



MEMORANDUM

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To: City of Bayonne Zoning Board of Adjustment

From: Brian Slaugh, PP, AICP
James Clavelli, PP, AICP

Re: **William Caban**
Application Z-24-007
Certificate of Nonconformity
Block 224, Lot 17
67 West 18th Street
R-2, Detached/Attached Residential District

Date: September 12, 2024

1. APPLICATION DESCRIPTION

1.1. Application. The applicant requests a certificate of nonconformity relating to a three-unit, multifamily dwelling building in the R-2 zone. The application states that the building was severely damaged by fire in September of 2021, and that the applicant is seeking approval to rebuild (see Comment 2.3) as a three-unit dwelling. The applicant states that the building was used as a three-unit dwelling since at least 1993.

A letter from Tracey Tuohy, Zoning Officer for the City of Bayonne, indicates that in her initial review of the application on September 13, 2022, the plans submitted to their office showed a two-family dwelling. On February 8, 2023, revised plans were submitted to the Building Department describing the use as a three-family dwelling.

Whether this should be considered a legally preexisting nonconforming use will depend on the extent of the destruction caused by the fire in 2021, and, whether it can be proven that the building was used continually as a three-unit dwelling since prior to 1995.

1.2. Property and Use Description. The building is three stories in height. It has two entrances, one on either side of the front façade, with separate concrete stairs leading to each. The first floor protrudes beyond the upper floors. The lot contains a back yard.

The lot is an interior lot with frontage on West 18th Street. The lot is rectangular and consists of 2,500 square feet of area (25' x 100' lot).

John Hatch, FAIA
George Hibbs, AIA
Brian Slaugh, AICP
Michael Sullivan, AICP
Michael Hanrahan, AIA
Mary Beth Lonergan, AICP



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

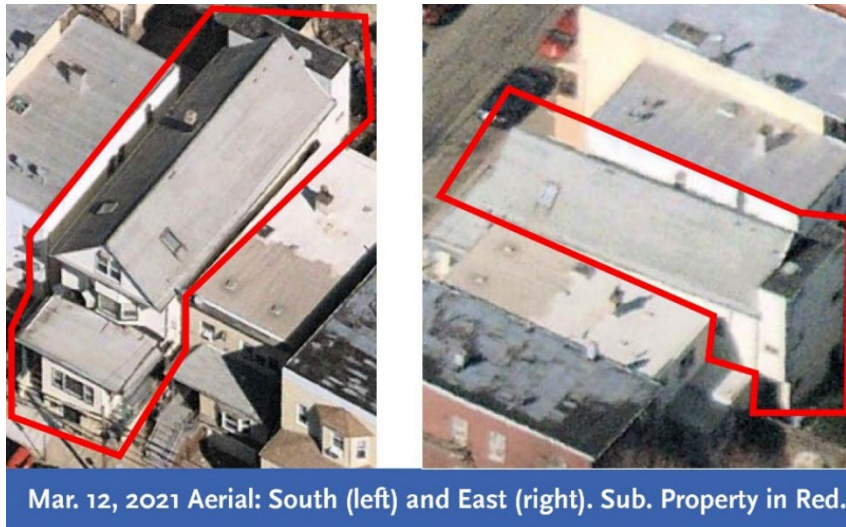
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1.3. **Neighborhood Context.** The building is located on the northern side of West 18th Street between John F. Kennedy Boulevard to the west and Avenue C to the east. The lot is closer to (approximately 170 feet) Avenue C. The site is located within the R-2 zone. West 18th is primarily residential, with a mix of housing types ranging from single-family dwellings to multifamily apartment buildings. Nonresidential uses are located on J.F.K. Boulevard and Avenue C on either end of the block. Most of the buildings on West 18th Street are of a similar size and scale as the subject property. Avenue C and J.F.K. Boulevard are both two-way roads with four lanes, while West 18th street is a one-way, west bound street.

2. DETERMINING THE EXTENT OF DESTRUCTION OF THE BUILDING IN THE 2021 FIRE

2.1. **Character of the Structure Before and After the Fire.** The Narrative Statement of the Applicant indicates that the property was severely damaged by fire in September of 2021. Whether or not the applicant can prove that the property has been continuously in use as a three-unit dwelling since prior to 1995, if the building was damaged to a great enough extent, it would not qualify as a legally preexisting nonconforming use, as the fire would have eliminated the use.

