

Case No. CNU-32917-2010
Convenience &
Dollar Plus Market

Applicant: Eagle Management Company

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record, that the decision of the Planning Board in Resolution PGCPB No. 13-66, including the transcript of proceedings and exhibits for the District Council's consideration of the application, to APPROVE an application for certification of a non-conforming use, CNU-32917-2010, of an existing convenience/retail store, located on the southeast side of Southern Avenue, approximately 1,240 feet northeast of Pennsylvania Avenue (MD 4), at 4119 Southern Avenue in Capitol Heights, and which became non-conforming when the property was rezoned pursuant to the 2010 *Approved Subregion 4 Master Plan and Sectional Map Amendment*, adopted in accordance with Subtitle 27 of the Prince George's County Code, is REVERSED, subject to the District Council's original jurisdiction over CNU-32917-2010 pursuant to §27-132(f)(1) and its authority to reverse the decision of the Planning Board set forth in Section 27-244 of the Zoning Ordinance; and Application CNU-25172-2011, is hereby DENIED.

As the basis for this action, and pursuant to §§ 27-132(f)(1) and 27-244 of the Zoning Ordinance, the District Council states its findings and conclusions in Attachment A of this Order.

ORDERED this 14th day of January, 2014, by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Patterson, Toles
and Turner.

Opposed:

Abstained:

Absent: Council Member Olson.

Vote: 8-0

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF
THE MARYLAND-WASHINGTON
REGIONAL DISTRICT IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: _____
Mel Franklin, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council

ATTACHMENT A

ORDER OF DENIAL—CNU-32917-2010

FINDINGS AND CONCLUSIONS

Procedural History

On or about December 13, 2012, the Prince George's County Planning Department, Development Review Division, accepted application CNU-32917-2010, which requested certification of a non-conforming use for variety/retail store in the R-T (Residential-Townhouse) Zone. *See* Technical Staff Report, 5/20/2013.

On or about March 4, 2013, Technical Staff completed its report and recommended disapproval of application CNU-32917-2010. *See* Technical Staff Report, 5/20/2013.

A hearing was scheduled on application CNU-32917-2010 before the Planning Board on or about March 21, 2013. After calling the hearing to order and taking partial testimony on the merits of the application, the Planning Board continued its March 21, 2013, hearing to allow Applicant's recently retained counsel, Dennis Whitley, III, Esquire, Law Offices of Shipley & Horne, P.A., 1101 Mercantile Lane, Suite 240, Largo, Maryland 20774, additional time to prepare. *See* (3/21/2013 Tr., at 31-32).

Thereafter, on or about April 18, 2013, the Applicant requested and the Planning Board denied Applicant's request for a second continuance to submit supplemental information and/or evidence into the record concerning application CNU-32917-2010. *See* (4/18/2013 Tr., at 5-6).¹

¹ The evidence in the record as to the proceedings conducted on April 18, 2013, by the Planning Board as to CNU-32917-2010 reveals that the Planning Board voted to deny Applicant's second continuance request and to proceed with the case as scheduled upon favorable motion made by Commissioner Washington, and seconded by Commissioner Geraldo (in favor: Comm'rs Washington, Geraldo, and Shoaf; opposed: were Chair Hewlett and Vice Chair Bailey). *See* 4/18/13 Tr., However, the transcript of the April 20, 2013 proceedings conclude without any additional testimony on the application or testimony to indicate whether the Planning Board reconsidered the motion to continue the case until the next record of a hearing on June 6, 2013.

On June 6, 2013, a public hearing was finally held and concluded on application CNU-32917-2010. After consideration of the evidence presented at the public hearing, the Planning Board voted to approve application CNU-32917-2010. *See* (6/6/2013 Tr.)

On June 27, 2013, the Planning Board adopted PGCPB No. 13-66, which contained its findings and conclusions approving application CNU-32917-2010. *See* PGCPB No. 13-66.

On July 8, 2013, the District Council deferred CNU-32917-2010 until July 15, 2013, whereupon the District Council, pursuant to §27-244 of the Zoning Ordinance,² elected to review this matter.

On October 21, 2013, the District Council, pursuant to §27-132 and its District Council Rules of Procedure, held oral argument and took this matter under advisement.

On January 14, 2014, the District Council, pursuant to §27-132, referred this item to staff to prepare an order of denial.

Applicable Law

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.** §27-244 (Emphasis added.)

§27-244 sets forth the following specific requirements for certifying a nonconforming use:

(a)(1) In general, 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

² *See* Prince George's County Code, Subtitle 27, Zoning Ordinance, (2011 Edition, as amended) (hereinafter "§ 27- 244").

illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).

