Case No.: S.E. 4716

Applicant: CD#15CL2001, Inc.
d/b/a Bazz and Crue
Group Hall

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and disposition recommendation of the Zoning Hearing Examiner for Special Exception 4716, that permission to use approximately two units within the Forestville Plaza Shopping Center, or approximately 4,000 square feet of an 18.17-acre shopping center property in the C-S-C (Commercial Shopping Center) / D-D-O (Development District Overlay) Zone, located at the northeast corner of Forestville Road and Marlboro Pike, also identified as 7752 and 7754 Forestville Road, Forestville, Maryland, as a Private Club with Adult Entertainment, is DENIED, pursuant to the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's County Code, Sections 27-127, 27-131−27-132, 27-140−27-142, and the Regional District Act, Land Use Article, Annotated Code of Maryland (2012 & Supp. 2014).[1]

[1] References to The Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's County Code, Subtitle 27-101 (2011 Ed. & 2014 Supp.) *et seq.*, are styled "the Zoning Ordinance" and cited "§ 27- ___" herein. References to the Regional District Act within Md. Code Ann., Land Use (2012 & Supp. 2014), are styled "the RDA" and cited "§___ of the RDA" herein. Effective October 1, 2012, pursuant to the provisions of Ch. 426, 2012 Laws of Maryland, Article 28 §§1-101 through 8-127 are repealed and recodified at Md. Code Ann., Land Use (2012). *See Ray v. Mayor of Baltimore*, 430 Md. 74, 59 A.3d 545 (2013). The provisions of the Zoning Ordinance and RDA cited herein are not exclusive designations as to the scope of authorities relied upon by the District Council in its denial of S.E. 4716.

> §27-127. Powers and duties to conduct hearings.
> (a) The Zoning Hearing Examiner shall conduct hearings for the following categories of zoning cases:
> (2) Applications for special exceptions under Part 4, including applications for variances in conjunction with the Special Exceptions.

Except where indicated herein, the District Council hereby adopts the findings of facts and conclusions of

PROCEDURAL HISTORY

On May 17, 2012, the Development Review Division of the Prince George's County Planning Department accepted, for processing, an application for special exception, S.E. 4716, filed by Applicant, CD#15CL2001, INC., Post Office Box 471647, District Heights, Maryland 20753, for permission to use a private club for adult entertainment in the I-1 (Light Industrial)[2] / D-D-O (Development District Overlay) Zone. As reflected on its application, CD#15CL2001, INC., employs trade names ("d/b/a" or doing business as) BAZZ AND CRUE and BAZZ AND CRUE GROUP HALL. The owner listed on the application form is Big Apple LLC, 1334 Tampa Road, Palm Harbor, Florida 34683. S.E. 4716 was filed pursuant to §§27-107.01(7.1), 27-473(b), 27-475.06.06, 27-317, and 27-459 of the Zoning Ordinance. *See* Exh. 1, Application Form. *See also* Exhibit 12, 10/24/2012 TSR.

On October 24, 2012, after completing its review of the subject application, the Development Review Division Technical Staff of the Maryland-National Capital Park and Planning Commission issued its report and recommendation as to S.E. 4716 in accordance with §27-311 of the Zoning Ordinance. The Technical Staff Report recommended DISAPROVAL of S.E. 4716. *See* Exhibit 12, 10/24/2012 TSR, at 3.

On November 8, 2012, after review of the Technical Staff Report, the Prince George's County Planning Board did not schedule S.E. 4716 for public hearing and transmitted the subject

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the Zoning Hearing Examiner in this matter, except as otherwise stated herein. *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596; 329 A.2d 428 (1974) (where the District Council has delegated duty of making findings of fact and recommendations to the Zoning Hearing Examiner, the Council may comply with the requirement of 'specific written findings of basic facts and conclusions of law' by adopting Examiner's findings and conclusions).

[2] The 2009 Marlboro Pike Sector Plan designated the subject properties as Priority Area 7, Forestville Flex Space Campus, and rezoned it to I-1 (Light Industrial) in the Development District Overlay Zone as part of the Low Intensity Business Park character area. At the time the subject application was filed, the property had a zoning classification of I-1, the result of the 2009 SMA. During the pendency of this application, however, and pursuant to approval of DSP-14013 by the District Council on October 1, 2013, the property (including the two addresses comprising the subject property) was rezoned to the C-S-C Zone.

application directly to the District Council/Zoning Hearing Examiner. *See* Exhibit 13, 11/9/2012 Ltr., Hirsch to Webb, at 1.

On January 15, 2014, January 29, 2014, and February 6, 2014, respectively, in accordance with §§27-127, 27-129, and 27-313 of the Zoning Ordinance, the Zoning Hearing Examiner conducted evidentiary hearings as to S.E. 4716. *See generally* 01/15/2014 Tr.; 01/29/2014 Tr.; 02/06/2014 Tr.

On June 14, 2013, the Applicant, through counsel, filed a Complaint for Declaratory Judgment, Preliminary and Permanent Injunctive Relief, Damages, Attorney's Fees, and Trial by Jury in the United States District Court for the District of Maryland, Case Number 8:13-cv-1722-DKC (federal complaint). The federal complaint challenges the constitutionality of County Bills 46-2010 and 56-2011, hereinafter CB-46-2010 and CB-56-2011. Applicant alleges therein that the elimination of conforming locations, and the special exception requirements of this challenged legislation, constitute a violation of certain stated protections within the First Amendment of the United States Constitution and other relevant provisions of the United States Constitution, as well as certain corresponding provisions of the Maryland Declaration of Rights.[3]

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[3] The District Council sits as an administrative agency when reviewing a zoning matter. *See County Council v. Brandywine Enters.,* 350 Md. 339, 711 A.2d 1346 (1998) ("The Regional District Act authorizes the County Council to sit as a district council in zoning matters, and, when it does so, it is acting as an administrative agency"); *County Council v. Carl M. Freeman Assoc's,* 281 Md. 70, 376 A.2d 869 (1973) ("When it sits at the district council in a zoning matter, the Prince George's County Council is an 'administrative agency' as the term is broadly defined"). *See also* §§14-101(f) and 22-101(b), RDA; §27-107.01(a)(1, 67, 68), Zoning Ordinance (each subsection therein defining "district" as that portion of the Maryland-Washington Regional District located in Prince George's County, Maryland, and "district council" as The Prince George's County Council, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Prince George's County).

See §27-141, Zoning Ordinance (Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision). *See* Rule 6, Oral Argument and Evidentiary Hearings, R. of Proc., D. Council:

" (f) The District Council may take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence."

