

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

ERR 274

DECISION

Application: Validation of Permit Issued in Error
Applicant: Robert and Cynthia Moses
Opposition: None
Hearing Dates: January 31, 2019, February 13, 2019 and
February 21, 2019
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval

NATURE OF PROCEEDINGS

(1) ERR-274 is a request for validation of Rental Housing License No. M-141 issued in error to Robert and Cynthia Moses to operate a multifamily dwelling unit on 0.14-acre site in the R-55 (One-Family Detached Residential) Zone, and identified as 4611 Edmonston Road, Hyattsville, Maryland. The subject property is located within an area governed by the 2009 Port Towns Sector Plan, and lies within the Established Communities Growth Area, discussed in the 2014 General Plan. The property does not lie within the municipal boundaries of the City of Hyattsville.

(2) No one appeared in opposition to the request at the hearings held by this Examiner.

FINDINGS OF FACT

(1) Applicants request validation of Rental Housing License No. M-141, most recently issued in error on October 27, 2018. (Exhibit 34) This permit allowed Applicants to continue to operate a 3-unit apartment building in what was originally a 1,329 – square-foot, 1½ story single-family dwelling. (Exhibit 9) Applicant, Robert Moses, and other family members purchased the property in 1975. The property was transferred to Robert Moses and his wife, Cynthia Moses, in 2007. (Exhibit 9)

(2) Applicant filed the instant request after receipt of the following information from the Maryland-National Capital Park and Planning Commission supplied in its review of Applicants Use and Occupancy Permit Application (30134-2012-U):

This permit is for a converted one family dwelling that contains 3 units in the R-55 Zone. Per property services Division of DER there is no record of a prior issued use and occupancy. The property was originally zoned Residential "A" on April 27, 1928, then placed in the R-55 Zone on November 29, 1949, and remained in the R-55 Zone to the present date. There is no record of a previously

approved special exception for this use. Apartment licenses have been issued for the 3 units since 1974 (M-141) which identified the 1974 license as "new" and that it was a converted one family with a total of 3 units. The applicant has submitted a copy [of] their first apartment license for the property in 1975 as well as copies of issued licenses since 2006 to the present date. In 1974 the Zoning Ordinance permitted conversions of dwelling with up to 3 units in the R-55 Zone **provided** the additional dwelling units were in existence prior to November 29, 1949, the owner resided in the building, and a use and occupancy was required to validate the additional dwelling units. There was no use and occupancy permit ever issued meeting these requirements for the use to be permitted. The current Zoning Ordinance still permits conversions of one family dwellings in the R-55 Zone if the conversion occurred prior to November 29, 1949, the owner resides in the building, and a valid use and occupancy permit was in effect on July 1, 1986. Otherwise a special exception is required for the conversion of a one family dwelling containing 3 units as long as the conversion occurred prior to November 18, 1980. Certification of nonconforming use is not an option because the building was constructed in 1947 per tax assessment and at that time the property was zoned Residential A which did not permit the use. It wasn't until 1968 when the Zoning Ordinance was amended to address conversions of one family dwellings and this site never complied with the requirements. Therefore the applicant must either file for a special exception or pursue Validation of Apartment License Issued in Error in accordance with Section 27-258 of the Zoning Ordinance.

(Exhibit 13)

(3) Mr. Moses testified that he was unaware of any appeals, controversies or fraud occurring at the time of issuance of any of the permits, and was indeed surprised when he learned that the permits have been issued in error:

[B]ack in 1975 I was starting law school and I talked to my father and said what do you think about trying to buy a house to... live in and I could share with other students and he said sure.... [S]o I looked around and Mr. Garrison, realtor, ... said I've got the perfect house for you[.] [I]t's a three unit house, you can live in one and rent the other two and it's licensed and everything and... that's when we said okay and that's how we bought this house. And ... at the time we purchased the house, it had a license for the three units and, I had no idea that ... there was any type of issue with ... it, it seemed validly licensed....

So, I ... lived in it for a couple of years while I was in law school and then, and then I ... got a job and I moved downtown and ... I rented it. And it's always been continuously licensed and continuously rented for the entire time I've had it....

The only time I found out that there was an issue was, I went to renew my license one year about 2012... and they asked for an occupancy permit and ... that's the first time anybody ever asked me for an occupancy permit. So I ... said well, I don't, don't you guys have it? I mean I bought this house in 1975 it's been, you know, 40 years almost, I mean how could there not be one.... [S]o I went to Park and Planning. They couldn't find it so they said go ahead and apply for one, so I applied for one and then they looked around and they said the property was zoned Residential A in 1928 and then placed in R-55 Zone in 1949 and remained R-55 to the present date.... [A]nd then Ms. Hampton explained that ... in order for me to, to get a proper permit, I ... needed to file this proceeding....

