

R E S O L U T I O N

WHEREAS, the Prince George's County Planning Board has reviewed Certification of Nonconforming Use CNU-15676-2018, Kay Cares Child Care Center, requesting certification of a nonconforming use for a day care in the R-18 Zone in accordance with Subtitle 27 of the Prince George's County Code; and

WHEREAS, after consideration of the evidence presented at the public hearing on May 16, 2019, the Prince George's County Planning Board finds:

1. **Location and Field Inspection:** The subject property, addressed as 915 Palmer Road, Fort Washington, Maryland, is zoned Multifamily Medium Density Residential (R-18), and is located in the southeast quadrant of the intersection of Palmer Road and MD 210 (Indian Head Highway). The site is known as Parcel 126, containing 38,768 square feet, recorded among the Prince George's County Land Records in Liber 40904 at folio 309. The site is developed with a 3,883-square-foot, two-story building, with a basement. The lot is served by an on-site 15-foot-wide asphalt driveway, which provides access from Palmer Road, an 80-foot-wide major collector located to the north of the property. The site plan indicates that the site is served by 15 total parking spaces, with one space reserved for handicap-accessible parking.
2. **Surrounding Uses:** The site is bounded by single-family detached dwellings to the north, with Palmer Road beyond; single-family detached dwellings to the east; and vacant land to the south and west, all within the R-18 Zone.
3. **History:** The subject property was placed in the Rural Residential (R-R) Zone at the time of adoption of the Zoning Map in 1957, depicted on Sheet Oxon 2, and according to the Maryland State Department of Assessments and Taxation database, the original building was constructed in 1952.

The following information was derived from the applicant's statement of justification, dated October 26, 2018, and incorporated by reference herein; documentation submitted by the applicant; and from the permit history of the site, as it relates to the use.

- a. **August 20, 1969:** Special Exception SE-2062 was approved by the Prince George's County District Council for the use of an educational institution (private day nursery) for a maximum of 30 children.
- b. **September 29, 1969:** Appeal No. 2591 requested a variance waiving the requirement of having at least 50 feet of street frontage for any lot used for institutional use, which offers day care in accordance with Section 28.329(b)(1) of the Zoning Ordinance in 1969, was granted by the Board of Zoning Appeals.

- c. **July 27, 1971:** Special Exception SE-2463 was approved by the District Council, which increased the maximum number of children in attendance for the educational institution (private day nursery) from 30 to 66.
- d. **June 9, 1972:** The Nayak family purchased the property and obtained a license from the Prince George's County Health Department to operate a day nursery for 66 children. A copy of the deed verifying the purchase is included in the record, however, a copy of the license was not provided by the applicant.
- e. **October 17, 1972:** Use and Occupancy (U&O) Permit 688-570-U was issued to operate a day nursery. A copy of this permit was not provided by the applicant.
- f. **March 19, 1973:** Building Permit 384-78-CG was issued for a 340-square-foot (20-foot by 17-foot) expansion to the existing building. A copy of this permit was not provided by the applicant.
- g. **March 3, 1975:** Building Permit 306-75-CG was issued for a second 340-square-foot (20-foot by 17-foot) expansion to the building, an increase in enrollment to 75 children, and redesign of the parking lot. The Health Department certified the space and issued a license for a day care for 75 children. A copy of this permit and license was not provided by the applicant.
- h. **January 13, 1986:** To correct the building permits, the Nayaks applied for a Special Exception (SE-3657) that would allow them to have a day care for 75 children. The Zoning Hearing Examiner (ZHE) approved SE-3657, which superseded previous Special Exceptions (SE-2062 and SE-2463) per Condition 1 of the ZHE's decision.
- i. **February 9, 1986:** The Nayaks withdrew SE-3657.
- j. **March 1986:** After applying for a permit, the Nayaks were informed that a permit could not be issued because the lot did not have frontage on a public right-of-way. The Nayaks were directed to petition the County Executive's office for a private right-of-way authorization.
- k. Prince George's County Council Resolution CR-106-1987, addressing the private right-of-way authorization, was discussed during a work session of the Housing and Economic Development Committee, and the Nayaks were directed to have the two building permits issued in error (384-78-CG and 306-75-CG) validated before the County Council could adopt the resolution for the use of private right-of-way.
- l. On October 21, 1988, the ZHE recommended validation of permits issued in error (384-78-CG and 306-75-CG) and on February 27, 1989, the District Council validated the two permits. The validation of the permits issued in error resulted in the day care center use on the subject property becoming nonconforming.