(b)(1) The applicant shall file an application for a use and occupancy permit in accordance with Division 7 of this Part.

(b)(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.

Findings and Conclusions

The subject property is located on the southeast side of Southern Avenue, approximately 1,240 feet northeast of Pennsylvania Avenue (MD 4), on 0.043 +/- acre identified as Lot 3-A, with a street address of 4119 Southern Avenue in Capital Heights. The property is square-shaped, improved single lot, consisting of an 800-square-foot, single-story building and requisite parking. Access to the development is available via ingress/egress on Southern Avenue. The

applicant's business is one of four businesses operating on Lot 3-A. *See* PGCPB No. 13-66, at 1; (6/6/2013 Tr. at 3); (3/21/2013 Tr., at 3); Technical Staff Rpt. 5/20/2013³, at 1.

The record contains evidence that certain improvements on the property were first constructed in 1960, as well as evidence suggesting a history of use as a retail/variety store on the property, to include a certificate of occupancy permit for a variety store issued to a James Palm on or about July 19, 1982 *See* (3/21/2013 Tr., at 3); Technical Staff Rpt. 5/20/2013, at 21, 23, 28. The applicant, Eagle Management Company, acquired the subject property on or about August, 2005. *See* PGCPB No. 13-66, at 1; (6/6/2013 Tr., at 3-4); (3/21/2013 Tr., at 3, 22); Tech. Staff Rpt. 5/20/2013, at 25. According to the record, the last two permits (Permit 29088-2007-UW on October 1, 2007, and Permit 37095-2008-UW on March 4, 2009) were issued for beauty services located at the subject property address. PGCPB No. 13-66, at 1; (6/6/2013 Tr., at 6-10); 5/20/2013 Tech. Staff Rpt., at 23. According to records and testimony advanced by the applicant, the subject property continuously operated as a retail/variety store, while also providing space for beauty services PGCPB No. 13-66, at 1; (6/6/2013 Tr.); (3/21/2013 Tr., at 10-11, 19-20, 24).

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 District Council approved the *Subregion 4 Master Plan and Sectional Map Amendment*, wherein the

³ According to the record, an original Technical Staff report was issued on March 4, 2013, in advance of the March 21, 2013, hearing before the Planning Board. However, certain supplemental evidence was offered during the course of the March 21, 2013, and in preparation for the April 18, 2013, scheduled hearing. This additional evidence prompted a later iteration of the Technical Staff Report dated May 20, 2013, that incorporates the additional materials as a supplement to its earlier report.

property was rezoned from Commercial Shopping Center (C-S-C) to the R-T Zone. *See* PGCPB No. 13-66, at 1; (6/6/2013 Tr. at 3); (3/21/2013 Tr., at 3); Technical Staff Report 5/20/2013⁴, at 1. As set forth in § 47-441(b) of the Zoning Ordinance, the R-T Zone prohibits retail sales and consumer service establishments as a land use.

The property is surrounded by the following uses:

North / 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.

Section 27-244(b)(2)(A) of the Zoning Ordinance articulates certain specific types of documentary evidence in order to demonstrate that the use has not ceased operation for more than 180 days from the time the use became nonconforming, or June 1, 2010, and the date when the application was submitted, December 13, 2012. These documents include tax records, business records, public utility bills, and sworn affidavits.

Here, the record evidence reflects the following documentary evidence submitted by Applicant to meet the criteria of Section 27-244 necessary for certification as a nonconforming use:

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:

⁴ According to the record, an original Technical Staff report was issued on March 4, 2013, in advance of the March 21, 2013, hearing before the Planning Board. However, certain supplemental evidence was offered during the course of the March 21, 2013, and in preparation for the April 18, 2013, scheduled hearing. This additional evidence prompted a later iteration of the Technical Staff Report dated May 20, 2013, that incorporates the additional materials as a supplement to its earlier report.

- 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.

PGCPB No. 13-66, at 4; Technical Staff Report 5/20/2013, at 3.

Applicant, by and through Counsel, submitted the following additional documents between the conclusion of the March 21, 2013, Planning Board Hearing and May 24, 2013, to bolster support for its claim of continuous use as a variety / retail use:

- 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; and
- 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.

PGCPB No. 13-66, at 5, Technical Staff Report 5/20/2012, at 3.

We have reviewed the record supporting the application, including applicant's evidence in support of its application for certification, as well as the transcripts of hearing testimony offered at the March 21, 2013, and June 6, 2013, hearings before the Planning Board, in context with oral arguments from the parties on October 21, 2013. Based on our review of that record, we are not persuaded by the evidence because, in our view, the Applicant has not met its burden to show that the 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 in accordance with Section 27-244(b)(2)(B) of the Zoning Ordinance.

