

## R E S O L U T I O N

WHEREAS, the Prince George's County Planning Board has reviewed a Certification of a Nonconforming Use request for a two-family dwelling in the R-55 Zone; and

WHEREAS, after consideration of the evidence presented at the public hearing on February 17, 2005, the Prince George's County Planning Board finds:

- A. **Location and Field Inspection:** The subject property is located on the west side of 49<sup>th</sup> Avenue, approximately 60 feet north of Ruatan Street, known as 8702 49<sup>th</sup> Avenue. The property is currently zoned R-55, single-family residential, and has an area of 8,263 square feet (50 feet in width and 165.26 feet in length). It is developed with a one-and-one-half story brick house with a basement. It has an enclosed area of 1,384 square feet and contains two bedrooms, a kitchen, a bathroom, and a family room in the basement and four bedrooms, two bathrooms, a kitchen, and separate entrance on the top two floors. There are two sheds in the rear yard of the property. One of the sheds has kitchen and bathroom facilities. The owner is planning to use the shed for storage. At present, the property is being used as a two-family dwelling. There are four people living in the main floor unit and two people living in the basement unit. All the residents are renters. The owner is not occupying the property at present. The property has approximately 50 feet of frontage on 49<sup>th</sup> Avenue, from which it is accessed.
- B. **History:** In 1928, the property was zoned Residential 'A' (equivalent to the R-55 Zone) which permitted two-family dwellings provided they were owner occupied. In 1949, the property was rezoned to R-55, which is the present zoning. Changes to the Zoning Ordinance from July 29, 1986, to September 20, 1988, mistakenly permitted two-family dwellings in the R-55 Zone without requiring owner occupancy. Council Bill 85-1988 eliminated two-family dwellings as a permitted use. Therefore, all two-family dwellings permitted in the R-55 Zone during that period became nonconforming uses.
- C. **Master Plan Recommendation:** The College Park-Berwyn Heights and Vicinity master plan retained the subject property in the R-55 Zone.
- D. **Request:** The applicant requests certification of a two-family dwelling in the R-55 Zone. The R-55 Zone permits only one 1-family detached dwelling on a lot. The applicant has stated that the property is being consistently used as a two-family dwelling unit.
- E. **Surrounding Uses:** The immediate area surrounding the property is characterized by residential developments in the R-55 Zone. The subject property and the adjoining properties to the north, east and west are zoned R-55. 49<sup>th</sup> Avenue is located to the south of the subject property.
- F. **Certification Requirements:** Certification of a nonconforming use requires that certain findings be made. First, the use must either predate zoning 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** sets forth the specific requirements:

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) certifies that the use is really nonconforming and not an illegal use.**

A use and occupancy certificate allowing “two apartments” was issued to the previous owner of the property (Mary Randolph) by the Prince George’s County Department of Inspection and Permits on November 6, 1970 (U&O Permit No. 678501U). The City of College Park issued city occupancy permits allowing “two dwelling units” in the property from 1969 to 1972.

Mary Randolph sold the property to Michael Holder and his mother, Linnea Berge, in 1983. From 1983 until the property was sold to the applicant, Ross Eichberg, in July 2004, Michael Holder operated the property as two dwelling units. Either the main floor unit or the basement unit were rented to various renters. The continuous use of the property as two separate units from 1983 to 2004 has been verified by affidavits from Mr. Holder and Mrs. Berge. In 1998 when Council Bill 85-1988 corrected the mistake in the Zoning Ordinance allowing two-family dwelling units and made all two-family dwelling units nonconforming, the previous owner did not get a Use and Occupancy certificate for the two-family dwelling. After purchasing the property in July 2004, the applicant applied for the subject certification of the nonconforming use on November 8, 2004.

The City of College Park has stated that the previous owners did not obtain city permits or use and occupancy permits for a two-family dwelling from 1983 onward. Therefore, the subject use does not qualify as a nonconforming use. The city has recommended denial of the nonconforming use. They have also stated that the total floor area of the house is not adequate to accommodate a two-family dwelling. The property does not have adequate on-site parking and the street parking on 49<sup>th</sup> Avenue is limited.

Certification of a nonconforming use requires a public hearing, and a sign was accordingly posted on the site. However, another sign was previously posted on the site by mistake. The sign stated that a request for a hearing must be made. After seeing the sign, a number of citizens sent in a request for a public hearing. Staff has received letters from various citizens and two civic associations, the Berwyn Civic Association and Calvert Hills Citizens’ Association. All of the letters request a public hearing for this case and that the two-family dwelling zoning not be granted. The reason for not granting the request is that the subject lots are not adequate to accommodate two dwellings and the on-street parking is limited. These letters indicate that the subject application was mistaken to be a request for a change in zoning to allow a two-family dwelling when the subject application is for certifying a nonconforming use. There is no specific statement in the letters that state that the nonconforming use can continue or not continue.

Although the previous owner did not obtain certification of the two-family dwelling unit when it became a nonconforming use on September 20, 1988, it was certified as a two-family dwelling from 1960 to 1972 and continued to remain a two-family dwelling even when it became a

nonconforming use in 1988. The applicant has submitted sworn affidavits from the previous owners stating that the property was continuously used as a two-family dwelling.