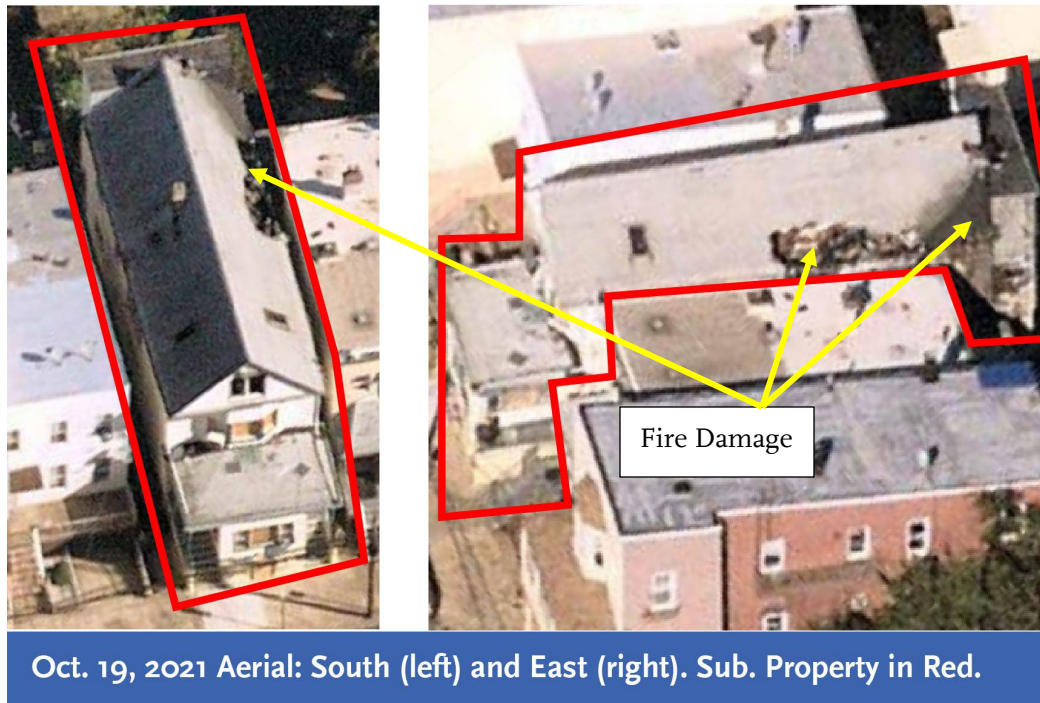
Using aerial data from Nearmap¹, the following images show the site prior to the fire, when the building was damaged by fire, while the building was being repaired, and after the repairs appear to have been completed. These may provide insight to the Board as to the extent of damage and destruction.



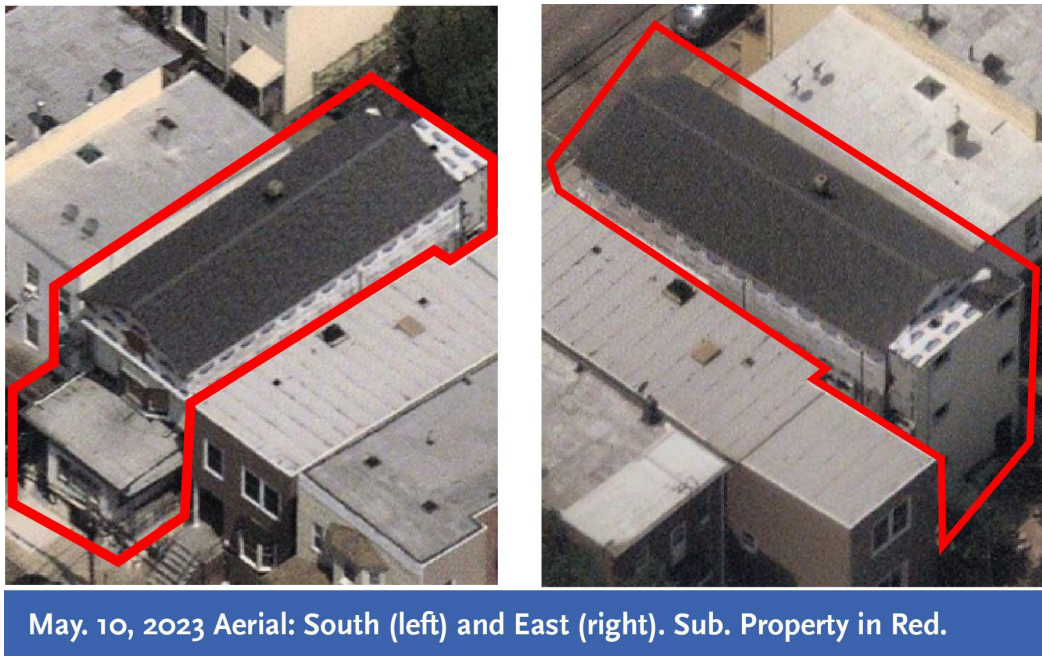
¹ - All images sourced from Nearmap. Aerial photographs dated March 12, 2021, October 19, 2021, May 10, 2023, and March 8, 2024, respectively. Accessed on September 9, 2024.