The federal complaint states as follows:

- **Count I** – The Restrictions Contained In The Challenged Subject Legislation Violate The Equal Protection Doctrine
- **Count II** – The Challenged Subject Legislation Represents An Unlawful Exercise Of Police Powers And Imposes An Impermissible Prior Restraint On First Amendment Protected Activities
- **Count III** – The Special Exception Process Imposed On Plaintiffs By CB-56-2011 Lacks Adequate Procedural Safeguards And Result In A Violation Of Plaintiffs' Constitutional Rights
- **Count IV** – The Adult Clubs Bill Takes Property Without Due Process Of Law
- **Count V** – The Subject Legislation Contains Terms That Are Unconstitutionally Vague
- **Count VI** – The Subject Legislation Allows For Unbridled Administrative Discretion
- **Count VII** – The Challenged Legislation Fails To Provide For Adequate Alternative Avenues Of Communication
- **Count VIII – (Supplemental State Court Claim Under 28 U.S.C. Sec. 1367)**
  The Challenged Legislation Violates Maryland Law For Failing To Provide An Amortization Period (Emphasis added).

See Complaint for Declaratory Judgment, Preliminary and Permanent Injunctive Relief, Damages, Attorney's Fees, and Trial by Jury in the United States District Court for the District of Maryland, Case Number 8:13-cv-1722-DKC, (ECF No. 6), filed June 14, 2013.

On August 13, 2013, Applicant requested that the ZHE stay this matter pending until the disposition of the Applicant's Motion for Preliminary Injunction filed in the above federal complaint.

On March 5, 2014, the Honorable Deborah K. Chasanow issued a 52-page Memorandum Opinion disposing of the above-referenced federal claims, as follows:

> **The motion for a preliminary injunction and temporary restraining order filed by Plaintiffs Maages Auditorium; CD15CL2001, Inc., d/b/a Bazz and Crue and X4B Lounge; D2; and John Doe Jane Doe, for all those similarly situated will be <u>denied</u>**. Defendant Prince George's County, Maryland's motion

> to dismiss Plaintiffs John Doe and Jane Doe will be granted. Defendant's motion to dismiss Count IV of Plaintiffs' complaint will be granted. Defendant's motion for summary judgment on Counts I, II, III, V, and VI of Plaintiffs'complaint will be granted. Defendant's motion for summary judgment on Counts VII and VIII of Plaintiffs' complaint will be denied.

See EFC No. 36, Case Number 8:13-cv-1722-DKC (emphasis added).

The federal court retained jurisdiction over Counts VII and VIII, which are limited factual proceedings on whether sufficient property exists in the I-2 zone to permit all 14 adult entertainment facilities to relocate, and whether, if sufficient property exists in the I-2 zone, the County has provided sufficient time under Maryland law for those businesses to close up shop and relocate. At oral argument, counsel for Applicant conceded that the constitutionality of the enactment CB-56-2011 is pending before the federal court, and that ruling may go a long way in determining what happens in this matter. *See* 02/09/2015 Tr., at 9.

On July 8, 2014, the ZHE issued a written disposition recommendation in accordance with §27-127 of the Zoning Ordinance and recommended DENIAL as to S.E. 4716. *See* 07/08/2014 ZHE Disp. Recmd'n, at 1.

On July 14, 2013, the District Council took no action in this matter.

On August 1, 2014, in accordance with §27-131 of the Zoning Ordinance, Applicant's counsel filed an appeal from the disposition recommendation of the ZHE with the Clerk of the District Council and requested oral argument before the District Council. *See* 08/01/2014 Ltr., Whitley to Floyd, at 1−2.

Notice of oral argument was mailed to all persons of record in accordance with §27-125.04 of the Zoning Ordinance by the Clerk of the District Council, stating that the District Council would conduct oral argument as to S.E. 4716 on February 9, 2015.

Thereafter, on February 9, 2015, the District Council conducted oral argument pursuant

to the procedures recited in §27-131 and its Rules of Procedure. *See generally* 02/09/2015 Tr. *See also* Rule 6, R. of Proc., County Council of Prince George's County sitting as the District Council. The Applicant raised several questions, discussed *infra*, at oral argument. *See* 08/01/2014 Ltr., Whitley to Floyd, at 1−2. *See also* 02/09/2015 Tr., at 6−9. At the conclusion of oral argument, and pursuant to §27-132 of the Zoning Ordinance, the District Council voted favorably to refer this matter to staff for the preparation of an Order of Denial.

FINDINGS AND CONCLUSIONS

- Subject Property

The Adult Entertainment use, d/b/a Bazz and Crue Group Hall, occupies two units in an integrated shopping center that has recently been remodelled, known as the Forestville Shopping Center. The subject property is improved with a one-story, 4,000 square foot building currently used as a Private Club offering Adult Entertainment. The subject application does not propose any construction or disturbance and, therefore, is exempt from the requirements of the Tree Canopy Coverage Ordinance. It is also exempt from the requirements of the Woodland Conservation Ordinance because it contains less than 10,000 square feet of woodland and has no prior Tree Conservation Plan approvals. *See* Exhibit 12, 10/24/2012 TSR, at 53. There are no regulated environmental features on the site, and the subject property is not situated within a Chesapeake Bay Critical Area Overlay Zone. The administrative record for the subject application, specifically the Technical Staff Report of October 24, 2012, includes a detailed chronology of the various applications and zoning permits issued for the property. *See* Exhibit 12, 10/24/2012 TSR, at 4−5.

During pendency of the subject application, the Forestville Shopping Center was purchased by PMM Enterprises, LLC. *See* Exhibit 55. This owner did not sign the original

application, as specifically required by the Zoning Ordinance. *See* Exhibit 1. As a result, Applicant submitted a revised application with the requisite signature on February 10, 2014. *See* Exhibit 59.

The neighborhood is defined by the following boundaries:

North	Parston Drive, Fernham Lane, and Cryden Way;
South	Pennsylvania Avenue (MD 4);
East	Capital Beltway (I-495); and
West	Forestville Road.

The subject property is surrounded by the following uses:

North	Strip commercial, light industrial, and auto-related uses in the I-1 / D-D-O Zones.
South	A small church, mattress store, and liquor store in I-1 / D-D-O Zones.
East	A vacant parcel and light industrial uses in the I-1 / D-D-O Zone. Further east on Marlboro Pike are the Forestville Baptist Church and single-family residences in the R-R (Rural Residential) Zone.
West	Across Forestville Road is the Forestville Memorial United Methodist Church in the R-55 (One-Family Detached Residential) Zone and a gas station in the C-S-C (Commercial Shopping Center) Zone.

- Master Plan and Sectional Map Amendment

The subject property is subject to the approved recommendations of the 2009 *Marlboro Pike Sector Plan and Sectional Map Amendment*, which designated the property as Priority Area 7, Forestville Flex Space Company, and rezoned it from the C-S-C to the I-1 (Light Industrial) / D-D-O (Development District Overlay) Zone. The D-D-O-Z Development District vision for the site is to develop flex and auxiliary office space for industrial businesses and related professional service companies that form the supply chain for major industrial tenants. The DDOZ does not

permit Adult Entertainment, nor does the DDOZ permit Private Clubs with Adult Entertainment. On October 1, 2013, the District Council approved, subject to certain specific conditions, a Detailed Site Plan (DSP-13014), filed by the present owner of the property (namely PMM Enterprises, LLC), the approval of which rezoned the subject property from the I-1 Zone to the C-S-C Zone. *See* Exhibit 31(a)–(e), 01/13/2014, Supp. TSR. A condition of the approval of DSP-13014 prohibited "Clubs or Private Lodges."

