

NOTICE OF FINAL DECISION

OF BOARD OF APPEALS

RE: Case No. V-124/125/126-08 Kane/Realty Development, LLC
V-127-08 Kane/Calvert Investors, LLC

Enclosed herewith is a copy of the Board Order setting forth the action taken by the Board of Appeals in your case on the following date: July 8, 2008 .

CERTIFICATE OF SERVICE

This is to certify that on December 2, 2010 , the above notice and attached Order of the Board were mailed, postage prepaid, to all persons of record.

(Original Signed) _____

Anne F. Carter
Administrator

cc: Petitioners
Adjoining Property Owners
City of College Park, Department of Public Services
Office of Law

BEFORE THE BOARD OF APPEALS FOR PRINCE GEORGE'S COUNTY, MARYLAND
Sitting as the Board of Zoning Appeals

Petitioners: Kane/Realty Development, LLC (V-124/125/126-08)
Kane/Calvert Investors, LLC (V-127-08)

Appeal Nos.: V-124-08, V-125-08, V-126-08, V-127-08

Subject Properties: (V-124-08) Parcel A, Block G, Lord Calvert Manor Subdivision, being 4206 Knox Road (Rooming House at 4204 Knox Road), College Park, Prince George's County, Maryland;
(V-125-08) Lot 57, Block H, Lord Calvert Manor Subdivision, being 4205 Knox Road, College Park, Prince George's County, Maryland;
(V-126-08) Parcel A, Block G, Lord Calvert Manor Subdivision, being 4206 Knox Road, College Park, Prince George's County, Maryland; and
(V-127-08) Parcel 92, Tax Map 33, Grid D-4, being 4611-4613 Calvert Road, College Park, Prince George's County, Maryland

Municipality: City of College Park

Counsel for City of College Park: Suellen M. Ferguson, Esq.

Counsel for Petitioner: Joseph M. Creed, Esq., Katie Krametbauer, Esq.

Witnesses: James L. Kane, Jr., Resident Agent

Jeannie Ripley, Code Enforcement Manager, College Park Dept. of Public Services

Derek Daves, Code Enforcement Officer, College Park Dept. of Public Services

Heard: March 4, 2009; Decided: July 8, 2009

Board Members Present and Voting: Bobbie S. Mack, Chairperson
Albert C. Scott, Vice Chairman
Anastasia T. Johnson, Member

RESOLUTION

This appeal was brought to the Board of Appeals, sitting as the Board of Zoning Appeals for the Maryland-Washington Regional District in Prince George's County (the "County"), Maryland (the "Board"), from the determination of the City of College Park, Department of Public Services, to issue the following zoning violation notices:

(V-124-08) Zoning Violation Notice No. CPZ-0360, dated November 24, 2008, citing Kane/Realty Development, LLC ("Realty Development") with violation of Prince George's County Code Section 27-253(a)(1) (Use of a building, structure and land without a valid Prince George's County Use and Occupancy Permit), requiring Realty Development to cease use of the premises until a valid use and occupancy permit, including final approval of the permit, is granted by the Department of Environmental Resources, on R-18 (Multifamily Medium Density Residential) zoned property located at Parcel A, Block G, Lord Calvert Manor Subdivision, being 4206 Knox Road (Rooming House at 4204 Knox Road), College Park, Prince George's County, Maryland;

(V-125-08) Zoning Violation Notice No. CPZ-0361, dated November 24, 2008, citing Realty Development with violation of Prince George's County Code Section 27-253(a)(1) (Use of a building, structure and land without a valid Prince George's County Use and Occupancy Permit), requiring Realty Development to cease use of the premises until a valid use and occupancy permit, including final approval of the permit, is granted by the Department of Environmental Resources, on R-18 (Multifamily Medium Density Residential) zoned property located at Lot 57, Block H, Lord Calvert Manor Subdivision, being 4205 Knox Road, College Park, Prince George's County, Maryland;

(V-126-08) Zoning Violation Notice No. CPZ-0362, dated November 24, 2008, citing Realty Development with violation of Prince George's County Code Section 27-253(a)(1) (Use of a building, structure and land without a valid Prince George's County Use and Occupancy Permit), requiring Realty Development to cease use of the premises until a valid use and occupancy permit, including final approval of the permit, is granted by the Department of Environmental Resources, on R-18 (Multifamily Medium Density Residential) zoned property located at Parcel A, Block G, Lord Calvert Manor Subdivision, being 4206 Knox Road, College Park, Prince George's County, Maryland; and

(V-127-08) Zoning Violation Notice No. CPZ-0363, dated November 24, 2008, citing Calvert Investors, LLC ("Calvert Investors") with violation of Prince George's County Code Section 27-253(a)(1) (Use of a building, structure and land without a valid Prince George's County Use and Occupancy Permit), requiring Calvert Investors to cease use of the premises until a valid use and occupancy permit, including final approval of the permit, is granted by the Department of Environmental Resources, on R-18 (Multifamily Medium Density Residential) zoned property located at Parcel 92, Tax Map 33, Grid D-4, being 4611-4613 Calvert Road, College Park, Prince George's County, Maryland.

