

DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND

OFFICE OF THE ZONING HEARING EXAMINER

ERR 284

DECISION

Application: Validation of Permit Issued in Error
Applicant: JH Calvert Park, LLC/The Current
@Riverdale Park Apartments
Opposition: None
Hearing Dates: August 18, 2021¹ and October 20, 2021
Hearing Examiner: Maurene Epps McNeil
Recommendation: Approval with Condition

NATURE OF PROCEEDINGS

(1) ERR-284 is a request for validation of Permit No. 47380-2014 for the erection of a six (6)- foot-high fence to enclose a dumpster on property improved with a single, five (5) -story multifamily dwelling with 55 dwelling units. This permit is the last to be issued by Prince George's County for the subject property, and Applicant believes that certification of this permit will allow the District Council to certify the multifamily dwelling as a nonconforming use, for reasons addressed within. The subject property is approximately 1.211 acres of R-10 (Multifamily High Density Residential) zoned land, shown as Lots 8,9 and 10 on the Map of the Riverdale Park Subdivision filed in Plat Book A, Plat 40 among the Land Records of Prince George's County, and is further identified as 5023 Riverdale Road, Riverdale Park, Maryland. The subject property lies within the municipal boundaries of the Town of Riverdale Park.

(2) No one appeared in opposition to the request at the virtual hearing held by this Examiner. The Town of Riverdale Park did not comment on the request but has issued licenses to allow the rental of dwelling units within the apartment for several years, as noted *infra*.

(3) At the close of the hearing held in October the record was left open to allow the applicant to submit revised floor plans and additional documents. The last of these was submitted on October 29, 2021 and the record was closed at that time.

FINDINGS OF FACT

(1) The subject property is bounded by Riverdale Road and Riverdale Elementary in the R-55 Zone to the north; single-family detached homes in the R-55 Zone to the south; open space, a WSSC storm drainage right-of-way and the Northeast Branch in the R-O-S Zone to the east; and single-family detached homes in the R-55 Zone to the west. (Exhibit 27)

¹ The first hearing was continued, prior to the posted hearing date, because the hearing information needed to be advertised in the newspaper(s) of record thirty days prior to the hearing.

(2) The State Department of Assessments and Taxation has certified that Applicant is in good standing to transact business within Maryland. (Exhibit 4)

(3) Applicant purchased the property for Five Million Dollars on August 19, 2020 with the intent to continue its use as an apartment building. (Exhibit 23; October 20, 2021 T. 11) After purchase Applicant applied for a Use and Occupancy Permit as required by applicable law. (October 20, 2021 T. 11)

(4) In its review of the permit (to ensure compliance with zoning requirements) a representative of the Maryland-National Capital Park and Planning Commission offered the following comment:

The site must be in compliance with the 1964 regulations. According to the 1964 Zoning Ordinance parking calculations there are 69 parking spaces required. The site is providing only 54 standard size parking spaces, therefore parking requirements were not met on the date of construction. Do you know if there were any rental licenses or certificate of occupancy issued to the property from Prince George's County? If so, the owner can pursue Validation of a permit/rental license issued in error.

(Exhibit 8)

(5) Applicant learned that the Department of Permitting, Inspections and Enforcement ("DPIE") had issued a building permit (CEW Permit No. 47380-2014) that allowed the former owner to build a six-foot-tall fence around a dumpster located on the property. Prior to the issuance County records revealed that DPIE inspected the work done to install the fence on at least three occasions. (Exhibit 31) The permit was recommended for approval by several agencies, and ultimately issued. (Exhibit 32)

(6) The permit expressly noted that the existing use on the site is an apartment building. (Exhibit 6) Applicant submitted a copy of the Site Plat reviewed along with the fence permit that clearly shows the 55-unit apartment building and parking on site as well as the dumpster enclosure. (Exhibit 33)

(7) Mr. Johnathan Hook, the managing member of Riverdale Portfolio Manager, LLC (which is the manager/ managing member of J H Calvert Park, LLC) appeared at the hearing and testified about renovations to the site since its purchase:

[Applicant expended considerable funds] upgrading the property, including rebranding the building with new awnings, power washing and other improvements as well as upgrading the building's mechanicals, certain upgrades to the boilers, a hot water pump, a bunch of security upgrades. In addition, we have expended monies paying utility bills including to Pepco and Washington Gas and paying property tax and other building charges....