The 2002 *Prince George's County General Plan* placed this property in the Developed Tier. The vision for the Developed Tier is a network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium- to high-density neighborhoods. The 2014 *Plan Prince George's 2035* General Plan Amendment places the property in the Established Communities of the County within the County Growth Boundary, which offers the following vision for property therein:

> "Plan 2035 classifies existing residential neighborhoods and commercial areas served by public water and sewer outside of the Regional Transit Centers and Local and Suburban Centers, as Established Communities. Established Communities are most appropriate for context-sensitive infill and low- to medium- density development. Plan 2035 recommends maintaining and enhancing existing public services (police and fire/EMS), facilities (such as libraries and schools), and infrastructure in these areas (such as sidewalks) to ensure that the needs of existing residents are met."

See 2014 *Plan Prince George's 2035*, at 13.

The subject property is also located within Joint Base Andrews airport safety zones Accident Potential Zone ("APZ") APZ I and APZ II, as set forth in the recommendations of the 2009 *Joint Base Andrews Naval Air Facility Washington Joint Land Use Study* ("JLUS"), adopted by the Council by way of CR-30-2010, and setting forth the policy foundation for the current Interim Land Use Controls ("ILUC") for Military Conformance for the public safety,

health, and welfare of the County, enacted via Council Bills CB-3-2012[4] and CB-4-2012. The District Council adopted these regulations for purposes of limiting the loss of life and property in the APZ's by reducing the public's exposure to hazards by planning for low-density land uses and development patterns. The regulations complement the recommendations and policies within the 2009 *Marlboro Pike Sector Plan and SMA* and seek to manage development in the height, noise, and safety impact areas near Joint Base Andrews so that a new Military Installation Overlay Zone ("MIOZ") is being developed that will implement land use recommendations within the JLUS study area in the County. *See* Exhibit 12, 10/24/2012 TSR, at 5.

- Prior History of the Subject Property

There is significant permit history for the subject property, with numerous permit applications filed for the property since its initial construction. The following provides a list of permits or approvals that specifically relate to the instant Application:

July 17, 2001	Applicant, "Masonic Lodge D.C. #15 Class 2001 t/a Bazz & Crue Group Hall F and AM," applied for a use and occupancy permit for "a private club and offices" for 7752 Marlboro Pike.
August 17, 2001	Permit 19557-2001-00, effective as issued by the Permits and Review Division of the Department of Environmental Resources, for a Private Club, Office, No Sales or Storage, at 7752 Marlboro Pike.
February 6, 2007	Applicant, styled as "CD #15CL2001, Inc. Masonic Hall t/a B&C Group Hall F.A.M II," applied for a use and occupancy permit for

[4] CB-3-2012, effective December 6, 2012, created new development standards and procedures, including the establishment and imposition of temporary zoning standards and requirements for development of properties in the vicinity of Joint Base Andrews in furtherance of the public health, safety, and welfare for a limited time period until a new Military Installation Overlay Zone is adopted for the area. §27-1809 sets forth a list of incompatible uses for which no permit shall be issued. Specifically, §27-1809(b)(5)(B) expressly prohibits Adult Entertainment. Notwithstanding, §27-1805(d), as currently in effect, provides exemptions to the applicability ILUC zoning regulations; §27-1805(d)(6) expressly exempts properties within a D-D-O Zone from the ILUC regulations. Since the subject property at 7752 Forestville Road and 7754 Road are subject to the Marlboro Pike D-D-O Zone approved in 2009, the subject property is exempt from the Interim Land Use Controls ("ILUC") for Military Conformance.

a "banquet hall / events center" for the adjoining unit at 7754 Marlboro Pike. The permit is put on hold to allow Applicant to change the requested use.

February 9, 2007 Applicant revised the application to request a permit for "classes, small receptions, and official gatherings, rest area for the elderly."

April 27, 2007 Permit 3802-2007-01 effective as issued by the Permits and Review Division of the Department of Environmental Resources, for Private Club "with a maximum of 65 seats per attached documentation," based on information within the application and correspondence submitted on behalf of Applicant that the requested use is a Private Club with "classes, small receptions, and official gatherings, rest area for the elderly" 7754 Marlboro Pike.

May 2009 Applicant issued a building permit to connect its two (2) units within the Forestville Shopping Center by placing doorways in the common wall.

- Applicant's Request

Applicant seeks approval of S.E. 4716 to operate a Private Club with Adult Entertainment through the validation of two (2) Use and Occupancy Permits for a Private Club. *See* Exhibit 12, 10/24/2012, at 39−42; E 19557-2001-00 for 7752 Marlboro Pike[5], and 3802-2007-U for 7754 Marlboro Pike).

- Applicable Law and Conclusions

The Prince George's County Council, by way of its express authority conferred by law from the Maryland General Assembly in the RDA, sits as the District Council for that portion of the Maryland-Washington Regional District lying within Prince George's County. *See* §§14-101(f), 22-101(b), RDA. As such, the RDA designates the Prince George's County Council,

[5] The Use and Occupancy permit applications submitted by Applicant in 2001 and 2007, respectively, list the subject property address as "7752 Marlboro Pike District Heights, MD 20747" as to 19557-2001-00, and "7754 Marlboro Pike District Heights, MD 20747" as t 3802-2007-01. However the subject application, as well as the 2009 *Marlboro Pike Sector Plan and SMA* designates the street address for the property as "7752−7754 Forestville Road."

sitting as the District Council, the broad authority to regulate zoning and land use matters. *See* §§22-201(b), 22-202(a, b), 22-206, 22-208, 22-301(a) − (c), 22-310(a), 22-407(a), RDA. In so doing, the legislature designated specific authority for the District Council to make factual determinations and to adjudicate certain factual disputes in reaching a final decision in zoning cases.

Moreover, as squarely designated in §22-104 of the RDA, the District Council may, by ordinance, adopt and amend the text of its zoning ordinance and also may, by resolution or ordinance, adopt and amend any zoning map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its County, the size of lots, yards, courts and other open spaces. In turn, in exercising this authority to regulate land use and zoning in the County, the District Council enacted certain procedural prescriptions within its County Zoning Ordinance. *See Prince George's County v. Ray's Used Cars*, 398 Md. 632, 635−36, 922 A.2d 495, 497 (2007).

