

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

WHEREAS, the Prince George's County Planning Board has reviewed CNU-28266-2012, Roberto's Market, requesting a certification of a nonconforming use for a food or beverage store in the M-X-T/T-D-O 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 May 30, 2013, the Prince George's County Planning Board finds:

- A. **Location and Field Inspection:** The subject property, 5600 Ager Road, is located on the west side of Ager Road, approximately 520 feet north of its intersection with Hamilton Street, and is more particularly described as Parcel P. A9 on Tax Map 41. The site consists of 0.319 acre of land and is improved with a 1,128-square-foot single-story building and an associated parking lot. There is an existing three-foot-high guard rail along part of the north and west side of the lot. Beyond the lot, along the north and west common property lines has an existing chain-linked fence. Access to the development is provided via two driveways from Ager Road.

During the field inspection, it was noted that the site has an existing trash enclosure that is falling apart. However, a note on the site plan states that the trash enclosure will be removed. The site has no existing sign. The location of the sign shown on the site plan shall be removed.

- B. **Development Data Summary:**

	<b>EXISTING</b>	<b>DISAPPROVED</b>
Zone	M-X-T/T-D-O	Unchanged
Acreage	0.319	Unchanged
Use(s)	Vacant Grocery/ Retail Store	Food or Beverage Store
Parcel(s)	1	Unchanged

- C. **History:** The following information was derived from documentation that was submitted by the applicant and from the permit history of the site as it relates to the use.

**1956**—The subject property was originally constructed and was used as an automobile filling station and auto repair shop for many years.

**1998**—The applicant, James Schneider, purchased the property, removed the gasoline storage tanks, and subsequently leased the property to Balamaf Enterprises as the tenant commencing on June 1, 1998 to May 31, 2003.

**September 18, 2000**—The last Permit, 5157-98-CU, was issued for a grocery store.

**April 2004**—A lease addendum was signed, extending the lease for an additional five years until March 31, 2009 (Exhibit H). After that date, the lease continued on a month-to-month basis.

**April 2010**—The first petition for “failure to pay rent” lawsuit was filed against the tenant with the District Court of Maryland for four months’ rent default (January 1, 2010 to April 30, 2010).

**September 2010**—A second petition for “failure to pay rent” lawsuit was filed against the tenant with the District Court of Maryland for another five months’ rent default (May 1, 2010 to September 30, 2010).

**October 19, 2010**—A petition for a “warrant of restitution” was filed to proceed with the eviction. A warrant of restitution was granted on December 2, 2010. When the eviction date came, the eviction crew was unable to remove the locks to gain entry to the building, which caused the sheriff to cancel the eviction.

**February 2011**—Another petition for a “warrant of restitution and failure to pay rent” was filed with the District Court of Maryland for another five months’ rent default (October 1, 2010 to February 28, 2011). The restitution was granted on March 14, 2011. Prior to the eviction, the tenant turned in the key on May 6, 2011.

**September 2011**—Caroline Aisirri paid a \$2,000.00 security deposit to hold the property for rent. Subsequently, Ms. Aisirri applied for a permit on October 6, 2011 (Permit 27753-2011-U) for a consignment/thrift store. Upon review of the application by The Maryland-National Capital Park and Planning Commission (M-NCPPC), Ms. Aisirri was notified that the use was not permitted; therefore, Keller Associates, Inc. refunded her security deposit of \$2,000.00 on November 4, 2011.

**February 10, 2012**—A five-year lease contract was signed by Roberto Ramirez. Mr. Ramirez immediately renovated the property and applied for a permit on May 10, 2012 (Permit 13774-2012-U) for a hair salon. Upon review of the permit by M-NCPPC, he was informed that the use was not permitted in the zone.

**September 13, 2012**—Mr. James Schneider (owner) applied for a permit to use the subject property for a food and beverage store (Permit 28266-2012-U). He also submitted an application for certification of a nonconforming use. Upon review of the permit by M-NCPPC, Mr. Schneider was informed that the food and beverage use of the property was nonconforming and that the permit could not be approved because of the 16-month period in which the use did not operate.

- D. **Master Plan Recommendation:** The 2006 *Approved Transit District Development Plan and Transit District Overlay Zoning Map Amendment for the West Hyattsville Transit District Overlay Zone* (West Hyattsville TDDP) kept the subject property in the Mixed Use–Transportation Oriented (M-X-T) Zone. However, the adopted TDDP use table placed the subject property in the Townhouse Land Use category which prohibits a food and beverage store.

The applicability section of the sector plan on page 38 states:

***Legally existing development.*** Until a site plan is submitted, all buildings, structures, and uses that were lawful or could be certified as a legal nonconforming use on the date of sectional map amendment (SMA) approval are exempt from the TDDP standards and from site plan review and are not nonconforming. However, if a permit application is submitted and it is determined that the legally existing building, structure, or use has been discontinued for more than 180 days in accordance with Section 27-241(c), it shall comply with all applicable TDDP standards and site plan review.

