

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

ERR-271

DECISION

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|-------------------|------------------------------------------------------------------------|
| Application: | Validation of Use and Occupancy Permit No. 8851-1998-U Issued in Error |
| Applicant: | Eugene Broadus/Drakkar Holdings,LLC |
| Opposition: | None |
| Hearing Dates: | December 20, 2017 and January 17, 2018 |
| Hearing Examiner: | Maurene Epps McNeil |
| Recommendation: | Approval with Condition |

NATURE OF PROCEEDINGS

(1) ERR-271 is a request for validation of Prince George's County Use and Occupancy Permit No. 8851-1998-U, issued in error, to operate a repair shop, storage yard, and storage of commercial vehicles on 10,000 square feet of R-20 (One-Family Triple-Attached Residential) zoned land, identified as 5932 Baltic Street, Capitol Heights, Maryland 20743.

(2) No one appeared in opposition to the request.

FINDINGS OF FACT

(1) Applicant requests validation of Permit No. 8851-1998-U issued in error on February 2, 1999. (Exhibits 2 and 5) This permit allowed Applicant's predecessor to operate a repair shop, storage yard, and storage of commercial vehicles at the subject property. As discussed below, this permit was issued in error.

(2) The subject property is zoned R-20 and is located within the Addison Road Metro (ARM) Town Center Development District Overlay Zone (adopted October 24, 2000). This overlay zone prohibits auto repair. Prior to its adoption, the subject property was in the I-1 Zone and the auto repair was a permitted use therein; after its adoption such uses became nonconforming.

(3) Mr. Eugene Broadus is the sole owner of Drakkar Holdings, LLC - the business that purchased the subject property. (Exhibit 22; T.25) Drakkar Holdings/ LLC has been issued a certificate of good standing to transact business in the State of Maryland. (Exhibit 22) Drakkar Holdings, LLC is owned by Drakkar Auto Body and Repairs, LLC, which has also been issued a certificate of good standing to transact business within the state. (Exhibit 30; T.32) Mr. Broadus is the sole member of the limited liability

corporation. (T.34)

(4) The site was purchased in June, 2017. The prior owner also operated an auto repair and storage business on the site. Mr. Broadus was shown a copy of its use and occupancy permit, and relied upon this permit in the decision to purchase the property. (Exhibit 5; T.36-37)

(5) Applicant submitted an aerial photograph of the subject property. (Exhibit 21 (a)) The site is improved with a 2- story, 12,120 square-foot warehouse and a 2-story 2,320 square-foot office. (Exhibit 33) The entire property is outlined in red on an aerial map. (Exhibit 32) The property is surrounded by similar uses, including a towing company, a trash truck business, and a cement business. (Exhibit 21(b)-(f); T.13-19) The subject property's storage area is screened by a 6-foot-tall, board-on-board (sight-tight) fence. (Exhibits 32(d) and (e)) Applicant also provided a copy of the house location/site plan submitted with its application for a new Use and Occupancy permit (that was placed on hold pending the outcome of this case). (Exhibit 33)

(6) Applicant submitted a Statement of Justification that explains the genesis of the instant request:

The Applicant hereby submits this request to validate Use and Occupancy Permit No. 8851-1998, which was issued on February 2, 1999 ... to Aaron P. Knight and Frank T. Anderson to operate a vehicle repair shop, storage yard, and the storage of commercial vehicles ("Subject Uses") upon the property located at 5932 Baltic Street in Capital Heights, Maryland, shown as Lots 5-15 of the Tolson Heights Subdivision, as shown on Plat Book 1, Plat No. 7 filed among the land records of Prince George's County. ("Subject Property" or "Property"). The Subject Property totals 0.5 acres of land in the R-20 zone. It is located in a well-established community that has been fully developed with a mixture of residential and industrial uses. Single-family homes zoned R-55 back up to the rear of the Subject Property, but are separated by a paper alleyway. Undeveloped property abuts the Property to the east in the O-S/D-D-O, while to the west is a cell tower in the R-20/D-D-O zone. To the south on the eastern side of Yost Place is a concrete batching plant, while on the western side of Yost Place is a tow truck company. Both of these properties are zoned R-20/D-D-O.