Thus, the Maryland Legislature ceded substantial legislative prerogative to the District Council in furtherance of their respective zoning powers and responsibilities via §22-104 of the RDA, as follows:

> **§ 22-104. Authority to adopt and amend zoning law.**
> (a) In general. -- The Montgomery County district council or the Prince George's County district council, in accordance with the requirements of this division as to the portion of the regional district located in the respective county, may:
> (1) by local law adopt and amend the text of the zoning law for that county; and
> (2) by local law adopt and amend any map accompanying the text of the zoning law for that county.
>
> (b) Purposes. -- The local law may regulate:
> (1) (i) the location, height, bulk, and size of each building or other structure, and any unit in the building or structure;
> (ii) building lines;

(iii) minimum frontage;
(iv) the depth and area of each lot; and
(v) the percentage of a lot that may be occupied;
(2) the size of lots, yards, courts, and other open spaces;
(3) the construction of temporary stands and structures;
(4) the density and distribution of population;
(5) the location and uses of buildings and structures and any units in those buildings and structures for:
(i) trade;
(ii) industry;
(iii) residential purposes;
(iv) recreation;
(v) agriculture;
(vi) public activities; and
(vii) other purposes; and
(6) the uses of land, including surface, subsurface, and air rights for the land, for building or for any of the purposes described in item (5) of this subsection.

(c) Limitation. -- The exercise of authority by a district council under this section is limited by §§ 17-402 and 25-211 of this article.

See §22-104, RDA.

In addition, and in direct conformance with the RDA, district councils may also divide the portion of the regional district located within its county into districts and zones of any number, shape, or area it may determine. *See* §22-201, RDA. As such, the enactment of zoning laws affecting the districts and zones of its respective geographic designation, as well as the right to the construction, alteration, and uses of buildings and structures, and the uses of land, including surface, subsurface, and air rights falls within the exclusive province of the district councils. *Id.* In so doing, the RDA inures the district councils with regulatory controls to promulgate prescriptions governing the form and manner of uses and structures on land, and to dictate the form and order of procedures deemed appropriate as to zoning and land use controls for land within its purview in §§22-202 and 22-206, which provide as follows:

22-202. Effect of zoning laws.
(a) Scope of section. -- This section applies to any zoning law that imposes a more

restrictive height limitation, lesser percentage of lot occupancy, wider or larger courts, deeper yards, or other more restrictive limitations than those provided by State, county, municipal, or other local regulations.

(b) Priority of regulations. -- A zoning law described in subsection (a) of this section shall prevail in the area where it is imposed over the limitations provided by State, county, municipal, or other local regulations. (Emphasis added.)

22-206. Procedures.
(a) In general. -- **A district council may amend its zoning laws**,[6] including any maps:
(1) in accordance with procedures established in its zoning laws; and
(2) after holding an advertised public hearing.

(b) **Permissible elements. -- The procedures and zoning laws may include:**
(1) procedures limiting the times when amendments may be adopted;
(2) provisions for hearings and preliminary determinations by an examiner, a board, or any other unit;
(3) procedures for quorums, number of votes required to enact amendments, and variations or increases based on factors such as master plans, recommendations of the hearing examiner, county planning board, municipal corporation, governed special taxing district, or other body, and petitions of abutting property owners, and the evidentiary value that may be accorded to any of these factors; and
(4) procedures for hearings, notice, costs, fees, amendment of applications, recordings, reverter, lapse, and reconsideration de novo of undeveloped zoning amendments.

(c) Notice to nearby property owners -- Prince George's County. --
(1) In Prince George's County, the district council may provide for notice of the public hearing on a proposed amendment to its zoning plan or zoning laws to be given to the owners of properties, as they appear on the assessment rolls of the county, adjoining, across the road from, on the same block as, or in the general vicinity of the property that is the subject of the proposed amendment.
(2) A zoning law adopted under this subsection may require notice to be given by mail or by posting the notice on or in the vicinity of the property involved in the proposed amendment or both.

(d) Limitation. -- In a year in which a district council is elected, the district

[6] Pursuant to §14-101 of the RDA:
(1) "Zoning law" means the legislative implementation of regulations for zoning by a local jurisdiction. (2) "Zoning law" includes a zoning ordinance, zoning regulation, zoning code, and any similar legislative action to implement zoning controls in a local jurisdiction.

> council may not amend a zoning law from November 1 and until the newly elected district council has taken office.

See §§22-202, 22-206, RDA (emphasis added).

Finally, the District Council enjoys specific authority within to regulate land use in the County through establishing local zoning procedures for special exceptions pursuant to §22-301 of the RDA:

> **22-301. Special exceptions and variances.**
> (a) Authorized. --
> **(1) A district council may adopt zoning laws that authorize the board of appeals, the district council, or an administrative office or agency designated by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division.**
> (2) Any zoning law adopted under this subsection shall contain appropriate standards and safeguards to ensure that any special exception or variance that is granted is consistent with the general purposes and intent of the zoning laws.
>
> (b) Appeals. --Subject to § 22-309 of this subtitle, an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.
>
> (c) Authorization to decide certain questions. -- The district council may authorize the board of appeals to interpret zoning maps or decide questions, such as the location of lot lines or district boundary lines, as the questions arise in the administration of zoning laws.

§22-301, RDA (emphasis added).

Accordingly, the District Council adopted specific local procedural provisions in its Zoning Ordinance, in exercise of its ample authority contemplated within §§20-104, 22-201, 22-202, 22-20, 22-301, and 22-310 of the RDA. To illustrate this point, §27-102 of the Zoning Ordinance declares its overarching purpose in exercise of its police power in furtherance of the public safety, health, and welfare of the citizens and residents of the County:

> (1) To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County;

> (2) To implement the General Plan, Area Master Plans, and Functional Master Plans;
> (3) To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;
> (4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;
> (5) To provide adequate light, air, and privacy;
> (6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;
> (7) To protect the County from fire, flood, panic, and other dangers;
> (8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;
> (9) To encourage economic development activities that provide desirable employment and a broad, protected tax base;
> (10) To prevent the overcrowding of land;
> (11) To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;
> (12) To insure the social and economic stability of all parts of the County;
> (13) To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;
> (14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and
> (15) To protect and conserve the agricultural industry and natural resources.

§27-102, Zoning Ordinance.

The Ordinance also sets forth local requirements for special exceptions pursuant to the general zoning authority conferred via §§22-202 and 22-206, as well as its specific authority for regulation of special exceptions conferred by §§22-301 and 22-310 of the RDA. *See generally* §§27-102, 27-311, 27-314–27-317, 27-319, 27-324, Zoning Ordinance. *See also* §§22-301(a)(2), 22-310(a), RDA. Local law regarding special exceptions, found in §27-317 within Part 4 of the Zoning Ordinance, provides as follows:

> [a] special exception **may** be approved, pursuant to §27-317(a), **if**:[7]

[7] *See* §27-108.01, Zoning Ordinance. Interpretations and rules of construction, specifically: "(10) The word 'approve' includes 'approve with conditions, modifications, or amendments'."

> (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
>
> (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
>
> (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
>
> (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
>
> (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
>
> (6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and
>
> (7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).

See §27-317, Zoning Ordinance (emphasis added).