- m. **September 12, 1989:** Council Resolution CR-89-1989 was approved by the District Council authorizing the issuance of a building permit for an existing day care having frontage on a private right-of-way or easement.
 - n. **April 20, 1990:** Permit No. 3975-90-GU was approved for a parking lot for a nonconforming day care center with up to 75 children and a final certificate of U&O was issued on June 11, 1990.
 - o. From 2007 to 2014, two U&O permits were approved for the operation of a nonconforming day care center with a maximum of 75 children.
 - (1) 20882-2007-U: Day Star Nursery (06/19/2007)
 - (2) 14667-2014-U: Kidz of the Kingdom (05/09/2014)
 - p. **February 2017:** Kidz of the Kingdom was evicted from the property due to nonpayment of rent. Consequently, the property was listed for rent or for sale as a day care center.
 - q. **February 2018:** Kay Cares Child Care Center, the applicant of the subject application, purchased the property at auction. The applicant applied for a U&O Permit (15676-2018-U) in April 2018. The permit was put on hold, and comments were sent to the applicant asking for documentation showing the continuous operation of the day care center from May 2014, in accordance with Section 27-241(c) of the Zoning Ordinance.
 - r. **May 8, 2018:** The Law Offices of Shipley and Horne, on behalf of the applicant, submitted documentation consisting of a commercial lease, a Maryland State Development Program License, past Prince George's County Department of Permitting, Inspections and Enforcement records, an affidavit, and real estate listings from May 2014 to 2017. No documentation was submitted from 2017 to the present date, so a letter was submitted in accordance with Section 27-241(c)(2) of the Zoning Ordinance requesting that the day care be reestablished, providing specific information as to when the day care ceased to operate and why, and providing evidence that the conditions of nonoperation were beyond the control of the applicant, Ms. Gbadamosi.
4. **Request:** The applicant is requesting certification of a nonconforming use (CNU) for a day care center for 75 children. The R-18 Zone allows the use of a day care center by special exception; however, this property became nonconforming as a result of the validation of two permits issued in error (384-78-CG and 306-75-CG), which allowed expansion of the building, parking, and day care enrollment without a special exception approving the modifications. The day care ceased operation after the tenant was evicted in February 2017 due to nonpayment of rent. The current owner purchased the property in February 2018 and applied for a U&O permit to operate a nonconforming day care center, as was previously permitted.

5. **Site Data Summary:**

Zone:	R-18
Acreage:	38,768 sq. ft.
Use:	Day Care Center
Total Units:	N/A
Lot Coverage:	10.54%

6. **Master Plan Recommendation:** The vision for this area in the *Plan Prince George's 2035 Approved General Plan* is for context-sensitive infill and low- to medium-density development. The 2006 *Approved Master Plan and Sectional Map Amendment for the Henson Creek-South Potomac Planning Area* (Henson Creek-South Potomac Master Plan and SMA) recommends low-density residential development on this site. The adopted SMA reflects the site within the R-18 Zone, in which a day care center is permitted by special exception.

7. **Certification Requirements:** Section 27-107.01(a)(166) of the Zoning Ordinance defines a nonconforming use as:

(A) **The "Use" of any "Building," "Structure," or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), provided that:**

- (i) **The requirement was adopted after the "Use" was lawfully established; or**
- (ii) **The "Use" was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.**

(B) **The term shall include any "Building," "Structure," or land used in connection with a "Nonconforming Use," regardless of whether the "Building," "Structure," or land conforms to the physical requirements of the Zone in which it is located.**

Two permits issued in error for the subject property (384-78-CG and 306-75-CG) were validated by the District Council in 1989, establishing the day care use as nonconforming.

