

14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772
TTY: (301) 952-4366
www.mnccppc.org/pgco
File No. CNU-625-76

RESOLUTION

E. **Request:** The Director of the Department of Environmental Resources (DER) requests Revocation of Permit CNU-625-76, an approved certification of nonconforming use for a nursery and garden center (wholesale and retail) for Holland Gardens Nursery and Landscaping located at 3800 Sellman Road due to the discontinued use of the property as a nursery and garden center wholesale and retail.

PGCPB No. CNU-625-76

File No. 13-92

Page 2

F. Surrounding Uses:

- North—** Residentially zoned and developed property in the R-R Zone as (Sellman Estates).
- South—** Agricultural fields associated with the Beltsville Agricultural Research Center in the (R-O-S) Zone.
- East—** Undeveloped parkland in the R-O-S Zone owned by The Maryland-National Capital Park and Planning Commission (M-NCPPC).
- West—** Residentially zoned and developed property in the R-R Zone.

G. Revocation of Certification Requirements: The revocation of certification of a nonconforming use requires that certain findings be made. Section 27-245 of the Zoning Ordinance established the following specific requirements for revoking the certification of a nonconforming use:

- (a) Upon a petition filed by the Director of the Department of Environmental Resources (or his designee), or upon its own motion, the Planning Board shall hold a public hearing to determine whether the certification of a nonconforming use should be revoked.**

In a letter dated March 12, 2013, the DER Director requested a public hearing for the Planning Board to revoke the certification of Certified Nonconforming Use Permit CNU-625-76.

(b) The Planning Board shall revoke the certification if it finds that either:

- (1) There was fraud or misrepresentation in obtaining the certification;**

There was no fraud or misrepresentation in obtaining the certification in 1977.

- (2) A certified nonconforming use has been discontinued for a period of one hundred eighty (180) or more consecutive calendar days, unless the conditions of nonoperation were beyond the control of the owner or holder of the use and occupancy permit; or**

DER provided supporting documents including, but not limited to, affidavits, the testimony of multiple witnesses, photographs, the approved site plan and other evidence demonstrating both the expansion and change of use from the original approved certification of nonconforming use and the discontinued operation of a nursery, garden, and landscaping use for more than 180 consecutive calendar days for the period of January 4, 2012 through April 29, 2013. There is no documentation from DER or the subject property owners that the conditions of nonoperation were beyond the control of the owner or the holder of the use and occupancy permit.

PGCPB No. CNU-625-76

File No. 13-92

Page 3

- (3) **Any applicable requirements of Subdivision 2 of this Division have not been met.**

There are no applicable requirements of Subdivision 2 (additional requirements for specific NCUs) of this Division that apply to the subject property.

- (c) **The Planning Board shall notify the Director of the Department of Environmental Resources (or his designee) of a revocation. The Director, in turn, shall revoke the use and occupancy permit for the nonconforming use.**
- (d) **The decision of the Planning Board may be appealed to the District Council in the same manner as an original certification (Section 27-244(f)(6)).**

Synopsis—By letter dated March 12, 2013, the DER Director provided background consisting of DER Property Standards Division's history of inspections of the subject property since its approval as a nonconforming use on February 24, 1977. Per the evidence provided, the subject property's use was improperly expanded in late 1990 to include a firewood operation. This was further documented by a 1992 decision of the Board of Appeals (No.11493), which confirmed this improper expansion.

Since 2010, DER has observed and sought relief for the expanded firewood operations. In 2011, DER petitioned the District Court of Maryland for Prince George's County for an injunction to cease all firewood operations. The Court entered Orders of Injunction in April and May of 2011. While inspecting the subject property for compliance, DER Inspectors began the photographic documentation of firewood operations at the subject property from January 4, 2012 through April 29, 2013. During this period, inspectors discovered that the subject property owners (a) continued to conduct unpermitted firewood operations on a substantial scale; (b) failed to obtain the required permit to conduct firewood operations and (c) discontinued the use of the subject property as a "nursery and garden center wholesale and retail."

DER submitted the following documents as evidence in support of the revocation:

1. A letter dated May 22, 2013 summarizing the documentation of nonoperation.
2. Permit CNU-625-76 issued February 24, 1977 to operate a nursery and garden center wholesale and retail for the subject property when it was zoned R-R to Mr. and Mrs. Arnold Leupen for 3800 Sellman Road.
3. A site plan dated May 6, 1976.
4. Aerial photographs from PGATLAS showing the property.
5. A Board of Appeals Order dated December 2, 1992, Appeal No. 11493.

PGCPB No. CNU-625-76

File No. 13-92

Page 4

6. Affidavits and live testimony from DER Property Standards Division Inspectors Edelen, Twine, and Suniega.
7. Photographs from January 4, 2012 through April 29, 2013 demonstrating the use of the property as a firewood operation.
8. A video created July 15, 2013, demonstrating the current use of the property is not as a nursery and garden center.

Comparisons of the approved site plan with the existing conditions, documented via PGATLAS aerial photo and the inspection photos, clearly demonstrate the discontinued use of designated planting and tree display areas.