A Private Club which includes Adult Entertainment use is permitted with an approved Special Exception in the C-S-C / D-D-O Zones in accordance with §27-461(b)(5), footnote 58, as follows:

> Any existing establishment in the C-S-C Zone or C-M Zone with a valid use and occupancy permit for an auditorium, private club or lodge that included activity that meets the definition of "adult entertainment" may continue upon approval of a Special Exception. Applications for adult entertainment must be filed and accepted by June 1, 2012. The hours of operation shall be limited to 5:00 P.M. to 3:00 A. M.

§27-107.01 (7.1) of the Zoning Ordinance defines Adult Entertainment as:

> (7.1) Adult Entertainment: Adult Entertainment means any exhibition, performance or dance of any type conducted in a premise where such exhibition,

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"(19) The words 'shall', 'must', 'may only' or 'may not' are always mandatory and not discretionary. **The word 'may' is permissive**." (emphasis added.)

Maryland cases consistently interpret 'may' as permissive; by contrast, 'shall', is consistently interpreted as mandatory under Maryland case law. *See Board of Physician Quality v. Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *State v. Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

> performance or dance involves a person who:
>
> (A) Is unclothed or in such attire, costume or clothing as to expose to view any portion of the breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals with the intent to sexually arouse or excite another person; or
>
> (B) Touches, caresses or fondles the breasts, buttocks, anus, genitals or pubic region of another person, or permits the touching, caressing or fondling of his/her own breasts, buttocks, anus, genitals or pubic region by another person, with the intent to sexually arouse or excite another person.

§ 27-107.01(a)(21.1) defines a Private Club as follows:

> (49) **Club or Lodge, Private**: An establishment providing facilities for entertainment or recreation for only bona fide members and guests, and not operated for profit excluding adult entertainment.

On August 17, 2001, Applicant applied for Use and Occupancy 19557-2001-00 for a "Private Club and Offices" for 7752 Marlboro Pike, Forestville, Maryland. Exhibit 5, Exhibit 52. On August 17, 2001, The Permits and Review Division of the Department of Environmental Resources approved the application and issued Use and Occupancy 19557-2001-00 for a "Clubs/Private/Rec., Office, No Sales or Storage." *See* Exhibit 5, Exhibit 53.

In February of 2007, Applicant applied for Use and Occupancy Permit 3802-2007-01 for "class, small receptions and official gatherings, and a rest area for the elderly." Exhibit 6, Exhibit 52. Correspondence addressed to Mary Hampton, staff of M-NCPPC, submitted contemporaneous with the application, stated as follows:

> **This Hall will be intended for the use of our elder members** who hold the Masonic degrees of 32* and above and suitable vouched for individuals only. **Its uses will be for classes, small reception, and official gatherings.**

Exhibit 12, 10/24/2012 TSR, at 43 (emphasis added).

On March 19, 2007, M. Hughes, of the Permits Division within M-NCPPC, recommended approval as follows: "OK for private club with a maximum of 65 seats" Exhibit

12, 10/24/2012 TSR, at 41−42. Use and Occupancy Permit 3802-2007-01 was then issued, effective April 27, 2007.

This special exception application was accepted for processing on May 17, 2012. §27-461, footnote 58 requires that "[a]pplications for adult entertainment must be filed and accepted by June 1, 2012." §27-296 of the Zoning Ordinance sets forth the required elements for an Application for a Special Exception in the County:

> **(a) General**
>
> *
>
> (3) All Applications shall be on forms provided by the Planning Board. All information shall be typed, except for the signatures.
>
> *
>
> (b) **Contents of Application form**.
>
> (1) The following information shall be included on the Application:
>
> (A) The name, address, and telephone number of the Applicant, and an indication of the Applicant's status as contract purchaser, agent, or owner;
>
> (B) The requested use of the property;
>
> (C) The street address of the property; name of any municipality the property is in; name and number of the Election District the property is in;
>
> (D) The total area of the property (in either acres or square feet);
>
> (E) The property's lot and block number, subdivision name, and plat book and page number, if any; or a description of its acreage, with reference to liber and folio numbers.
>
> (F) The name, address, and signature of each owner of record of the property. Applications for property owned by a corporation must be signed by those officers empowered to act for the corporation; and
>
> (G) The name, address, and telephone number of the correspondent.
>
> (c) **Other submission requirements**.
>
> (1) Along with the Application, the Applicant shall submit the following with all plans prepared at the same scale (where feasible):
>
> (A) An accurate plat (prepared, signed, and sealed by a registered engineer or land surveyor) capable of being reproduced on an ozalid or similar dry-copy machine, or six (6) copies of the plat. This plat shall show:
>
> (i) The present configuration of the property, including bearings and distances (in feet).
>
> (ii) The names of the owners of record or subdivision lot and block numbers of adjoining properties;

(iii) The name, location, distance to the center line, and present right-of-way width of all abutting streets. If the property is not located at the intersection of two (2) streets, the distance to, and the name of, the nearest intersecting street shall be indicated;

(iv) The subdivision lot and block numbers of the subject property (if any);

(v) A north arrow and scale (not smaller than one (1) inch equals four hundred (400) feet);

(vi) The total area of the property (in square feet or acres);

(vii) The location of all existing buildings on the property; and

(viii) The subject property outlined in red.

(B) A site plan (drawn to scale) showing all existing and proposed improvements and uses on the subject property, and the use and zoning of adjacent properties. The site plan shall be in sufficient detail so that a determination can be made that the proposed use will be in compliance with all requirements of this Subtitle applicable to it. The site plan must be capable of being reproduced on an ozalid or similar dry-copy machine, or nine (9) copies of the plan must be supplied. In a Chesapeake Bay Critical Area Overlay Zone, the site plan shall be prepared in accordance with Subtitle 5B.

(C) A landscape plan shall be prepared in accordance with the provisions of the Landscape Manual. The landscape plan must be capable of being reproduced on an ozalid or similar dry-copy machine, or nine (9) copies of the plan must be supplied.

(D) Three (3) copies of the appropriate Zoning Map page on which the property is plotted to scale and outlined in red.

(E) A certificate of public convenience and necessity for a public utility power transmission line right-of-way, tower, pole, conduit, pipeline, or similar facility, if:

(i) The actual record owner of the subject property has not signed the Application; and

(ii) A certificate is required by the State or Federal agency having jurisdiction over the public utility operation.

(F) Three (3) copies of a typewritten statement of justification in support of the request. The statement shall address the provisions of this Subtitle applicable to the requested use. The statement shall also set forth the factual reasons showing why approval of the request would not be detrimental to the public health, safety, and welfare. This statement may be accompanied by three (3) copies of any material which (in the Applicant's opinion) is necessary to clarify or emphasize the typewritten statement. This additional material, if not foldable, shall be not larger than eighteen (18) by twenty-four (24) inches.

(G) A statement listing the name, and the business and residential addresses, of all individuals having at least a five percent (5%) financial interest in the property.