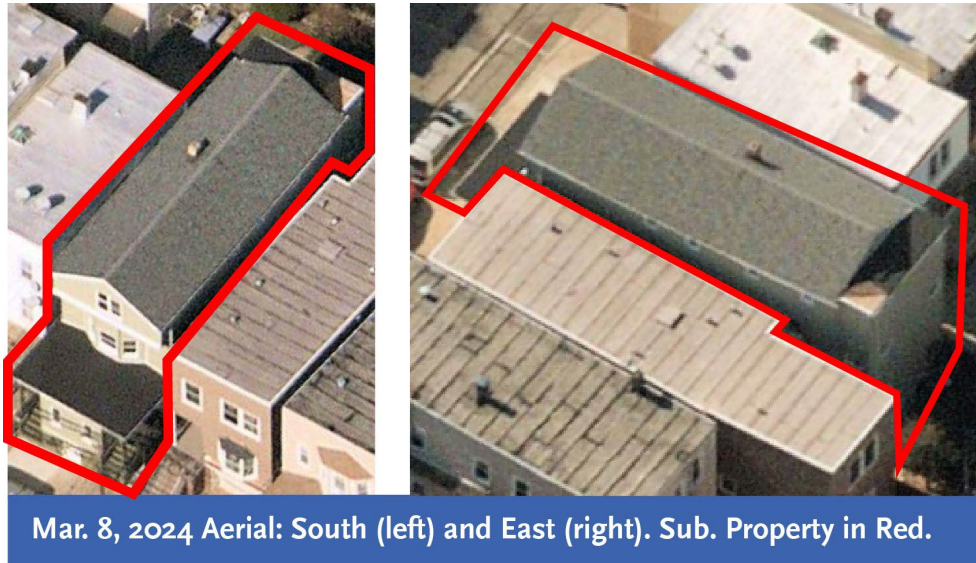
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After the April, 2021 Fire



While the Building Was Under Repair



The Building After the Repairs Appear to Have Been Completed

2.2. **Relevant Guidance from the Court.** The courts have adjudicated matters involving the lawfulness of preexisting non-conforming uses/structures in the event of their total or partial destruction. We have used this guidance in the preparation of our report; however, the Board should consult with the Board Attorney for advice on the exact application of judicial decisions in this particular matter. We have summarized the following relevant cases, highlighted in the land use treatise by Cox and Koenig (which this office notes does not have any official status).

- **Grungo v. Robles.** The owner of a preexisting non-conforming use has the right to rebuild in the event of partial destruction of a structure. The owner does not have the right to *perpetuate an unsafe or unhealthy condition or an eyesore and the rebuilding may be conditioned upon reasonable site plan review*².
- **Motley v. Borough of Seaside Park Zoning Board of Adjustment.** This decision provides a commonly used “rule of thumb” (though stating that this is not adopted as a legal standard), that in determining total or partial destruction of an accessory structure, that if two walls of the structure survive a permit can be issued for rebuilding because the destruction is only partial³. Interpretation is still required in that the totality of the destruction must be

² - *New Jersey Zoning and Land Use Administration*. P. 416, §27-4. Gann Law Books, Newark, NJ. 2023 edition.

³ - *ibid.*



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

assessed, as well as the ability of the standing walls to be utilized in the reconstruction without reinforcement. Cases stand on their own merits and are context sensitive.

- **Township of Lacey v. Mahr.** This case involved an inn that burned down. Testimony established that 69% of the building was totally destroyed, and an additional 14% was badly gutted. The court found that the inn was totally destroyed and would require variance relief to permit reconstruction. In this case the use was permitted, but the location of the building was non-conforming as it violated front and side yard requirements⁴. This suggests that a determination of total destruction requires at least a finding that the large majority of a structure has been destroyed.

- 2.3. **Conclusion Regarding Degree of Destruction.** It would seem reasonable to conclude, based on examination of these relevant decisions, that the property was certainly not totally destroyed and in fact appears that as little as 20% of the building was damaged by the fire. Typically, if the Board reaches a similar conclusion, it can find that the use remains eligible to be considered a legal non-conforming use. Whether it is a legal non-conforming use with three units where only two units are permitted would appear to be the crux of the application. The applicant, or their professionals, should provide testimony as to the extent of the damage to the building. The aerials, while instructive, only provide a partial picture of the extent of damage. Furthermore, if it is indeed the case that the building was only partially destroyed, it is strongly recommended that the applicant recharacterize the proposed construction as rehabilitation or renovation, rather than “rebuilding.”