- E. **Request:** The applicant is requesting certification of a nonconforming use for an existing vacant food and beverage store in the M-X-T/T-D-O Zone because the use had ceased operation for more than 180 consecutive calendar days. The nonconforming status began upon adoption of the West Hyattsville TDDP on July 2006. The use table in the TDDP prohibits a food and beverage store in such a land use category unless the uses were lawfully established at the time the sectional map amendment was approved and the use has not been discontinued for more than 180 days unless “the Planning Board determines that the conditions of nonoperation were beyond the control of the person who was in control of the property during the period of nonoperation.” The Board determination must be based on satisfactory evidence presented by the person making the request.

F. **Surrounding Uses:**

North— Vacant property in the M-X-T/T-D-O Zone.

South— Jamestown Road, an access right-of-way, and a parking lot for the West Hyattsville Metro Station, in the M-X-T/T-D-O Zone.

East— Vacant open land across Ager Road with various commercial development (i.e. Mercadito Cruz Latin Market, bus and van storage lot, gas station with auto repair shop) in the R-T (Townhouse) Zone.

West— Immediately behind the subject property is property owned by Washington Metro Area Transit Authority (WMATA). Beyond that is the West Hyattsville Metro Station in the M-X-T/T-D-O Zone.

- G. **Other issues:** The proposed site is located within the municipality of the City of Hyattsville. An e-mail from Jim Chandler, Director of Community & Economic Development, City of Hyattsville, stated that, “On the evening of May 6, 2013, the Mayor and Council of the City of Hyattsville voted to not support CNU-28266-2012 (Roberto's Market) a request for a continuing non-conforming use as per the Table of Uses in the West Hyattsville Transit District Development Plan.”

- H. **Certification Requirements:** Certification of a nonconforming use requires that certain findings be made. First, the use must either pre-date 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.**

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

1. A sworn affidavit from Fred Kay, property manager, Keller Associates Inc., attesting that the convenience store known as Ager Road Supermarket was continuously operating from 1998 through May 2011.
2. The original lease agreement between Jim Schneider, "landlord," and Josephine Amafa T/A Balamaf Enterprises, "tenant." The commencing date of the first lease was on June 1, 1998 ending May 31, 2003, and an extended lease addendum entitled "General Addendum," commencing April 1, 2004 ending March 31, 2009.
3. Copies of the yearly business licenses from the City of Hyattsville for Ager Road Supermarket from June 14, 2005 to June 30, 2009.
4. A copy of a Certificate of Occupancy Permit (5157-98-CU) for groceries/retail, issued by the Prince George's County Department of Environmental Resources (DER), Permits and Review Division, with an effective date of September 18, 2000.
5. Utility bills from Washington Suburban Sanitary Commission (WSSC) from January 1, 2006 to November 28, 2012.
6. Copies of applications for "failure to pay rent" and "warrants of restitution."
7. A copy of a bank deposit paid by Caroline Aisirri to Keller Associates Inc. and a copy of a refund check issued by Keller Associates, Inc. to Ms. Aisirri for holding the property while she investigated the permit requirements to use the property as a consignment/thrift store (Permit 297-20011-U).
8. A commercial lease agreement signed with Mr. Roberto Ramirez and the permit application (13774-2012-U) for a hair salon.

**Analysis**—The foregoing documentation clearly indicates that the food or beverage store was legally established on the property prior to the date upon which the use became nonconforming. The property was operating with a Use and Occupancy Permit (5157-98-CU) and a business license issued by the City of Hyattsville, which expired on June 30, 2009. Upon expiration of both the lease and the license, neither the business license nor the lease was renewed. At that point, the lease continued on a month-to-month basis, and the business stopped operating for two years (January 2010 to November 2012), as indicated in the WSSC bill. The applicant reasons that, due to Mr. Amafa's erratic payment record, a new lease extension was not signed. The applicant's statement of justification further confirms that the property was vacant for a while and the applicant claims it was beyond his control to do anything because during the vacancy, the property was in full control of the long-term tenant, Josephine Amafa. There was never a 180-day period during which it was in the owner's control to police the use.

However, according to the history of the property in Finding C above, the Planning Board believes that the owner was negligent in finding a new tenant on time. He had more flexibility to regulate the property after the lease extension expired. The applicant had ample time to advertise the property to find a new tenant within six months (180 days) and give notice to the existing tenant to quit the property. Instead, even with the inconsistent payment history of Mr. Amafa, the owner continued to hold on to the existing tenant for almost a year before taking any action to evict the tenant. As an alternative, he chose to file multiple law suits, perhaps one every four months, to recover one year of lost rent and waited ten months to file the first restitution to process eviction to repossess his property. In addition, to minimize the further break in day-to-day operations after Mr. Amafa turned in the key, the applicant failed to inform the current tenant about the allowable uses set forth in the land use category in the West Hyattsville TDDP. Had this been done, another year would not have elapsed before applying for this certification of nonconforming use. For these reasons, the Planning Board concludes that the discontinuance of day-to-day operations for a period of 180 or more calendar days was in fact under the control of the property owner. Therefore, the Planning Board is compelled to recommend denial of this application.

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 DISAPPROVED 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 Washington, seconded by Commissioner Geraldo, with Commissioners Washington, Geraldo, Shoaff and Hewlett voting in favor of the motion, and with Commissioner Bailey absent at its regular meeting held on Thursday, May 30, 2013, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 20<sup>th</sup> day of June 2013.

Patricia Colihan Barney  
Executive Director

By Jessica Jones  
Planning Board Administrator

PCB:JJ:TA:arj