> (H) 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. This 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.
>
> (I) 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).
>
> (J) An approved Natural Resource Inventory.
>
> (K) A Type 2 Tree Conservation Plan prepared in conformance with Division 2 of Subtitle 25 and the Woodland and Wildlife Habitat Conservation Technical Manual or a Standard Letter of Exemption.
>
> (L) A statement of justification describing how the proposed design preserves and restores the regulated environmental features to the fullest extent possible; and
>
> (M) All other data or explanatory material deemed necessary by the District Council, Zoning Hearing Examiner, or Planning Board (submitted in triplicate).
>
> (2) For the purposes of (G), (H), and (I) above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

§27-307 requires that "[a]t least thirty (30) days prior to the public hearing established under Section 27-302(a), the original copy of the application, plans, maps, specifications, Technical Staff Report, and all other data, materials, or record evidence (to date) pertaining to the requested Special Exception shall be sent by the Planning Board to the District Council." This section directly corresponds with Technical Staff Report filing requirements, at least 30 days prior to the scheduled evidentiary hearing, as recited in §25-202 of the RDA.

Next, §27-308 provides that "[a]t least thirty (30) days prior to the public hearing, the original Special Exception application file shall be available for public examination in the Office of the Zoning Hearing Examiner, and a copy of the file shall be available for public examination in the Office of the Planning Board. This file may be reviewed by anyone, and copies of any of its contents may be obtained at a reasonable cost."

These filing requirements within stated minimum time periods prior to the prescribed public hearing ensure orderly administration of a transparent, due process of law in furtherance of fundamental fairness for all interested parties. *See Lussier v. Md. Racing Comm'n*, 343 Md. 681, 688–89, 684 A.2d 804, 807 (1996) (where Legislature delegated broad authority to administrative agency to promulgate regulations in an area, agency's regulations are valid under the statute if they do not contradict the statutory language or purpose); *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881 (1989) (reviewing court will ordinarily follow a zoning agency's interpretation of its own ordinance, even if questionable; agency's decision, favorable or unfavorable to an applicant, is presumed correct); *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169 (2001) (interpretation by a local zoning board is entitled to "considerable weight"). The requirement that Applicant provide full disclosure of its case 30 days prior to the evidentiary hearing ensures that all parties have a reasonable opportunity to prepare a meaningful response or rebuttal.

§27-311 of the Zoning Ordinance specifies, "In connection with each application for a Special Exception, the record shall include a report by the Technical Staff. This report shall include the Staff's recommendation." Accordingly, on October 24, 2012, the Technical Staff issued its required report as to S.E. 4716 and recommended disapproval. In discussing the required findings of §27-317 of the Zoning Ordinance, the Technical Staff stated:

> The proposed continued use as adult entertainment is permitted through the special exception process in the . . . zone but not in the I-1 / D-D-O Zone use table contained in the 2009 *Marlboro Pike Sector Plan and SMA*. Therefore, there is no legislative presumption that the uses can be carried out in harmony with the purposes of the Subtitle with no adverse impacts on health, safety, and welfare. The District Council could have chosen to add that [D-D-O] zone to CB-56-2011, but [it] did not. The presumption is that the Council, relying on Section 27-548.22 of the Zoning Ordinance, found that such uses are **"incompatible with, or detrimental to, the goals of the Development District and purposes of the D-**

D-O Zone."

> The proposed use is not permitted in the zone in which it is located and the permits which were issued were fraudulently obtained through what appears to gross misrepresentation.
>
> The continuation of a use not permitted in the Table of Uses in the [2009] *Marlboro Pike Sector Plan and SMA* would impair the integrity of the plan. Barring evidence to the contrary, we must conclude that, by prohibiting private clubs and adult entertainment, the District Council relied upon Section 27-548.22(b), finding that such uses **"are incompatible with, or detrimental to, the goals for the Development District and purposes of the D-D-O Zone."**
>
> The adult entertainment use operates during the late evening and early morning hours when other nearby uses are closed, with the exception of the liquor store to the south along Marlboro Pike and convenience store to the north along Forestville Road. However, there are residences to the southeast, well within the 1,000-foot radius prescribed by the District Council to ameliorate negative impacts [of the use]. One of the homes, the Harley residence, is less than half that distance from the rear doors of the club, separated from the use by a vacant lot.
>
> The District Council, by omitting the [adult entertainment] uses from the D-D-O Zone, found them to be incompatible uses.

Exhibit 12, 10/24/2012 TSR, at 9−10 (emphasis in original).

After reviewing the prepared Technical Staff Report, on November 8, 2012, the Planning Board did not decide to conduct a public hearing on the subject application and, along with the letter of November 9, 2012, transmitted S.E. 4716 directly to the District Council / Zoning Hearing Examiner, along with a statement that the Technical Staff's recommendation of denial constitutes the Planning Board's recommendation as to the subject application. Exhibit 13, 11/09/2012 Ltr., Hirsch to Floyd, at 1.

Applicant testified during the evidentiary hearing that subject property has been used for Adult Entertainment since 2001. Assuming the truth of these statements, then Applicant committed fraud in obtaining Use and Occupancy Permit 19557-2001-00 and, similarly, Use and Occupancy Permit 3802-2007-01, through specific concealment of the intentions as to intended

use of the subject property. 02/06/2014 Tr., at 48−49. *Accord,* Exhibit 12, 10/24/2012 TSR, at 10. At no time during the pendency of either the 2001 or the 2007 Use and Occupancy Permit Application process did Applicant disclose intentions to include Adult Entertainment uses (in whatever form or definition) at the subject property. Had the Applicant done so, each Application for a Use and Occupancy Permit for a Private Club would have been denied, as expressly stated in the Zoning Ordinance that "no use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses." §27-461(a), Zoning Ordinance; Exhibit 12, 10/24/2012 TSR, at 10. *See also* §§27-114 (No land, building, or structure shall be used in any manner which not allowed by this Subtitle), 27-461(a)(7) (All uses not listed are prohibited). *See, e.g., County Comm'rs of Carroll Co. v. Zent,* 86 Md. App. 745, 759 fn. 9, 587 A.2d 1205, 1212 fn.9 (1991) (Permissive zoning ordinances list the uses permitted, and all other uses are prohibited). Lastly, §27-253(a) of the Zoning Ordinance prohibits the use of any building, structure, or land, or the conversion of any such use, "unless a use and occupancy permit certifying compliance with this Subtitle has been issued for the activity by the Building Inspector."

Moreover, in its supplemental Technical Staff Report, the Zoning Section of the Development Review Division of M-NCPPC, it was noted that the District Council approved detailed site plan application DSP-13014 at the request of the present owner of the shopping center, resulting in a change to the zoning classification for the subject property from I-1 / D-D-O Zones to the C-S-S / D-D-O Zones. *See* Exhibit 31(a), 01/13/2014 Supp. TSR, at 1−2. While the change in zoning category for the underlying zone eliminated a need for Applicant to pursue a variance in conjunction with its special exception application, it did not affect the recommendation of disapproval by the Technical Staff, as follows:

> "The District Council could have chosen to add the C-S-C / D-D-O Zones to the CB-56-2011, but [it] did not. The presumption is that the Council, relying on Section 27[-]548.22(b) of the Zoning Ordinance, found that such uses **"are incompatible with, or detrimental to, the goals of the Development District and purposes of the D-D-O Zone."**

See Exhibit 31(a), 01/13/2014 Supp. TSR, at 2 (emphasis in original).