(January 31, 2019 T. 5-8)

(4) Applicants have submitted copies of the prior permits issued over the years that

allowed the rental of apartments at the site. (Exhibits 14(a) and (h), 16(a) – (b), 17(a) – (g), and 33)

(5) Applicants submitted photographs of the neighborhood, of the exterior of the building, and the interior of the three units. (Exhibits 36(a)-(q)) They also submitted floor plans for each of the three units. (Exhibit 35) Apartment 1 is approximately 797-square-feet in size, Apartment 2 is approximately 693-square-feet, and the basement apartment (Apartment B) is approximately 773-square-feet. (Exhibit 49; February 21, 2019 T. 15-16)

(6) Applicants state that they rent the units at an affordable rate, utilities are included for two of the units, and access to the washer and dryer are included in the rent. (Exhibits 49 and 50; February 21, 2019 T. 16-17) Moreover, all three units have been occupied since Mr. Moses' purchase in 1975. The tenant in Apartment 2 recently left and that unit is vacant awaiting a decision by the District Council on the instant Application. (February 21, 2019 T. 15-16)

(7) Applicants submitted a location survey plat for the subject property and a copy of the zoning map for the area. (Exhibits 10 and 26) The subject property is located in a neighborhood with a mix of uses. Most uses are residential on the subject property's side of Edmonston Road, but directly across the street is the rear of a strip shopping center and nearby are an auto sales business, an auto repair business, the Salvation Army store, and a Mexican restaurant. (Exhibit 26(b); February 21, 2019 T.11-14)

(8) Applicant has expended approximately \$13,000 (for the period between October 2018 and February, 2019) in reliance on the most recently issued permit. (Exhibit 50) The money was expended on mortgage payments, property taxes, insurance, licenses and repairs to the units. However, as noted above, Mr. Moses purchased the property in 1975 specifically to allow him to rent two of the units and reside in the third. (January 31, 2019 T.5-7) He submitted copies of several invoices and receipts that indicate Applicants have expended over \$99,000 on the upkeep of the units, and over \$300,000 on mortgage and tax payments, since the time of purchase up to the time that the most recent permit was issued. (Exhibits 43, 44, 48 and 49)

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. Section 27-244 of the Zoning Ordinance provides 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 sign(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) Section 27-258 of the Zoning Ordinance provides 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) The Application satisfies the spirit of Section 27-244 and Section 27-258 (g) of the Zoning Ordinance. Most of the provisions in Section 27-244 simply cannot be retrofitted to address this request. Requests to validate permits issued in error (“ERRs”) are not nonconforming uses; rather they are uses that do not comply with all of the regulations for the particular zone in which the land is located, but nonetheless have been issued a permit that allows them to operate. Since ERRs involve uses that were not legal at the time of the issuance of the permit/license 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))

(2) Section 27-244 (c)’s requirement that notice of the Application be provided in accordance with Section 27-125.01 of the Zoning Ordinance requires 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]....” An applicant would not know that he needs to apply for a permit issued in error until he learns from DPIE that an error occurred, and therefore cannot meet these pre-application notice requirements. 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. There is no administrative review of the request by the Planning Director, nor is there a hearing by the Planning Board. (Sections 27-244 (d) and (f))

(3) The instant Application meets the requirements in Section 27-258(a) of the Zoning Ordinance, since the request is to validate an apartment license. (Section 27-258 (a))

(4) The record reveals that no fraud or misrepresentation was practiced in obtaining the permit, as noted by Mr. Moses’ sworn testimony, and as reasonably inferred by the lack of testimony to the contrary. (Section 27-258(g)(1)(A))

(5) 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))

(6) The Applicant has acted in good faith, expending nearly \$13,000 for the first few months this year in reliance on the most recently issued permit, and over \$300,000 (as a conservative estimate) since the permit was first issued in error to Mr. Moses. (Section 27-258 (g)(1)(C))

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

(8) Finally, the validation will not be against the public interest as the instant Application validates a use that has operated successfully at the site since the 1970's with no vacancies (until the one necessitated by the pendency of this request). Moreover, it is a use that blends in with the surrounding mixed-use neighborhood and does not detract from the residential character of the surrounding area. (Section 27-258 (g)(1)(E))

RECOMMENDATION

It is recommended that the District Council validate the 3-unit multifamily dwelling in accordance with the Location Survey (Exhibit 26) and the Floor Plans (Exhibit 35). It shall be declared to be a Certified Non-Conforming Use.