Certification of a nonconforming use requires that certain findings be made. Section 27-244 of the Zoning Ordinance sets forth the following specific requirements for certifying a nonconforming use:

Section 27-244

(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.**

Two permits issued in error for the subject property (384-78-CG and 306-75-CG) were validated by the District Council in 1989, establishing the use as nonconforming. Two prior U&O permits identifying the use of the property as nonconforming were issued in 2007 and 2014. The current owner has applied for a U&O permit, in accordance with requirements outlined below.

(b) Application for use and occupancy permit.

- (1) The applicant shall file an application for a use and occupancy permit in accordance with Division 7 of this Part.**

The applicant filed U&O Permit 15676-2018-U on April 4, 2018, 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;**

Along with the evidence provided in the History findings of this resolution, the application and accompanying site plan, the applicant submitted the following documentary evidence in support of the application:

- a. Email correspondence (Jeff Stein to Kay Cares) dated April 5, 2018 corroborating the dates the use of the day care ceased and the property was listed for sale.

- b. A consolidated tax bill for July 1, 2017 to June 30, 2018, which includes a solid waste service charge that is specific to the use of a day care center.
- c. A commercial lease agreement between the Nayak family, operating as Palmer Holdings II, LLC, and Hawanya Jones d/b/a Kidz of the Kingdom, LLC made on April 30, 2014, for a five-year term ending in April 2019.
- d. A license from the Department of Human Resources for the operation of a day care, valid February 15, 1990 until February 15, 1992.
- e. A Maryland State Child Development Program License issued on August 14, 2014, revised on October 29, 2014, and valid through July 31, 2016.

Previous approvals, permit history, and licensing and tax bills establish that use of the property has consistently existed as a nonconforming day care from 1989 until February 2017, when the last tenant utilizing the property as a day care was evicted.

(B) Evidence that the nonconforming use has not ceased to operate for more than 180 consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than 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.

The applicant submitted evidence demonstrating the continuous operation of the day care center use until February 2017, when the last tenant was evicted. The applicant has also provided evidence indicating when the property was advertised for lease/sale and the duration that the property was on the market, as set forth below:

- a. A signed and notarized affidavit from Akila Nayak stating that a day care center was in continuous operation on the property from May 2014 until they stopped paying rent and were legally evicted in February 2017. After time period, the Nayaks actively listed the property for rent or for sale as a day care center.

- b. A real estate listing showing a previously licensed day care center for sale or lease.
- c. Real estate listing for sale of the property at auction.

The evidence submitted clearly establishes that the site operated as a certified nonconforming use. In addition, ample evidence is provided that demonstrates the site ceased operation for a period exceeding 180 days, which resulted in the loss of its nonconforming status. The applicant purchased the property more than 180 days past cessation of the prior user and justifies that the nonoperation was beyond its control because the property was not under their ownership for the period of nonoperation. The applicant further provides that the nonoperation was beyond the control of the prior owner because, despite his continued efforts to sell or lease the property, he could not find a buyer or tenant.

(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;**

The applicant did not submit a deed confirming the legal description of the property and the site plan does not reference the deed. However, the submitted site plan, along with the application, notes the exact nature, location, size, and use of the property and the legal description has been confirmed through current (Liber 40904 folio 309) and previous deed records.

(D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.

The applicant did not submit a U&O permit issued for the day care center prior to its establishment as a certified nonconforming use. The first U&O permit submitted by the applicant was for Day Star Nursery Inc., issued in 2007, 19 years after the District Council validated the permits issued in error.

(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.**

The applicant has not submitted documentary evidence demonstrating the continuity of the use from February 2017, when the last tenants were evicted, to the present. Therefore, the applicant requested a hearing before the Planning Board by filing this application.

The required findings of the Planning Board are further described in Section 27-244(f)(4)(A) as follows:

(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.**

In an email dated May 16, 2019 (Edelen to Onyebuchi) the Department of Permitting, Inspection and Enforcement (DPIE) confirmed that the property has no outstanding code violations.