Additionally, staff noted in its supplemental report that the "District Council's order of approval for DSP-13014 lists auditoriums and clubs or private lodges as prohibited uses for the site, although these uses are already prohibited uses in the C-S-C / D-D-O Zone within the Low-Intensity Business Park Character Area" of the 2009 *Marlboro Pike Sector Plan and SMA*. *See* Exhibit 31(a), 01/13/2014 Supp. TSR, at 2.

Based on our review of the administrative record, we find Applicant's testimony based largely on whatever is most advantageous at that moment. We also find that Applicant's testimony, stated intent to include Adult Entertainment uses at the subject property at the time of each application for a Use and Occupancy Permit in 2001 and 2007, and evidence in the record confirming existence of the Adult Entertainment uses on the property, renders the Use and Occupancy Permits null and void *ab initio*.

As a result, we further find, consistent with the findings and conclusions of the July 8 2015, disposition recommendation of the ZHE, that the parameters of two (2) Use and Occupancy Permits issued to Applicant for a Private Club use on the subject property are limited to the uses as set forth in their respective applications by Applicant—in 2001, for a "private club and office," and in 2007, for "classes, small receptions, and official gatherings, rest area for the elderly"—are insufficient to constitute, even constructively, valid Use and Occupancy Permits for a Private Club at 7752 Forestville Road or 7754 Forestville Road, for which permitted uses thereon includes uses or activity within the definition of Adult Entertainment, amounting to a

claim for relief pursuant to §27-461(b)(5) footnote 58. *See* 07/08/2014 ZHE Disp. Recmd'n, at 11. *See also* Exhibit 31(a), 01/13/2014 Supp. TSR, at 2.

We also agree, based on our review of the record, with the disposition recommendation of disapproval of S.E. 4716 issued by the ZHE on the basis the District Council approved a Detailed Site Plan subsequent to its adoption of CB-56-2011 and determined, on the face of the approval of DSP-13014 that the provisions of footnote 58 in the Use Tables for the C-S-C Zone should not apply to the subject property. *See* 07/08/2014 ZHE Disp. Recmd'n, at 11−12. *See also* Exhibit 31(a), 01/13/2014 Supp. TSR, at 2.

The July 8, 2014, disposition recommendation of denial by the ZHE likewise concludes that provisions within the Zoning Ordinance authorize the District Council to adopt regulations in approving a D-D-O Zone that may supercede other use regulations, including adult entertainment uses, that may otherwise be applicable within the underlying zoning classification for a property. We agree. *See* 07/08/2014 ZHE Disp. Recmd'n, at 13; §§27-548.19 (D-D-O is mapped zone superimposed by SMA over other zones in a designated development district and may modify development requirements in the underlying zones), 27-548.22(a) (uses allowed on property in a Development District Overlay Zone shall be the same as those allowed in the underlying zone in which the property is classified, except as modified by Development District Standards approved by District Council), 27-548.22(b) (Development District Standards may limit land uses or general use types allowed in the underlying zone where the uses are incompatible with, or detrimental to, the goals of the Development District and purposes of the D-D-O Zone), Zoning Ordinance. As a result, the ZHE rightly concluded, and we further find that the language in the 2009 *Marlboro Pike Sector Plan and SMA* D-D-O Zone, via adoption of CR-90-2009 on November 17, 2009, reflects an unambiguous intent by the District Council to

prohibit adult entertainment uses in the Development District at the subject property. *See* 07/08/2014 ZHE Disp. Recmd'n, at 13; Exhibit 31(a), 01/13/2014 Supp. TSR, at 2; Exhibit 12, 10/24/2012 TSR, at 9.

Lastly, while we generally agree with the findings and conclusions of the ZHE and disposition recommendation as to S.E. 4716, we must nevertheless disagree with the finding of the ZHE therein that the "proposed use will not adversely affect the health, safety and welfare of the residents or workers in the area as it is primarily surrounded by commercial and industrial uses, and it has generally coexisted with without incident at the site since 2001." Instead, we find persuasive the hearing testimony and information within reports submitted by the Technical Staff that the exclusion of Adult Entertainment uses from the 2009 *Marlboro Pike Sector Plan and SMA* D-D-O Zone pursuant to §27-548.22(b) plainly constitutes a legislative finding that the adult entertainment use is contrary to the public safety, health, and welfare of the County. What's more, we find that the D-D-O Zone regulations complement other County land use policy for the area, namely its prohibition of certain uses, via §27-1809(b) for in the designated area in order to manage development and minimize loss of life and associated public health and safety risks due to proximity with Joint Base Andrews. We are not persuaded that the proximity of this specific adult entertainment use at this location to specific adjacent residential areas with no more than a vacant lot between the use and residential dwellings, and no buffer, does not constitute probative evidence that the use does not have a greater adverse effect *at this location* within the zone. We find, instead, that this record evidence demonstrates that this particular use proposed at this particular location proposed presents an actual incompatibility between the existing surrounding uses in the vicinity of the proposed adult entertainment. Further, we find that this specific incompatibility of uses is detrimental to the health, safety or welfare of residents

or workers in the area of the proposed use. *See Futoryan v. Mayor & City Council of Baltimore*, 150 Md. App. 157, 178−79, 819 A.2d 1074, 1086 (2003) (administrative agency performs weighing process of probable benefits versus probable detriments of a use on neighboring properties on case-by-case basis, and denial proper where unique circumstances of review of proposal reveals issue of fact as to greater adverse effect adjacent property), *rev'd on other grounds, People's Zoning Counsel of Baltimore Co. v. Loyola College of Md.*, 406 Md. 54, 105, 956 A.2d 166, (2008).