The property owner(s), Mr. (Arnold) and Mrs. Leupen, were notified in writing, by letter dated May 7, 2013, of the June 25, 2013 (original) Planning Board hearing date. Mr. Jacobus Leupen, visited the Planning Department on May 13, 2013 to request a later Planning Board hearing date, which was provided in writing. The request was granted and the hearing date moved without additional notification to any of the parties (Mr. Leupen or Mr. Adam Ortiz). Zoning Staff did speak via telephone with Mr. Leupen on June 26, 2013, to discuss the current Planning Board Hearing date and the submission of documentation to contradict the claim of non-operation of a nursery, garden and landscaping center (wholesale and retail) at the subject property. Mr. Leupen indicated that he should have been notified of the new Planning Board Hearing date prior to the public posting of signs on his property. Mr. Leupen also indicated that he would provide staff with supporting documentation demonstrating continuous operation of a nursery, garden and landscaping center (wholesale and retail) at the subject property. Zoning Staff did not receive any supporting documents from Mr. Leupen.

DISCUSSION

The 1977 approved nonconforming use limited the use of the subject property for "a nursery and garden center wholesale and retail." The evidence provided, including testimony from numerous adjoining property owners demonstrates that this use has ceased on the subject property. The following property owners testified:

- (a) Phillip Pollack, adjacent property owner, Weymouth Avenue, testified that the change in use has occurred within the last six to seven years. During the last five there hasn't been any garden related activities occurring. He has noted firewood sales in the last 1 ½ years. He has taken numerous pictures over the years and has served as the main complainant to the County Inspectors. He stated that he purchased top soil from the business about ten years ago.
- (b) Winnie To, Ulster Road, lives in the impacted neighborhood, is aware of the complaints and supports the revocation of the use.

PGCPB No. CNU-625-76

File No. 13-92

Page 5

- (c) Ken Yetman, adjacent property owner, Taunton Drive, lives to the rear of the property. Operates the community list serve, the community wants the property cleaned up. He cited problems with mosquitos and bees. Stated the problem has been ongoing for the last six to seven years. He did purchase topsoil from the business about ten years ago He is supportive of the revocation of the use.
- (d) Kevin Kennedy, Ulster Road, lives in the neighborhood, supports the revocation of the use

Department of Permitting, Inspections and Enforcement Inspector Suniega has conducted 82 inspections of the subject property during the period of January 4, 2012 through May 14, 2013. During this time, there has been no indication of the subject property being used as a "nursery and garden center wholesale and retail." The 1992 decision by the Board of Appeals provides further evidence that the subject property has been used for firewood operations and that this unpermitted use expanded over a 20 year period.

The conditions of the subject property's nonoperation as a "nursery and garden center wholesale and retail," was within the control of the property owner (Mr. Jacobus Leupen) or holder of the use and occupancy permit (Mrs. Harmanna Leupen). There is no evidence that any action was taken to address the repeated violations. Furthermore, as detailed in the March 12, 2013 letter from the DER Director, "All enforcement actions taken by DER against the subject property were related to the unpermitted firewood operations." The subject property/owners/ holder of the use and occupancy permit was always afforded the right to operate within the scope of approved Nonconforming Use Permit CNU-625-76, as long as that use was as a "nursery and garden center wholesale and retail." Given the discontinued use of the subject property in this manner, revocation of the nonconforming status for the subject property is consistent with the requirements of the Zoning Ordinance.

Credibility - Mr Leupen's credibility was severely undermined by his other witness, Mr. Charles Swody, who testified that Mr. Leupen has substantial ongoing memory problems. Mr. Swody, although obviously seeking to help someone he views as a friend and mentor, simply could not be believed due to his demeanor and the overwhelming contradictory evidence of numerous other witnesses, particularly some of whom have no personal interest in this matter.

CONCLUSION

Section 27-245 of the Zoning Ordinance provides specific requirements for revocation of a certified nonconforming use that must be presented to demonstrate that the use has ceased operation for more than 180 consecutive calendar days. DER has submitted the Board of Appeals Order dated December 2, 1992, photographic evidence (January 2012 to April 2013), the uncontradicted testimony of various inspectors, adjoining property owners, and the original site plan and approved permit dated February 24, 1977. Based on the evidence submitted by DER, together with the lack of credible and/or persuasive contradictory evidence from any other source, the Planning Board revokes Nonconforming Use Permit CNU-625-76 based upon the non-operation of a garden, nursery, and landscaping (wholesale and retail) use for a period of more than 180 days.

PGCPB No. CNU-625-76
File No. 13-92
Page 6

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 revocation of above-noted application.

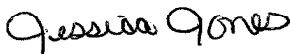
BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council for Prince George's County, Maryland within thirty (30) days of the final notice of the Planning Board's decision.

* * * * *

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 Shoaff, seconded by Commissioner Bailey, with Commissioners Shoaff, Bailey, Geraldo and Hewlett voting in favor of the motion, and with Commissioner Washington absent at its regular meeting held on Thursday, July 18, 2013, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 12th day of September 2013.

Patricia Colihan Barney
Executive Director

By 
Jessica Jones
Planning Board Administrator

PCB:JJ:IT:arj

APPROVED AS TO LEGAL SUFFICIENCY


M-NCP&C Legal Department

Date 8/27/13