Evidence Presented

The testimony and record evidence considered by the Board included, but was not limited to, the following:

1. The subject properties are all located within the limits of the City of College Park (the "City") and are all zoned R-18 (Multifamily Medium Density Residential). See Exhibit ("Exh.") 3.

2. Mr. James L. Kane, Jr. ("Mr. Kane"), Calvert Investors and Realty Development are the current owners of the subject properties as described below. See Exhs. 13-4 (exhibit 4 to Exh. 13 ("Exh. __-")) thru 13-9, 13-11.

3. Zoning Ordinance Section 27-253(a)(1) requires that use of a building, structure or land shall not take place unless a valid U&O permit has been issued for the property, and the subject properties did not have such permits for the current owner/occupant, and Section 27-253(d) states that when an occupant vacates a premises and a different occupant assumes possession, the new occupant must obtain a use and occupancy permit, regardless of whether the use has changed.

4. Jeannie Ripley, Code Enforcement Manager, testified that all four of the subject zoning violation notices cite Petitioners under Zoning Ordinance Section 27-253(a)(1) for use of a building, structure and land without a valid Prince George's County ("County") Use and Occupancy ("U&O") Permit. See Exh. 8-1. She stated that a new U&O permit is required when the owner or use of a property changes. Ms. Ripley stated that the City requires owners of multi-family structures to provide a copy of their U&O permit as part of the annual application process for City occupancy permits.

5. Ms. Ripley testified that the City licenses almost 4,000 rental units. She stated that she reviewed the files for the subject properties and found no applications for a City occupancy permit for 2008-2009.

6. Ms. Ripley testified that she examined the Department of Assessments and Taxation ("MDAT") real property and business entity data which provides the names of the current owners of the subject property and discovered that the names on U&O permit documentation in the City files were not consistent with the current owner names of the subject properties on the recent applications for City residential occupancy permits. See Exhs. 13-4, 13-6, 13-7, 13-13. She stated that current property ownership was confirmed through deeds. See Exhs. 13-5, 13-8, 13-9.

7. Jeannie Ripley testified that in 2003 the City began enforcing the County zoning code.¹ Ms. Ripley testified that in 2003, systematic reviews began with commercial properties and then progressed to residential properties approximately 18 months ago to ensure that the City has copies of valid U&O permits for those properties with more than single-family dwellings requiring a County U&O permit. She explained that when there are no copies of U&O permits in the files, the City requests copies from the property owners. She recalled that approximately 60 days prior to the issuance of the subject zoning violation notices, she learned from a County inspector that current U&O permits had not been issued for the subject properties. She estimated that about 50 similar violations notices had been issued for other properties in violation of Section 27-253(a)(1), but she was unaware of how many of those were for residential properties. She acknowledged that she did not attempt to contact Mr. Kane before the zoning violation notices were issued and explained that when processing the annual licensing paperwork for City occupancy permits, the property owners are usually contacted when something is missing. She stated that although she assumed the necessary paperwork to be filed had been mailed to Mr. Kane, nothing had been filed for the annual licensing for any of the four subject properties in either 2007 or 2008.

8. Ms. Ripley stated that in 2003 she became aware of the change in ownership of one of the four subject properties, but did not pursue permit issues at the time because the office was focused on commercial properties. She testified that there is no automatic notice given to the City of problems associated with U&O permits.

9. Derek Daves, Code Enforcement Officer, testified that annual inspections are conducted to ensure that buildings meet the requirements of the City's code or in response to complaints. He stated that a City occupancy permit is in effect for one year, an application to renew a permit is sent out before it expires, an inspection is scheduled once the application is submitted, and an inspection of the entire building is conducted. He testified that to ensure the safety of the tenants, the buildings on the subject properties are annually inspected even if an application has not been filed for the current year.