The Subject Property was rezoned from the I-1 zone to the R-20 zone, and placed in the Addison Road Development

District Overlay Zone (“Addison Road DDOZ”) through the *2000 Approved Addison Road Metro Town Center and Vicinity Sector Plan* (“Addison Road SMA”). The Addison Road SMA was subsequently amended by the *2010 Approved Subregion 4 Master Plan and Sectional Map Amendment* but the zoning of the Subject Property, and its location within the Addison Road DDOZ, was not changed in this SMA. An auto repair facility and ... storage area operated on the Subject Property when it was zoned I-1 and has been continuously operating as such since that time. These uses became nonconforming when the Addison Road SMA was adopted on October 24, 2000 when these uses were no longer permitted in the R-20 zone or the Addison Road DDOZ.

The Applicant learned of the Property’s nonconforming status while applying for an Use and Occupancy Permit in September, 2017. When the Applicant purchased the Subject Property several months earlier, he had no reason to believe the Subject Uses were nonconforming; he was told by the former owner that the Subject Uses were permitted upon the Property, and he was shown a copy of the former owners’ Use and Occupancy Permit for auto repair and storage upon the Subject Property. After buying the Property, but before applying for the Use and Occupancy permit, the Applicant hired several contractors to begin renovating and refurbishing the Subject Property. When he applied for Use and Occupancy Permit No. 43697-2017 in September, 2017, it generated comments from the Permit Review Section of Maryland-National Capital Park and Planning CommissionWithin these comments, it was indicated that auto repair is not permitted in the R-20 zone within the Addison Road DDOZ unless it was lawfully existing on the date of SMA approval, October 24, 2000, and if so, this use will be allowed to continue and would be not nonconforming.

In 1998, Use and Occupancy Permit No. 8851-1998, was approved by Prince George’s County to operate a “repair shop, storage yard, and storage of commercial vehicles” upon the Subject Property. Before the County issued this permit, however, the file was sent back to the Permit Review Section of M-NCPPC for further review. Upon further review, M-NCPPC noticed several deficiencies with the site

plan ... and the permit was put on hold until the required corrections could be made. Prior to those corrections being made, however, the County issued Permit No. 8851-1998 on February 2, 1999, and thus this permit was issued in error....

(Exhibit 17)

(7) Staff of the Maryland-National Capital Park and Planning Commission Permit Review Section researched the zoning of the property in its review of Applicant's Use and Occupancy Permit Application (Permit No. 43697-2017-U) and offered the following comment:

This permit is for a body shop. A body shop is considered a form of auto repair in the Prince George's County Zoning Ordinance. The property was previously zoned I-1 however it was rezoned to the R-20 Zone on October 24, 2000, and is now located within the Addison Road Metro (ARM) Town Center Development District. Auto repair is a prohibited use in the ARM Town Center Development District. Uses which were lawful on the date of Sectional Map Amendment approval are exempt from the standards and are not nonconforming and may continue. However prior permit 36847-2011-U was placed on hold on January 11, 2012 for used car sales, storage and repair. Prior permit 13956-2015-U was also put on hold for auto repair, towing and storage for the same tenant Anthony Okozi. During the review of this permit it was determined that the uses of auto repair and storage was not legally existing at the time of the rezoning in 2000. Prior permit 8851-98-U was approved for "repair shop, storage yard, and storage of commercial vehicle" on October 20, 1998, however the County inspectors sent the permit file back to M-NCPCC to be reviewed. The supervisor of the Permits Section ... listed several site plan deficiencies (parking schedule, screening of outdoor storage, etc.) that the permit reviewer was to have the applicant correct. These corrections were never made ... [but] the permit was issued by the County on February 2, 1999. This permit was issued in error ... [and] ... the owner ... was advised that ... he had the option of [pursuing] Validation of Permit Issued in error if the auto repair uses commenced at the time this permit was issued [1999]....

(Exhibit 19)

(8) Applicant expended approximately \$875,000 to purchase the property. (Exhibit 23; T.38-39) Subsequent to that purchase Applicant expended over \$30,000 to replace the gutters, install and/or repair the automobile lifts, repair plumbing leaks, patch the roof, correct water infiltration due to grading, remove junk cars and parts, and perform other repairs. (Exhibit 24; T. 39-42)

(9) Mr. Broadus testified that he is unaware of any appeals, controversies or fraud occurring at the time of the permit's issuance.

(10) Mr. Broadus operated a similar business off of D'Arcy Road but was renting the facility. His former customers continue to come to him at this location, a testament to the services he provides at the site.