(October 20, 2021 T.16)

(8) Applicant submitted invoices supporting Mr. Hook's testimony, as well as ones for the monthly mortgage, tax and insurance payment of approximately \$69,000 and an approximately \$13,000 payment for a new canopy. (Exhibits 18 (a)-(g), 19 (a)-(f), 22 and 24) Mr. Hook averred that all renovations and payments were expended in reliance on

the fence permit and on the belief that the apartment was properly permitted in the past. (October 20, 2021 T. 19)

(9) Applicant also submitted evidence of its fruitless request that the County provide a copy of any prior multifamily rental licenses for the subject property. The County representative only noted that the Town of Riverdale Park “regulates and issues licenses for all rental properties (multi and single family) in the Town” and “[t]he county does not maintain licenses or code enforcement records for properties no longer regulated by the County.” (Exhibit 34) The People’s Zoning Counsel argued that the validation of the instant permit cannot be used to validate the apartment building itself. Applicant’s counsel countered that approval of the enclosure permit should also validate the apartment building and site given the circumstances surrounding said approval:

I believe [that] if we look at the ... Site Plan that was submitted in conjunction with this permit, it does show the entire property, not just the location of the fence and the dumpster. And ... if I understand correctly ... under Mr. Brown’s logic ... then the permit itself would be in isolation and separate from the Site Plan itself. It wouldn’t have to be related to the building or the property it’s located on, it can just be for the fence and showing the location around the dumpster. But it doesn’t, it shows the entire property, and if we look at Exhibit 33, ... it does show it’s approved by Park and Planning [... [T]here was also an inspection scheduled for this, which I believe is ... Exhibit 31, [that] shows that there were inspections by the county. So I understand exactly what Mr. Brown is talking about, but I ... think a lot of what the idea of a validation of permit issued in error is sort of a detrimental reliance. It was fair [for] my client to rely on this type of building permit that was reviewed by Park and Planning and by the county and issued by to county, to say that this use could be permitted.

Because there were many times for somebody to say, wait, okay, let’s look at this fence and then it needs to relate to a use as proper. But at no point did anybody go back and say oh there’s already an existing use and occupancy permit and mention that. They just look at the fence, it shows the property and so there’s a presumption that because the fence is allowed and shown on that Site Plan it should be referenced by the whole Site Plan....

I’m not saying that this is a general practice and every fence permit should allow any sort of building permit issued in error, I’m saying ... there is a case for it [under these facts]

(October 20, 2021 T. 35-36)

(10) Applicant submitted copies of the multi-family rental licenses issued by the Town of Riverdale Park for the subject property (formerly operating as the Calvert Park apartments) for 55 rental units, covering the period from 2009-2021. (Exhibits 36 (a)- (h)) The last license issued in 2021 expired; Applicant’s Counsel noted that an application for the new rental license has been submitted. (October 20, 2021 T. 17)

(11) Applicant submitted several pictures of the exterior elevations of the well-maintained apartment building. (Exhibits 9, 10, 11 and 13) Applicant also submitted floor plans for the apartment building. (Exhibit 35)

(12) Applicant testified that it is unaware of any appeals, controversies or fraud occurring at the time of the permit’s issuance. (October 20, 2021 T. 19-20) It also submitted a “zoning report” it obtained concerning the property prior to its purchase, that did not alert to any issues with permits for the apartment building. (Exhibit 37)

(11) Applicant believes that validation of the permit will not be against the public interest and noted that it had business dealings with the prior owner for many years and had owned the apartment since the 1950’s. (October 20, 2021 T. 16 and 20)

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 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) 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.

(3) Pursuant to Section 4-111(a) of the Building Code a “permit” is not required for a fence not greater than four (4) feet in height; logically any fence in excess of 4 feet would require a permit. Section 27-252(a) of the Zoning Ordinance notes that a building or structure cannot be erected “unless a building permit has been issued” by DPIE.

CONCLUSIONS OF LAW

(1) The Application satisfies all applicable provisions of Section 27-244 and Section 27-258 of the Zoning Ordinance since 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 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 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]....” 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)) Finally, the District Council will make the final determination on the request, but in accord with Section 27-258, not 27-244(e).

(3) The instant Application is in accordance with Section 27-258(a) of the Zoning Ordinance. First, the request is to validate a permit for a fence and such permits are considered “building permits” under the above referenced sections of the Building Code and the Zoning Ordinance. This permit was issued in error since the dumpster was erected for an apartment building that was constructed without the number of parking spaces required by the Zoning Ordinance in effect at the time of construction. (Section 27-258 (a))

(4) The record reveals that no fraud or misrepresentation was practiced in obtaining the permit as noted by 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 over \$117,766 since its purchase of the subject property (on a few months’ worth of utilities, property taxes, boiler replacement and new canopy alone), in reliance on the permit. (Section 27-258 (g)(1)(C))

(7) The Application meets the spirit of the applicable provisions of Sections 27-258 (g)(1)(D), and 27-244, as noted above.

(8) Finally, the validation will not be against the public interest as the instant Application validates a use that has existed over seventy years, that does not detract from the character of the surrounding area, and is apparently supported by the municipality in which the site lies since it has annually issued a multifamily rental license for the use since the time that the municipality took over the licensing authority. (Section 27-258 (g)(1)(E)) Moreover, it would arguably be against the public interest to deny the request when the County chose not to retain any records for the apartment building once it ceded regulatory authority to the Town of Riverdale Park.

RECOMMENDATION

It is recommended that the District Council validate the permit issued in error that allowed the construction of a fence to surround the dumpster on site, and that it certify the multifamily dwelling that has existed on site since the middle of the last century, in accordance with the Use and Occupancy Plat (Exhibit 33), with the condition that the single multifamily building with fifty-five (55) dwelling units as depicted on the floor plans (Exhibit 35) be Certified as a Non-Conforming Use.