Absent from the record is 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**. *See* Tr. 06/06/2013, at 11-12, 13-14. In fact, the District Council finds persuasive the record testimony of Commissioner Washington questioning the evidence supporting the application. We are not persuaded that purchase records for goods typically offered for sale at a convenience store are credible to show that these items were actually sold, especially without wholesale invoices to demonstrate those sales. *See* Tr. 06/06/2013, at 11-12; Technical Staff Report 05/20/2013, at 61-62. Moreover, the District Council assigns considerable probative value to the testimony from the hearing by Commissioner Geraldo highlighting gaps in the business and tax records submitted by Applicant, particularly the fact that there are no tax records for the six-month period of June 1, 2010, to January 1, 2011, to adequately demonstrate the continuous operation of the use. *See* Tr., 06/06/2013, at 12-14, 15.

Statutory Construction

We approach the construction of the provisions of the Zoning Ordinance in the case *sub judice* mindful of well-settled rules governing our role. The cardinal rule of statutory

interpretation is to ascertain and give effect to the intention of the legislative body which enacted the statute. The primary source to which we refer to determine legislative intent is the language of the statute itself. *See Blum v. Blum*, 295 Md. 135, 140, 453 A.2d 824 (1983), *Ford Motor Land Development v. Comptroller*, 68 Md. App. 342, 346-47, 511 A.2d 578, *cert. denied*, 307 Md. 596, 516 A.2d 567 (1986). Furthermore, the statute must be construed considering the context in which the words are used and viewing all pertinent parts, provisions, and sections so as to assure a construction consistent with the entire statute. *Comptroller v. Mandel Re-election Com.*, 280 Md. 575, 579, 374 A.2d 1130 (1977). Finally, we may not rewrite the statute by inserting or omitting words therein to make the legislation express an intention not evidenced in its original form, or to create an ambiguity in the statute where none exists. *Hunt v. Montgomery County*, 248 Md. 403, 414-15, 237 A.2d 35 (1968); *Montgomery County v. Fulks*, 65 Md. App. 227, 233, 500 A.2d 302 (1985).

Applying these maxims to the task at hand, we find no ambiguity in §27-244 of the Zoning Ordinance. §27-244 plainly provides, in pertinent part, the following specific requirements for certifying a 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. (Emphasis added.)

We believe that observation is applicable to the plain legislative intention expressed in §27-244. *See Lussier v. Md. Racing Comm'n*, 343 Md. 681, 696-97, 684 A.2d 804 (1996), *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881 (1989) (An agency's interpretation of the statute that it administers will be given considerable weight).

We may **only** affirm the certification of a nonconforming use application if we find, based on the record before the Planning Board, that a nonconforming use exists **and has continuously operated**. §27-244. Here, and based on the record, we are not persuaded by the evidence, particularly the tax and business records, is sufficient to show that the Applicant's variety / retail use has operated continuously from June 1, 2010, the date of the rezoning, and December 13, 2012, (the filing of the application). *See* PGCPB 13-66, Technical Staff Report with exhibits, 5/20/2013, (06/06/2013 Tr.). The burden of proof in any zoning case shall be the Applicant's. §27-142. As a result, and based on our review of the record evidence, we find that the Applicant has failed to carry its burden in this case. Therefore, we REVERSE the decision of the Planning Board in PGCPB No. 13-66, to APPROVE CNU-32917-2010, and Application CNU-32917-2010, is hereby DENIED. *See Gardner*, 293 Md. at 268, 443 A.2d at 119 ("These local ordinances and regulations must be strictly construed in order to effectuate the purpose of eliminating nonconforming uses.") (citing *City of Hagerstown v. Wood*, 257 Md. 558, 563, 263 A.2d 532, 534 (1970); *Hewitt v. County Comm'rs of Baltimore County*, 220 Md. 48, 59, 151 A.2d 144, 150 (1959); *Mayor of Baltimore v. Byrd*, 191 Md. 632, 638, 62 A.2d 588, 591 (1948); *Colati*, 186 Md. at 658-59, 47 A.2d at 616; *Knox v. Mayor of Baltimore*, 180 Md. 88, 96, 23 A.2d 15, 18 (1941)).

Conclusion

For the reasons stated above, the decision of the Planning Board in PGCPB Resolution No. 13-66, to APPROVE Application CNU-32917-2010, is REVERSED, and Application CNU-32917-2010 is hereby DENIED.