APPLICABLE LAW

(1) The Application can be approved if it satisfies the applicable provisions of Section 27-244 and all of Section 27-258 of the Zoning Ordinance. Applicant filed the Application prior to the District Council's enactment of CB-49-2017, adopted November 14, 2017. (Exhibit 1) CB-49-2017 revised Section 27-244 of the Zoning Ordinance as follows:

Sec. 27-244. - Certification.

(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 is not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division). Any person making use of or relying upon the certification that is violating or has violated any conditions thereof, or that the use for which the certification was granted is being, or has been exercised contrary to the terms or conditions of such approval shall be grounds for revocation proceedings in accordance with this Code.

(b) **Application for use and occupancy permit.**

(1) The applicant shall file 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 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.

(E) In the case of outdoor advertising signs, the requirements of Section 27-244(b)(2)(B) are not applicable. Documentary evidence, including, but not limited to deeds, tax records, business records, approved plats or development plans, permits, public utility installation or payment records, photographs, and sworn affidavits, showing that the outdoor advertising sign was constructed prior to and has operated continuously since January 1, 2002.

(c) **Notice.**

(1) Notice of the proposed application shall be provided by the applicant in accordance with Section 27-125.01 of this Subtitle.

(2) The following notice provisions shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(3) The Planning Board shall post the property with a durable sign(s) within ten (10) days of acceptance of the application and

accompanying documentation. The signs(s) shall provide notice of the application; the nature of the nonconforming use for which the permit is sought; a date, at least twenty (20) days after posting, by which written comments and/or supporting documentary evidence relating to the commencing date and continuity of such use, and/or a request for public hearing from a party of interest will be received; and instructions for obtaining additional information. Requirements regarding posting fees, the number, and the location of signs shall conform to the requirements set forth in Subsection (f), below.

(d) Administrative review.

- (1) Except for outdoor advertising signs, if a copy of a valid use and occupancy permit is submitted with the application, where applicable a request is not submitted for the Planning Board to conduct a public hearing, and, based on the documentary evidence presented, the Planning Board's authorized representative is satisfied as to the commencing date and continuity of the nonconforming use, the representative shall recommend certification of the use as nonconforming for the purpose of issuing a new use and occupancy permit identifying the use as nonconforming, upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property other than failure to have a use and occupancy permit. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.
- (2) For outdoor advertising signs, if satisfactory documentary evidence described in Section 27-244(b)(2)(E) is received, the Planning Board's authorized representative shall recommend certification of the use as nonconforming for the purpose of issuing applicable permits and certifying the use as nonconforming. This recommendation shall not be made prior to the specified date on which written comments and/or requests for public hearing are accepted.
- (3) Following a recommendation of certification of the use as nonconforming, the Planning Board's authorized representative shall notify the District Council of the recommendation. Electronic notice of the recommendation for certification shall also be made by the Planning Board's authorized representative not later than seven (7) calendar days after the date of the recommendation.

The Planning Director shall also publish the development activity report on the Planning Department's website.

- (4) If the District Council does not elect to review the recommendation within thirty (30) days of receipt of the recommendation as authorized by Subsection (e), below, the representative shall certify the use as nonconforming.
- (5) Subsections (3) and (4), above, and Subsection (e), below, shall not apply to uses that, with the exception of parking in accordance with Section 27-549, occur solely within an enclosed building.

(e) **District Council review.**

- (1) The District Council may, on its own motion, vote to review the Planning Board representative's recommendation, for the purpose of determining whether the use should be certified as nonconforming, within thirty (30) days of receipt of the recommendation.
- (2) If the District Council decides to review the proposed certification, the Clerk of the Council shall notify the Planning Board of the Council's decision. Within seven (7) calendar days after receiving this notice, the Planning Board shall transmit to the Council all materials submitted to it in connection with the application.
- (3) The Zoning Hearing Examiner shall conduct a public hearing on the application. The Zoning Hearing Examiner shall make the same findings required for Administrative review or approval by Planning Board required in this Section, as well as any other applicable prescriptions regulating the proposed use specified within any other applicable Subtitle of this Code.
- (4) The Zoning Hearing Examiner shall file a written recommendation with the District Council within thirty (30) days after the close of the hearing record.
- (5) Any person of record may appeal the recommendation of the Zoning Hearing Examiner within fifteen (15) days of the filing of the Zoning Hearing Examiner's recommendation with the District Council. If appealed, all persons of record may testify before the District Council.
- (6) Persons arguing shall adhere to the District Council's Rules of Procedure, and argument shall be limited to thirty (30) minutes for each side, and to the record of the hearing.
- (7) The District Council shall affirm the certification only if it finds that a nonconforming use exists and has continuously operated,

and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.