DISCUSSION

On the recommendation of the ZHE, the District Council validated the two building permits (384-73-CG and 306-75-CG), as referenced in the History finding of this resolution; thereby, establishing the day care center as a certified nonconforming use for the subject site. U&O permits were obtained in 2007 and 2014, which identified the day care use as nonconforming, a use that operated continuously until February 2017.

Subsequently, in February 2017, the owner listed the property for both lease and sale but was unable to find a tenant or a buyer. Permit records, included in the record, indicate that a potential tenant/buyer, Jessica Foxx, acting on behalf of Joshua's Christian Academy, applied for U&O Permit No. 34671-2017-0 on July 21, 2017. The permit was put on hold, and the Prince George's County Planning Department requested that the applicant provide documentation which demonstrates that the day care center has not ceased operation for more than 180 days, beginning from May 2014. The Prince George's County Planning Department attempted to reach the applicant at that time but received no response.

A year after operation of the day care center had ceased its operations, the current applicant, Oluwafunke Gbadamosi, purchased the property in February 2018. She applied for a U&O permit on April 4, 2018. The permit was put on hold, and again the applicant was directed to provide documentation showing continuous operation to the present day. The applicant was unable to do so.

The applicant agreed that the day care center ceased operation for more than 180 consecutive days. However, the applicant contended that the conditions of non-operation were beyond the current and previous owner's control. The applicant stated that because the property had operated as a day care center for several decades, and is designed to specifically support this use, the Nayak family had no alternative other than to advertise the property as a day care facility.

However, a cursory inquiry with DPIE, by the applicant, would have revealed the requirements for obtaining permits for this site and, moreover, the requirement that operation not have ceased longer than 180 days, in order to continue its nonconforming status. Section 27-241 provides that, in order for a nonconforming use to continue;

- (c) **Continuous, day-to-day operation of a certified nonconforming use is required to maintain its nonconforming status. Discontinuance of day-to-day operation for a period of one hundred eighty (180) or more consecutive calendar days shall constitute abandonment of the use. No certified nonconforming use may be reestablished unless either:**
- (1) **The case involves reconstruction, restoration, or reestablishment in accordance with Section 27-243; or**
 - (2) **The Planning Board determines (upon written request) that the conditions of nonoperation were beyond the control of the person who was in control of the property during the period of nonoperation. The Planning Board's determination shall be based on satisfactory evidence presented by the person making the request.**

The owner, at the time of cessation of the use, voluntarily sought eviction of the day care tenant. In addition, the strict application of Subtitle 27 of the Prince George's County Code does not require that an owner or applicant demonstrate intent to abandon, but that mere discontinuance constitutes abandonment. In this instance, the certified nonconforming day care use was abandoned prior to the current ownership.

At the Planning Board hearing on May 16, 2019, citizens provided opposition to the day care use, citing that trash and access were issues they had experienced over the years the property had been in use as a day care. The applicant, in this case, provided testimony that she had contacted the neighbors in an effort to address their concerns, and had been continuously working to further improve the subject property.

Regarding the non-operation, the applicant provided testimony concerning the stringent requirements for day care licensing, and the difficulty involved in obtaining the required permits to operate a day care center facility. Further, she provided that the previous owners, the Nayaks, were not licensed day care providers and had no option but to wait for a licensed day care operator to lease or buy the property in order to continue the use. It was also noted that the prior tenants had a lease agreement with the Nayaks until 2019, and that during the time of non-operation, both under the prior and current ownership, the property has continued to be taxed for the day care use.

After the applicant's testimony, the Planning Board found that the prior tenant's eviction due to non-payment, the stringent requirements for permits and licensing, and the immediate attempts by the previous owner to sell and/or lease the property were outside of the control of the owners and are grounds for the re-establishment of the non-conforming use.

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 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.

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This is to certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Washington, seconded by Commissioner Bailey, with Commissioners Washington, Bailey, and Hewlett voting in favor of the motion, and with Commissioners Doerner and Geraldo opposing the motion at its regular meeting held on Thursday, May 16, 2019, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 6th day of June 2019.

Elizabeth M. Hewlett
Chairman

By Jessica Jones
Planning Board Administrator

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