10. James L. Kane, Jr. testified that Realty Development owns the properties at 4205 and 4206 Knox Road. He explained that there is an accessory building, which is a rooming house with a post office address of 4204, and a principal building, which is a 15-unit apartment building, on the property at 4206 Knox Road. He testified that across the street is a 6-unit building with the address of 4205 Knox Road. Mr. Kane stated that both apartment buildings are occupied by students on 10-month leases, with the buildings closed in the summer, and that the rooming house is year-round occupancy. He testified that all of these buildings were constructed by his father, 4205 in about 1959, 4206 in about 1963-64, and the rooming house in about 1967-68, and were in the name of another corporation which his father and mother owned. He explained that after his father died, Realty Development, LLC, of which he is the sole member, purchased these properties in 2005 (he believes). Mr. Kane identified U&O permits in the names of Realty Investment and Surety Association, Inc. and Realty Development GP for 4205 Knox Road and the rooming house at 4206 Knox Road. See Exh. 8-3.

11. Mr. Kane testified that the current owner of the subject property on 4611-4613 Calvert Road is Calvert Investors, LLC, of which he is the sole member, which he believes was purchased in 2003 from his parents, James and Margaret Kane. He explained that there is one apartment building on the property that is divided into two mailing addresses, 4611 and 4613, and it is leased to permanent residents. He stated that there is a 1973 U&O permit for this property with the names of J.H. and M.H. Kane. See Exh. 8-2.

¹ The City of College Park is authorized, pursuant to a Memorandum of Understanding ("MOU") approved by Council Resolution 57-2002, to enforce the Prince George's County Zoning Ordinance, with City citations or violation notices appealable to the Board of Appeals. See Exh. 10, Attachment A, pp. 3-4.

12. Mr. Kane testified that he is unaware of any other owner of a rental property in the City receiving a similar zoning violation notice, but knows of two instances where the City was made aware of changes of property ownership but did not enforce the law.

13. A U&O permit (No. 6982U) issued on September 30, 1963, to "Realty Dev. Group Inc." for the apartment building at 4206 Knox Road was submitted into the record after the hearing. See Exh. 14.

14. Counsel for the City's arguments (see Exh. 17) include the following:

(a) The City is authorized, pursuant to the MOU, to enforce Prince George's County zoning law (the "zoning code") pursuant to Article 28, Section 8-112 of the Annotated Code of Maryland, as amended, which specifically authorizes the delegation of enforcement to a municipality. Once the owner of a property applies for a U&O permit, Prince George's County, and not the City, has jurisdiction over issuance of U&O permits. MOU, section (c) (Exh. 10, Att. A). The City began enforcement of the County zoning code through its Public Services Department ("PSD") at the beginning of 2003, which included enforcing the property, rental, noise, nuisance, traffic and animal codes. While the County issues U&O permits which are renewed at change of owner/occupier, the City issues an annual Occupancy Permit pursuant to its own Code, under which it inspects for health and safety of renters and commercial properties. The PSD has integrated enforcement of the zoning code into their normal flow of business, focused initially on dealing with complaints and non-residential properties, and then turned to the residential properties, as it was not physically possible to cover all of these areas at the inception of enforcement.

(b) In November, 2008, the PSD filed notices of violations for failure to have a valid County U&O permit in compliance with Section 27-253(a)(1) on 4611-4613 Calvert Road, owned by Calvert Investors (see Exh. 13-13), and 4204, 4205 and 4206 Knox Road, owned by Realty Development (Exhs. 13-4, 13-6, 13-7), the four subject properties. (Jeannie Ripley testified that only four notices were filed for the five buildings because 4611 and 4613, while two separate buildings, are located on the same un-subdivided property.)

(c) The U&O permits that were issued decades ago by the County for the four subject properties do not reflect the current owner/occupant of the subject properties. The permit application was filed on behalf of, and a U&O permit was issued for 4611-4613 Calvert Road to, J.H. and M.H. Kane in 1973. See Exh. 8-2. They were the parents of James L. Kane, Jr. The property was transferred to Calvert Investors in 2003. Exh. 13-13. James L. Kane, Jr. is the sole shareholder and officer of Calvert Investors.

(d) In 1962, a U&O permit was issued to use and occupy 4205 Knox Road to Realty Investment & Surety Association, Inc.

(e) In 1967, U&O permits were issued to Realty Development Group, Inc. for 4204 Knox Road for a rooming house, and in 1963 to use and occupy at 4206 Knox Road for the apartments.