- (8) The District Council shall make its decision within forty-five (45) days from the filing of the Zoning Hearing Examiner's recommendation. Failure of the Council to take action within this time shall constitute a decision to certify the use.
 - (f) **Planning Board review.**
 - (1) Required hearing.
 - (A) If a copy of a valid use and occupancy permit is not submitted with the application, if the documentary evidence submitted is not satisfactory to the Planning Board's authorized representative to prove the commencing date or continuity of the use, or if a public hearing has been requested by any party of interest challenging the commencing date and/or continuity of the use, the Planning Board shall conduct a public hearing on the application for the purpose of determining whether the use should be certified as nonconforming.
 - (2) Application for certification.
 - (A) Whenever the Planning Board will hold a hearing on a certification of the use as nonconforming, the applicant shall complete the appropriate form provided by the Planning Board.
 - (3) At least seven (7) calendar days prior to the public hearing, the Planning Board shall send written notice of the date, time, and place of the hearing to the applicant and to all persons of record.
 - (4) Planning Board action.
 - (A) The Planning Board may decide to either grant or deny certification of the use as nonconforming. If it decides to certify that a nonconforming use actually exists and has continuously operated and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.
 - (B) The recommendation of the Planning Board shall be in the form of a resolution adopted at a regularly scheduled public meeting. The resolution shall set forth findings of fact and conclusions of law in support of the Planning Board's recommendation.

- (C) The Planning Board shall send a copy of the resolution to all persons of record.
- (5) District Council election to review; Appeal of Planning Board's recommendation.
 - (A) The recommendation of the Planning Board may be appealed by any person of record to the District Council by filing an appeal with the Clerk of the Council. In addition, and notwithstanding any appeal of the Planning Board's recommendation filed by a person of record, the District Council may, on its own motion, vote to review the Planning Board's recommendation for the purpose of making a final decision as to whether the use should be certified as nonconforming.
 - (B) The appeal shall be filed, or District Council vote to review the Planning Board recommendation shall occur, within thirty (30) calendar days after the resolution of the Planning Board was mailed. If no appeal is filed, and the District Council does not elect to review the recommendation of Planning Board within thirty (30) calendar days after the resolution of the Planning Board is mailed, the Planning Board's recommendation shall become the final decision as to the application to certify the use as nonconforming.
 - (C) Before the District Council makes a decision on the application, it shall hold a public hearing.
 - (D) The Council may decide to affirm, reverse, or modify the recommendation of the Planning Board. The decision of the Council shall be based on the record made before the Planning Board. No new evidence shall be entered into the record of the case unless it is remanded to the Planning Board and a rehearing is ordered.
- (g) **Applicability.**
 - (1) This Section shall not apply to nonconforming buildings or structures occupied by conforming uses. (See Section 27-243.03.)

(2) CB-49-2017 amended Section 27-258 as follows:

Sec. 27-258. - Validation of permit issued in error.

(a) Authorization.

(1) A building, use and occupancy, or absent a use and occupancy permit, a valid apartment license, or sign permit issued in error may be validated by the District Council in accordance with this Section.

(b) Application.

(1) An application for the validation shall be filed with the Department of Permitting, Inspections, and Enforcement.

(2) The application form shall be provided by the Department of Permitting, Inspections, and Enforcement and shall contain the information which the Director of that Department deems is necessary to meet the provisions of this Section.

(3) Along with the application, the applicant shall submit the following:

(A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the subject property;

(B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors;

(C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);

(4) For the purposes of (A), (B), and (C) above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

(c) Transmittal.

(1) The application and accompanying material shall be forwarded by the Department of Permitting, Inspections, and Enforcement to the Office of the Zoning Hearing Examiner.

(d) Zoning Hearing Examiner hearing procedures.

- (1) The Zoning Hearing Examiner shall conduct a public hearing on the matter in accordance with Part 3, Division 1, Subdivision 2 of this Subtitle.
- (2) The Zoning Hearing Examiner shall review the application for conformance with subsection (g) of this Section.

(e) Notice of public hearing.