3. REVIEW OF REQUEST OF CERTIFICATE OF NONCONFORMITY

- 3.1. **Overall Comment.** While this office defers to the Board Attorney in advising the Board on the application of relevant criteria for determining whether a certificate of nonconformity should be granted, this report identifies criteria for purposes of establishing a framework for review. Pursuant to *§N.J.S. 40:55D-68*:

“The prospective purchaser, prospective mortgagee, or any other person interested in any land upon which a nonconforming use or person interested in any land upon which a nonconforming use or structure existed before the adoption of the ordinance which rendered the use or structure nonconforming. The applicant shall have the burden of proof. Application pursuant hereto may be made to the administrative officer within one year within one year of the

⁴ - *ibid.*



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

adoption of the ordinance which rendered the use or structure nonconforming or at any time to the Board of Adjustment...”

As the owner(s) of the property, the applicant(s) may be considered an “other interested party.” Given the length of time since the adoption of the R-2 zone standards, the applicant must apply to the Board of Adjustment, as the Zoning Officer is unable to issue the certificate.

- 3.2. The land use treatise by Cox and Koenig, though not having any official status, is often used as a compendium of case law and practice on the administration of land use in New Jersey. Regarding the burden of proof, and elements of proof, the Treatise says the following:
- **Burden of Proof**⁵. *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. Then, if any question arises in the future by the same or a different owner who may be seeking to extend or substantially modify the use, the record will contain an ample description of the use as it is protected by the statute.*
 - **Elements of Proof**⁶. *The proper question presented to the board by one who seeks to obtain a certificate for a nonconforming use is: what was the use which existed on the property in question at the time of the adoption of the zoning ordinance? It is this use which the statute protects, and such use must have been continuous...In determining the status of a purported nonconforming use or structure, the board of adjustment must trace 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.*
- 3.3. **Establishment of the R-2 Zone.** The Bayonne Zoning Maps adopted on December 11th 1990 and May 3, 1995 both show that the site was located in the R-2 zone at that time, though it was entitled the “R-2 Low Medium Density Residential” zone. Ordinance 01-01-19, adopted on March 21, 2001, repealed the entirety of that version of the R-2 zone and replaced it with the “R-2 Detached/Attached Residential” zone that it is in effect today.

⁵ - *ibid.* p. 411-412, §27-2.3.

⁶ - *ibid.*



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

The 1990 Master Plan states on page 136 “*The City’s major residential zone, the R-2 General Residential District, only allows for residential structures of 1 to 6 units.*” It appears that the R-2 zone at that time allowed for three-family dwellings.

- 3.4. **When Was the Building Constructed?** The building is depicted on the 1912 Sanborn fire insurance map. According to historic aerials dating back to 1931 when the entire state was aerially photographed by New Jersey show that the building was constructed in one form or another as early as 1954 (the 1931 image is blurry and it is difficult to determine if it is the same building and footprint, and as such will not be relied upon). The 1979 aerial, which is the clearest of the aerials until 2002, indicates that the extent of the principal building remained unchanged since at least 1979.

The applicant’s submittal contains a deed of the dwelling from April 16, 1992, when Mr. Caban purchased the property. The deed does not indicate the number of units in the building, which may be immaterial, as the application materials indicate that it has been used as a three-unit dwelling since 1993.

4. EVIDENCE SUBMITTED BY THE APPLICANT

- 4.1. The applicant has provided two forms of evidence as part of their application. The first consists of documents from the Department of Community Affairs, and the second consists of photos of the utility meters and equipment within the building.
- 4.2. **Department of Community Affairs.** Seven documents from the Department of Community Affairs have been provided (though exhibits A-9 and A-10 appear to be the same document).

The first is a Certificate of Inspection with an issuance date of February 1, 2019 which refers to the building as a Multiple Dwelling with three units on the property. The second document appears to be the same document, stating the same information.

The third document is a Certificate of Inspection with an issuance date of January 23, 2014, which also refers to the building as a Multiple Dwelling with three units on the property.

The fourth document is a Certificate of Registration with an issuance date of November 2, 1998, which also refers to the building as a Multiple Dwelling with three units on the property. This document states the transfer of ownership was April 17, 1992.



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

The fifth document is an Order to File Application for Certificate of Inspection with an issuance date of March 28, 2013, which also refers to the building as a Multiple Dwelling with three units on the property.

