



COFONE CONSULTING GROUP, LLC

CHRISTINE A. COFONE, PP, AICP
Principal

May 11, 2017

Lance Landgraf, AICP, PP
Director of Planning
Casino Reinvestment Development Authority
15 South Pennsylvania Avenue
Atlantic City, NJ 08401

RE: **Mohammed Homary**
2429 Arctic Avenue
Block 339, Lot 62
Application #2017-04-2172

Dear Mr. Landgraf:

As per your direction, we have reviewed the above-referenced development application. In the subject application, the applicant is seeking a Certificate of Nonconformity for the use and structure at 2429 Arctic Avenue, aka Block 339, Lot 62.

The property is currently occupied by a structure that contains a vacant commercial space on the ground floor and one apartment on the second floor. The property is located within the NC-1 District, which does not permit the residential usage on the site. Accordingly, the Applicant is seeking a Certificate of Nonconformity for the use and structure.

As part of our analysis, we undertook the following tasks: an inspection of the subject premises; a survey of surrounding land uses; review of the City of Atlantic City Zoning Ordinance and Zoning Map; and review of the filed application materials, including supporting evidence.

We offer the following analysis and comments for your consideration.

Description of Site and Summary of Development Proposal

The Site is occupied by a structure that contains a vacant commercial space on the ground floor and one apartment on the second floor. The applicant is not seeking any modifications to the site at this time. The only action sought is a certification of a non-conforming use.

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Surrounding Land Uses

The subject property is located in an area generally characterized by single/multi-family residential, with interspersed commercial uses. This land use pattern is applicable to the immediate area to the north, east, south, and west of the subject property.

Zoning Compliance

The property is located in the NC-1 "Neighborhood Commercial" District, which purpose is enunciated at Ordinance Section 163-59(A)(1) as follows:

The Neighborhood Commercial Districts are established to provide for groups of small business establishments located to serve frequent retail and personal service needs of residents within convenient traveling distance, with an option of moderate density multiple-family residential development located above such business establishments. These districts are not intended to permit major commercial or service establishments which would attract substantial amounts of trade from outside the neighborhood.

The residential use, one apartment on the second floor, is not permitted. The NC-1 Zone only permits three or more units at the second floor or above.

The term "nonconforming use" is defined at N.J.S. 40:55D-5 as "a use or activity which was lawful prior to the adoption, revision, or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reason of such adoption, revision or amendment."

N.J.S. 40:55D-68 provides that "[a]ny nonconforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof."

The burden of proof in establishing and proving the existence of a nonconforming use is upon the Applicant. According to the 2011 Edition of New Jersey Zoning and Land Use Administration at 11-2.2, titled "Burden of proof," the Applicant should be very clear in explaining the prior usage of the subject property:

It is important that the evidence presented to the board establish exactly what the use was at the time of adoption of the ordinance, its character, extent, intensity and incidents.

Further at 11-2.3, titled "Elements of proof," it states:

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In determining the status of a purported nonconforming use or structure, the board of adjustment must trade the nonconforming history of the property back to the zoning ordinance in existence at the time the use in question commenced in order to establish that it was in fact conforming when commenced or existed prior to an amendment which made it nonconforming.

If the residential usage of the property had changed at any given time contrary to the use for which an applicant seeks a certificate of nonconformity – and is therefore not a continuous usage of the property – then it is not entitled to protection. Municipal records, such as tax certificates and certificates of occupancy, have been found to be sufficient by the judiciary (*Eltrym Euneva v. Keansburg*, 407 N.J. Super. 432, 438-439 (Law Div. 2008)).

According to the 2016 Edition of New Jersey Zoning and Land Use Administration at 11-3, titled “Abandonment,” there is a two-step process involved in order for the board to determine the existence of a legal non-conforming use: 1) proof that the use was lawful at the time of the creation of the zoning ordinance and 2) the use had not been abandoned during the period in which it was a prior nonconforming use or structure.

However, note that courts have determined that simply not utilizing the nonconforming condition does not constitute abandonment. Abandonment occurs with the following acts: 1) an overt act or some failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in the subject matter of the abandonment and 2) an intention to abandon.

Planning Analysis and Issues for Consideration by the Board

We offer the following for your consideration in reviewing the Application:

- 1) The burden of proof is on the Applicant to prove the existence of a legal non-conforming use prior to the adoption of the ordinance establishing the NC-1 District. The Applicant is also burdened to prove that the use had not been abandoned.
- 2) The test year appears to be 1979. The applicant has submitted documentation indicating a “bar and one family” use on the property in 1961, 1981, and 1991. In addition, the application has provided a deed, dated March 2017.
- 3) The Applicant should provide testimony regarding all supporting historical public record documentation to prove the existence of a legal non-conforming use.

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I would be happy to address any questions or comments on the above at the public hearing.

Respectfully submitted,

Christine A. Nazzaro-Cofone, AICP, PP
Principal