- (1) The Zoning Hearing Examiner shall designate a date for the public hearing and shall notify the applicant of the date.
- (2) The Clerk of the Council (or the office of the Zoning Hearing Examiner) shall publish a notice of the hearing at least thirty (30) days prior to the hearing date, at least one (1) time in the County newspapers of record.
- (3) The notice shall contain:
 - (A) The date, time, and place of the hearing;
 - (B) A description and location of the property; and
 - (C) A description of the nature of the request.

(f) District Council hearing (oral argument) procedures.

- (1) The District Council shall decide upon the application, in accordance with the procedures for oral argument and Council hearings contained in Part 3, Division 1, Subdivision 3 of this Subtitle.

(g) Criteria for approval.

- (1) The District Council shall only approve the application if:
 - (A) No fraud or misrepresentation had been practiced in obtaining the permit;
 - (B) If, at the time of the permit's issuance, no appeal or controversy regarding its issuance was pending before any body;
 - (C) The applicant has acted in good faith, expending funds or incurring obligations in reliance on the permit; and
 - (D) The application meets the criteria of Section 27-244 of this Subtitle; and
 - (E) The validation will not be against the public interest.

(h) Status as a nonconforming use.

- (1) Any building, structure, or use for which a permit issued in error has been validated by the Council shall be deemed a nonconforming building or structure, or a certified nonconforming use, unless otherwise specified by the Council when it validates the permit. The nonconforming building or structure, or certified nonconforming use, shall be subject to all of the provisions of Division 6 of this Part.

CONCLUSIONS OF LAW

(1) Applicant's counsel provided legal argument as to why he believes the request satisfies the new criteria in Section 27-258 (g)(1)(D) of the Zoning Ordinance (which requires that it meet the criteria of Section 27-244), approved by the District Council upon its adoption of CB-49-2017(DR-3). I agree with Applicant's position for the following reasons.

(2) First, CB-49-2017 amended Section 27-258 (g)(1)(D) of the Zoning Ordinance to require compliance with Section 27-244, *supra*. The bill took effect on November 14, 2017, subsequent to the filing of the instant request on October 12, 2017. (Exhibit 1) It would be unfair to retroactively apply the provisions of the new law to this application.

(3) Assuming, arguendo, Section 27-244 must be followed, many of the provisions simply cannot be retrofitted to address this request. ERRs are not filed with the Planning Board, making it difficult to require compliance with Section 27-244 (c)'s requirement that notice of the Application be provided in accordance with Section 27-125.01. Section 27-125.01 (a)(2) of the Zoning Ordinance requires the applicant to send "an informational mailing to all adjoining property owners, including owners whose properties lie directly across a street, alley or stream" and "notice of application filing to every person of record in a previous zoning, site plan or other application [not at issue in this case]...." Sufficient notice was provided as soon as Applicant became aware that a new Use and Occupancy permit would not be issued and that Applicant would need to file a request for Validation of Permit Issued in Error – the property was posted (as required in Section 27-244(c)(3), but for 30 days, not 10), and notice of the hearing was inserted in the applicable newspapers of record.

(4) Similarly, ERRs involve uses that were not legal at the time of the issuance of the permit/license. Therefore there is no documentary evidence "showing the commencing date and continuous existence of the nonconforming use", and the Planning Board or District Council cannot certify that the use "is not illegal". (Sections 27-244 (a) and (b))

(5) The instant Application is in accordance with Section 27-258(a) of the Zoning Ordinance, since the request is to validate a Use and Occupancy permit. (Section 27-258 (a))

(6) The record reveals that no fraud or misrepresentation was practiced in obtaining the permit. (Section 27-258(g)(1)(A))

(7) There is no evidence that any appeal or controversy regarding the issuance of the permit was pending before any administrative body at the time of its issuance. (Section 27-258(g)(1)(B))

(8) The Applicant has acted in good faith, expending over \$900,000 in reliance on this permit. (Section 27-258 (g)(1)(C))

(9) The Application meets the spirit of the applicable provisions of Section 27-258 (g)(1)(D), as noted above.

(10) Finally, the validation will not be against the public interest as the instant Application validates an auto repair and auto storage yard that has existed in the community for nearly 20 years, in an area surrounded by similar industrial uses, without controversy. (Section 27-258 (g)(1)(E))

RECOMMENDATION

It is recommended that the District Council validate Use and Occupancy Permit No. 8851-1998-U (Exhibit 5) in accordance with the Location/Site Plan (Exhibit 33). This Location/ Site Plan shall be revised to include a Note that any storage shall not be located within any of the required parking spaces. The auto repair and storage business shall be declared to be a Certified Non-Conforming Use.