Section 27.107.01, Definitions, of the Zoning Ordinance defines:

A two-family dwelling as either a building containing two dwelling units arranged one on top of another or two attached buildings arranged side by side.

A nonconforming building or structure is a building or structure which is not in conformance with a requirement of the zone in which it is located provided that the requirement was adopted after the building was constructed; the building was constructed after the requirement was adopted and a use and occupancy permit was obtained to validate permits issued in error.

A nonconforming use is defined as a use of any building, structure or land which is not in conformance with a requirement of the zone in which it is located provided that the requirement was adopted after the use was lawfully established; the use was established after the requirement was adopted; and the District Council has validated a use and occupancy permit issued in error.

In this case, the house has been on the property since 1949. The current zoning for the property has been in existence since 1949. Two-family dwellings are not currently permitted in the R-55 Zone. However, the existing house was legally constructed as a two-family dwelling in 1949 and has always been a two-family dwelling. From 1960 to 1972, the previous owners obtained use and occupancy permits for a two-family dwelling from Prince George's County and the City of College Park. The previous owner who owned the property from 1983 to 2004 did not obtain certification for the nonconforming use even though the property was being used as a two-family dwelling. What is most important in the review of a nonconforming use is that the use was legally constructed in accordance with the requirements in effect for the zone at that time. The two-family dwelling was built as permitted in 1949 and continues to have two separate entrances, kitchens and bathrooms. The unit is therefore a two-family dwelling. Failure to obtain permits does not cause the structure to cease being defined as a two-family dwelling.

The applicant has submitted sworn affidavits from the previous owners stating that the property was continuously used as a two-family dwelling. In previous approvals, a precedent has been set to use sworn affidavits as adequate evidence that a nonconforming use has been in continuous operation.

## **2. Application for Use and Occupancy Permit:**

- a. The applicant shall file for a use and occupancy permit.**
- b. Along with the application and accompanying plans, the applicant shall provide the following:**

- (1) **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.**
- (2) **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 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.**
- (3) **Specific data showing:**
  - (i) **The exact nature, size and location of the building, structure and use.**
  - (ii) **A legal description of the property.**
  - (iii) **The precise location and limits of the use on the property and within any building it occupies.**
- (4) **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.**

After purchasing the property in July 2004, the applicant applied for a use and occupancy permit. At that time he was informed that he should file an application for certification of the existing nonconforming use. The applicant filed an application for the subject certification of the nonconforming use on November 8, 2004. The applicant has submitted sworn affidavits from previous owners that state that the property was being used as a two-family dwelling unit. The affidavits clearly indicate that 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. The applicant has also submitted a drawing showing the location of buildings and their use and a surveyor's drawing showing the property location and dimensions. The applicant has submitted valid use and occupancy certificates for the two-family dwelling prior to the use becoming a nonconforming use.

**G. Documentary Evidence:** The applicant has provided copies of use and occupancy permits issued by Prince George's County and the City of College Park from 1960 to 1972 and sworn affidavits from previous owners who owned the property from 1983 to 2004.

## **CONCLUSION:**

Based on the documentary evidence provided by the applicant and the lack of contradictory evidence from other sources, the Planning Board concludes that the subject property can be certified as a nonconforming use with a two-family dwelling. The owner of the property is using the property as a rental property. The renters park cars on the street and create traffic problems for the other residents in the neighborhood. Several neighbors and the City of College Park have complained that the parked vehicles create traffic problems. Since there is not enough on-street parking available, the neighborhood residents and the City of College Park requested the Planning Board to restrict the number of residents to six unrelated individuals. Conditions of approval have been added to require the same.

The existing shed in the rear yard is a two-story structure with a fireplace, deck, kitchen and bathroom facilities. No permits were obtained for this shed. Since this structure will constitute a third residence and the non-conforming use certification is for a two-family dwelling within the main dwelling unit, the third residence cannot be approved. The Planning Board recommended that the shed be modified to be made inhabitable so that it meets the definition of an accessory structure in the Zoning Ordinance. **Section 27-101.01, Definitions, of the Zoning Ordinance defines an accessory building as a building subordinate to, and located on the same lot with, a main building, and used for an accessory use.** Conditions of approval have been added to require the same..

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 CNU-24941-2004, subject to the following conditions:

1. Prior to issuance of a Use and Occupancy certificate for the two-family dwelling, the applicant shall:
  - a. Submit documentation that the two-family dwelling will not be occupied by more than six unrelated individuals at a given time.
  - b. Obtain all the required rental permits from the City of College Park.
  - c. Remove all the structures like bathrooms, kitchens, stoves, deck etc. from the shed in the rear yard to make it inhabitable and meet the definition of an accessory structure as defined in Section 27-101.01, Definitions, of the Zoning Ordinance. If the shed cannot be made inhabitable, the shed shall be removed.

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 Eley, seconded by Commissioner Hewlett, with Commissioners Eley, Hewlett, Harley and Squire voting in favor of the motion, and with Commissioner Vaughns absent, at its regular meeting held on February 17, 2005, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 31st day of March 2005.

Trudye Morgan Johnson  
Executive Director

By Frances J. Guertin  
Planning Board Administrator

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