALDO: As the motion maker, I
4 accept that.

5 MADAM CHAIR: Secunder?

6 COMMISSIONER DOERNER: I accept that as well. I
7 think those are helpful clarifications.

8 MADAM CHAIR: Thank you. Okay. So is there any
9 additional discussion?

10 (No audible response.)

11 MADAM CHAIR: I'm going to start with Madam Vice
12 Chair.

13 MADAM VICE CHAIR: I vote aye.

14 MADAM CHAIR: Commissioner Washington?

15 COMMISSIONER WASHINGTON: Aye.

16 MADAM CHAIR: Commissioner Geraldo?

17 COMMISSIONER GERALDO: Aye.

18 MADAM CHAIR: Commissioner Doerner?

19 COMMISSIONER DOERNER: Aye.

20 MADAM CHAIR: The ayes have it, 5-0.

21 Congratulations. At this point I think this was Number 8.

22 UNIDENTIFIED SPEAKER: That was Number 9.

23 MADAM CHAIR: Number 9, I'm sorry, Number 9. I'm
24 going to take Item 10 and then we're going to take a, Item
25 10 is request for a continuance.

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(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Prince George's County Planning Board in the matter of:

E&K INTERNATIONAL FOOD MARKET, LLC

Certificate of Non-Conforming Use, CNU-26029-2019



By: _____

Date: September 22, 2020

Diane Wilson, Transcriber