(f) Mr. Kane testified that these various corporations were owned by his parents and over the years the properties were transferred between corporations until 2003, when each was transferred to Realty Development for \$800,000.00. See. Exhs. 13-4 thru 13-9. The U&O permits submitted into the record by Petitioners for the subject properties are found at Exhs. 8-2, 8-3 and 14.

(g) The original U&O permits were issued to persons who are now deceased or defunct corporations.

15. Counsel for Petitioners' arguments (see Exhs. 9 & 16) include the following:

(a) The zoning violation notices are factually incorrect on their face since Mr. Kane has a U&O permit for all four locations in compliance with Section 27-253(a)(1).

(b) A permit for the 4611-4613 Calvert Road properties was issued on March 16, 1973. Exhibit (Petitioners' memorandum of law, page 4. Permits for the Knox Road properties were issued on December 1, 1967 (rooming house at 4604 Knox Road) and July 3, 1962 (4205 Knox Road). Thus, there are use and occupancy permits for the properties.

(c) The City ignored its own procedures for obtaining compliance for such zoning violations and selectively enforcing the regulation. The City, after approval of the October 22, 2002 MOU created a

Zoning Enforcement Implementation Plan (the "Plan") on November 18, 2002. See Exh. 8-4. The City failed to follow its own plan and therefore failed to properly give notice to Calvert Investors and Realty Development of any noncompliance with the zoning regulations. In the Plan, the City stated that it will "place additional emphasis on initial personal contact with violators to seek cooperative compliance and provision, in writing, of complete information needed for compliance" and would seek "cooperative compliance before initiating [the] enforcement process." Exhs. 8-4 (p. 2, ¶¶ 9 & 15). The City never sought cooperative compliance with either Calvert Investors or Realty Investments prior to initiating the enforcement process.

(d) Even if the City had asserted that Petitioners failed to obtain permits upon a change of ownership, the responsible parties are the previous owners, not the current owners pursuant to Section 4-118(c) of the Zoning Ordinance which states that:

No change in use group, owner, or tenant of a building, structure, or land shall be permitted, wholly or in part, until a new use and occupancy permit has been issued by the Building Official certifying compliance with applicable parts of this Subtitle and other applicable State or local laws, ordinances, and regulations.

Counsel for Petitioners argues that the parties who violated this provision are the previous owners who had a change in ownership without obtaining a new permit.

(e) Section 4-118(c) is unconstitutionally vague because in providing that "[n]o change in use group, owner, or tenant of a building, structure, or land shall be permitted, wholly or in part, until a new use and occupancy permit has been issued", it is unclear who is prevented from "permitting" a change in ownership. A change in ownership takes place as a matter of contract between the prior and current owners and is permitted. The language of the provision is unclear what a property should do or not do to be in compliance and therefore the provision is unconstitutionally vague and cannot be enforced.

(f) By failing to act at the time of the transfers in ownership, the City waived any right it may have had to enforce zoning violation notices against Realty Investment and Calvert Investors. During litigation between the City and Petitioners in 2003, Petitioners Realty Investment and Calvert Investors produced U&O permits to the City as part of discovery and Mr. James Kane sent a letter to the City giving actual notice of the change in ownership in 2003. It was within the power of the City to check the permits at that time and raise any alleged deficiencies, but because it did not do so, the City waived any right it may have had to challenge the permits.

(g) The City expressly waived any violation by Petitioners. After the City served the zoning violation notices on Mr. Kane, he informed the City that he intended to apprise his tenants that they were required to vacate the premises no later than December 24, 2008. The City responded by letter, stating that it was not requiring the tenants to vacate. See Exh. 8-5. The City waived any argument that Petitioners are in violation of the Zoning Ordinance because although the City cited Petitioners for allegedly using the property without U&O permits, it reversed course and informed Petitioners that they could continue to use the properties irrespective of the alleged violations.

(h) The City is barred from enforcing the zoning violation notices because for years it maintained policies that did not require Petitioners to obtain new U&O permits. The City also waited years to take this action against Petitioners and thereby waived its right to seek this enforcement.

(i) In pursuing the notices of violation, the City is improperly focused on the ownership shown on the permit, rather than the certification of compliance that the permit represents.

(j) As there is no evidence that the City has enforced the zoning provisions at issue against any other property owners, and as the City's issuance of the zoning violation notices deprived Petitioners of their property interest, particularly because the City failed to abide by its own Plan in refusing to confer with Mr. Kane before issuing the notices, the City has engaged in selective enforcement against Mr. Kane in violation of his rights to equal protection and due process.