The sixth document is an Inspection Report and Orders of the Commissioner consisting of four pages with an issuance date of March 28, 2013, which also refers to the building as a Multiple Dwelling with three units on the property.

The seventh and final document from DCA is a Bureau of Housing Inspection Cyclical Inspection card dated 2013 (the exact date is difficult to make out due to the poor quality of the document making the date appear faded). This document states that the building contains three units.

This documentation appears to verify that from November 2, 1998 to February 1, 2019 that the building contained three dwellings. This is not enough information to prove that:

- **The building was used as a three-unit dwelling prior to 1995, or**
- **Continuously used as a three-unit dwelling after 2019.**

The applicant should provide additional testimony and evidence to account for the years prior to 1995 and after 2019.

- 4.3. **Property Photos.** The applicant provided images of utility meters in the building's interior.

Of the five photos, two are more instructive than the others. These include photos three and four. Photo three shows three separate boilers, two of which are clearly labeled as "Ap. 2" and Ap. 3", respectively, while a third has no such marking. Photo four shows four separate utility meters, three clearly marked as "Apt. #1", "Apt. #2", and "Apt #3". These would seem to suggest that there are three separate apartments, as this is a typical configuration for a multiple dwelling building with separate apartments.

This office notes that the photos are undated. This is not enough information to prove that the building was continuously used as a three-dwelling multifamily building from prior to 1995 to the current day.

5. ANALYSIS OF THE APPLICATION

- 5.1. At this time, it does not appear that sufficient evidence has been submitted regarding the continuous use of the site as a preexisting nonconforming use. The evidence that has been provided indicates that from November 2, 1998 to February 1, 2019 that the building contained three dwellings.



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

The applicant should be prepared to offer additional evidence to supplement the documents submitted thus far in testimony of the following:

- The extent of destruction of the building after the fire, ideally in percentage terms, as that is what has been typically used in judicial decisions to determine partial vs. complete destruction (see section 2).
- That the building has been continually used as a three-unit multifamily building since prior to 1995 up to the present day, with no change of use in that time.
- Any permits, approvals, or other official documentation that would support the application by indicating that the nonconforming use has been in continuous existence since prior to 1995.
- The applicant should also provide testimony as to the discrepancy that was discovered by the Zoning Officer when the two-unit dwelling approved by her was labeled as a three-unit dwelling in the documents submitted to the building office the following year. The property record card also lists this as a two-unit structure.

6. APPLICANT AND THEIR PROFESSIONALS

- Applicant/Owner. William Caban, 67 West 18th Street, Bayonne, NJ 07002. Tel: 201.339.0924.
- Attorney. Paul Weeks, Esq., Raff, Masone & Weeks, 1083 Avenue C, Bayonne, NJ 07002. Tel: 201.339.0924. Email: firm@raffmasone.com
form@rmwlawfirm.com
- Architect/Planner. Stephen M. Kawalek, RA, PP, 764 Avenue C, Bayonne, NJ 07002. Tel: 551-208-9167. Email: steve.kawalek@gmail.com

7. MATERIALS REVIEWED

The following materials were reviewed in the preparation of this report:

- Application, dated June 11, 2024.
- *Narrative Statement of Applicant*, undated.
- *Letter from Zoning Officer*, dated February 16, 2023.
- Property deed, dated April 16, 1992.



WILLIAM CABAN | CERTIFICATE OF NONCONFORMITY

Clarke Caton Hintz

- Department of Community Affairs Certificate of Inspection, multiple, dated February 1, 2019; January 23, 2014.
- Department of Community Affairs Certificate of Registration, expiration date November 2, 2024.
- Department of Community Affairs Certificate of Order to File Application for Certificate of Inspection, issuance date March 28, 2013.
- Department of Community Affairs Inspection Report and Orders of the Commissioner, issuance date March 28, 2013.
- Department of Community Affairs Bureau of Housing Inspection Cyclical Inspection, issuance date is unclear but appears to be in 2013.
- *Photographs of Utility Meters.*
- *Letter from Joseph Coughlin, Fire Sub-Code Official for the City of Bayonne, dated August 19, 2024.*
- 1912-1950 Sanborn Fire Insurance Map (Plate no. 45), *Library of Congress.*
- *Detailed Property Report, NJTaxMaps.com, accessed September 12, 2004*

We would be pleased to answer any questions concerning this review.

Cc. Alicia Losonczy, Land Use Administrator
Richard N. Campisano, Esq., Board Attorney
Robert J. Russo, PE, PP, CME, Board Engineer
Suzanne T. Mack, PP, AICP, CTP, FITE, AHP, City Planner
Tracey Tuohy, Zoning Officer

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