After hearing all the testimony and reviewing the evidence presented, the Board finds that:

1. The four subject properties are all zoned R-18 (Multifamily Medium Density Residential) and located within the municipal boundaries of the City of College Park in Prince George's County, Maryland.

2. The City of College Park is authorized, pursuant to the MOU (which is specifically authorized under Article 28, Section 8-112 of the Annotated Code of Maryland, as amended), to enforce the Prince George's County Zoning Ordinance, with City citations or violation notices appealable to the Board of Appeals.

3. Section 27-253(a)(1) states that:

None of the following activities shall take place unless a use and occupancy permit certifying compliance with this Subtitle has been issued for the activity by the Building Inspector:

- (1) Use of a building, structure, or land;
- (2) Conversion of a building, structure, or land from one use to another use;
- (3) Medical practitioner's, insurance sales, and real estate sales offices;
- (4) Conversion of a one-family detached dwelling to include additional dwelling units (by Special Exception).

4. On November 24, 2008, Zoning Violation Notice No. CPZ-0360 was issued to Realty Development for violation of Prince George's Zoning Ordinance Section 27-253(a)(1) for property located at 4206 Knox Road. Ownership of the property was transferred to Realty Development, LLC in 2003, but at the time of the transfer a new U&O permit was not issued to Realty Development, LLC pursuant to Section 27-253(a)(1).

5. On November 24, 2008, Zoning Violation Notice No. CPZ-0361 was issued to Realty Development for violation of Prince George's Zoning Ordinance Section 27-253(a)(1) for property located at 4205 Knox Road. Ownership of the property was transferred to Realty Development, LLC in 2003, but at the time of the transfer a new U&O permit was not issued to Realty Development, LLC pursuant to Section 27-253(a)(1).

6. On November 24, 2008, Zoning Violation Notice No. CPZ-0362, was issued to Realty Development for violation of Prince George's Zoning Ordinance Section 27-253(a)(1) for property located at 4206 Knox Road. Ownership of the property was transferred to Realty Development, LLC in 2003, but at the time of the transfer a new U&O permit was not issued to Realty Development, LLC pursuant to Section 27-253(a)(1).

7. On November 24, 2008, Zoning Violation Notice No. CPZ-0363, was issued to Calvert Investors for violation of Prince George's County Code Section 27-253(a)(1) for property located at 4611-4613 Calvert Road. Ownership of the property was transferred to Calvert Investors in 2003, but at the time of the transfer a new U&O permit was not issued to Calvert Investors pursuant to Section 27-253(a)(1).

8. Undisputed evidence was presented that each of the subject properties was originally owned by Mr. and Mrs. Kane and ownership transferred at some point to one of the Petitioners in 2003. Counsel for Petitioners and Mr. Kane has each stated that a U&O permit for each property was never issued to the current owners.

9. Petitioners have raised several arguments but none challenges what we believe is the gravamen of the concern here – a change of ownership of property triggers the attendant requirement for the issuance of a new U&O permit pursuant to Section 27-253(a). The Board believes that Petitioners' argument related to the Zoning Enforcement Implementation Plan is not supported by evidence that insufficient due process of notice was observed in this matter. In addition, we note that application of Section 4-118(c) is not the ground on which the City's violation notices were issued and find it curious that Petitioners use that statute to support their arguments when it appears to buttress the City's arguments that change of ownership triggers the statutory necessity of a new U&O permit. The Board finds no reason to conclude that the City somehow

waived its enforcement powers based on the arguments presented by Petitioners. We give credence to the City's representation that it systematically attempted to ensure that valid U&O permits were in place for thousands of rental properties within its jurisdiction over a period of years. Likewise, we do not believe that the application of the doctrines of equitable estoppel and laches are warranted based on the behavior of the City. Petitioners have not shown that they have relied on any City action to their detriment.

10. There is no evidence of egregious behavior by the City or selective enforcement of compliance against Petitioners based on the totality of the evidence.

BE IT THEREFORE RESOLVED, by majority vote, Ms. Johnson abstaining, that the determination of the City of College Park, Department of Public Services, to cite Petitioners with Zoning Violation Notice Nos. CPZ-0360, CPZ-0361, CPZ-0362 and CPZ-0363 for the above locations, be and hereby is AFFIRMED.

BOARD OF ZONING APPEALS

By: (Original Signed)
Bobbie S. Mack, Chairperson

NOTICE

Within thirty (30) days from the date of this decision, any person, firm, corporation, or governmental agency who was a party to the Board's proceedings and is aggrieved by its decision may file an appeal to the Circuit Court of Prince George's County.