When we, the administrative agency for land use and zoning proposals, review a special exception application, we are mindful to note the premise of Maryland administrative law that "[e]valuation of a special exception application is not an equation to be balanced with formulaic precision." *See Sharp v. Howard County Bd. of Appeals*, 98 Md. App. 57, 73, 632 A.2d 248, 256 (1993). And, this lack of a precise rubric is reflected in the standard of judicial review applied to zoning decisions. *Schultz v. Pritts*, 291 Md. 1, 26, 432 A.2d 1319, 1333 (1981); *see also Alviani v. Dixon*, 365 Md. 95, 107−08, 775 A.2d 1234, 1241 (2001); *Board of County Commissioners v. Oakhill Farms*, 232 Md. 274, 283, 192 A. 2d 761, 766 (1963) (whether test of substantial evidence on the entire record or test against weight of all the evidence is followed, courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences, or to make independent determinations of fact, as to do so constitutes non-judicial role). Rather, courts have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record. In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous or, to use the phrase which has become standard in

Maryland zoning cases, not fairly debatable. *Id*. The basic reason for the fairly debatable standard is that zoning matters are, first of all, legislative functions and, absent arbitrary and capricious actions, are presumptively correct, if based upon substantial evidence, even if substantial evidence to the contrary exists. *See Cremins v. County Comm'rs of Washington County*, 164 Md. App. 426, 438, 883 A.2d 966, 973−74 (2005) (internal quotations and citations omitted). There is substantial evidence to support the zoning agency's conclusion if reasoning minds could reasonably reach the conclusion from facts in the record. Evidence is substantial if there is a little more than a scintilla of evidence. *Id.* Thus, "fairly debatable" under Maryland administrative law is whether the agency's determination is based upon evidence from which reasonable persons could come to different conclusions. *Sembly v. County Bd. of Appeals*, 269 Md. 177, 182, 304 A.2d 814, 818 (1973). *See also Prince George's County v. Meininger*, 264 Md. 148, 151, 285 A.2d 649, 651 (1972). 232 Md. At 283, 193 A. 2d at 766 (internal quotations omitted); *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398, 396 A.2d 1080, 1089 (1979).

Here, while Applicant bears the burden of "adducing testimony which will show that his use meets the prescribed standards and requirements [for a special exception], he does not have the burden of establishing affirmatively . . . that his proposed use would be a benefits to the community"; if Applicant "shows to the satisfaction of the Board that the proposed use would be conducted without real retirement to the neighborhood and would not actually adversely affect the public interest, he has met his burden." *Anderson v. Sawyer*, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974), *citing Turner v. Hammond*, 270 Md. 41, 55, 310 A.2d 543, 551 (1973); *Schultz v. Pritts*, 291 Md. 1, 23, 432 A.2d 1319, 1325 (1981). Moreover, "to the extent of any harm or disturbance to the neighboring area and uses is . . . [but there must be] probative

evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the functioning of the comprehensive plan." *Turner v. Hammond*, 270 Md. 41, 55, 310 A.2d 543, 551 (1973). Consequently, based on review of the administrative record for S.E. 4716, we find the Development District Standards imposed by the D-D-O Zone in the 2009 *Marlboro Pike Sector Plan and SMA*, developed in congruence with the Interim Land Use Control for Military Conformance recommended by the Joint Base Andrews Land Use Study, plainly prohibit adult entertainment. As such, we also find that adult entertainment is not in harmony with the *Marlboro Pike Sector Plan and SMA* Development District vision to "develop flex and auxiliary office space for industrial businesses and related professional service companies that form the supply chain for major industrial tenants." *See* Exhibit 12, 10/24/2012 TSR, at 5.

With this legal framework in mind, including §27-142 of the Zoning Ordinance, we take administrative notice that the burden of proof in any zoning case shall be the Applicant's. *See also Turner v. Hammond*, 270 Md. 41, 55, 310 A.2d 543, 551 (1973) (burden of proof on applicant in special exception case to show that proposed use meets the prescribed standards and requirements); *Prince George's County v. E.L. Gardner, Inc.*, 47 Md. App. 471, 480, 424 A.2d 392, 397 (1981) (reaffirming applicant's burden in special exception to produce probative and credible evidence on all issues required to be proven). We find that Applicant has not, based on the foregoing discussion. We must therefore conclude, then, that S.E. 4716 should be denied.

We now turn to the questions raised by the Applicant, through counsel, at oral argument. *See* 08/01/2014 Ltr., Whitley to Floyd, at 1−2; 02/09/2015 Tr., at 7−9.

- The District Council's jurisdiction to review of S.E. 4716 is limited to appellate jurisdiction based on County Council *County Council of Prince George's County*

v. Zimmer Dev't Co., 217 Md. App. 310, 92 A.3d 601 (2014).[8]

This contention is without factual or legal merit. The reported opinion by the Court of Special Appeals in *County Council of Prince George's County v. Zimmer Dev't Co.*, 217 Md. App. 310, 92 A.3d 601 (2014) ("*Zimmer*"), as it currently stands, applies only to zoning cases decided by the Planning Board. In fact, despite its recency, *Zimmer*, does not address the issue of the District Council's jurisdiction, nor its standard of review pursuant to §27-132(f)(1), as it relates to a disposition recommendation of the ZHE. That determination was rendered by thy intermediate appellate court more than fifteen years again within that court's **1998** decision, *County Council v. Curtis Regency Serv. Corp*., 121 Md. App. 123, 708 A.2d 1058 (1998). In *Curtis Regency*, the court specifically distinguished the role of the Planning Board and the ZHE as follows:

> Before we address the central issue in this case, the standard of review to be applied by the District Council in this type of appeal, we note that the District Council's suggestion, that the procedure used on appeal of a ZHE decision is parallel to an appeal of a Planning Board decision, is without merit. We find that the role of the ZHE is far removed from that of the Planning Board. For example, in a case relied upon by the District Council, *Cox v. Prince George's County*, 86 Md. App. 179, 586 A.2d 43 (1991), this Court explained the process through which a special exception passes before reaching the District Council. First, the Technical Staff makes a report and recommendation and forwards it to the Planning Board. The Planning Board decides whether to accept the Staff's recommendation and forwards its own recommendation to the District Council. **Before the District Council decides the case, however, the ZHE, an employee of the District Council, files a written decision, with specific recommended findings of facts, conclusions of law, and a disposition recommendation.**

[8] We take exception to the *Zimmer* decision including, but not limited to, the holding by the Court of Special Appeals of Maryland as to the District Council's scope of authority, jurisdiction, and standard of review in "zoning cases" for which the Planning Board has rendered preliminary determination. Accordingly, pursuant to §22-407 of the RDA, we sought review of *County Council of Prince George's County v. Zimmer Dev't Co.*, 217 Md. App. 310, 92 A.3d 601 (May 28, 2014) on July 10, 2014, and on September 19, 2014, the highest court in Maryland issued a Writ of Certiorari as to *Zimmer*, assigned as Case No. 64. On March 6, 2015, the Court of Appeals of Maryland heard argument as to Case No. 64, and a final decision from the Maryland high court is pending as of March 9, 2015, the date of this final action as to S.E. 4716.
See http://www.courts.state.md.us/coappeals/petitions/201409petitions.html.

> **Finally, the District Council decides whether to grant the exception**.
>
> **Although the ZHE has authority under § 27-312(a)(C) of the Prince George's County Code to approve or deny a special exception or variance, the Zoning Ordinance specifically retained in the District Council the authority, "upon its own motion," to elect "to make the final decision on the case itself." There is no analogue to this language with regard to the Planning Board's decisions on subdivisions.** Instead, the process used for subdivision plat applications, under § 24-137 of the County Code, is as follows: (1) The applicant files its application with the Planning Board; (2) The Technical Staff then reviews the application and makes a recommendation; (3) The Planning Board reviews the recommendation, holds a public hearing, and then votes on the application; (4) If no appeal is taken, the decision of the Planning Board is final.
>
> **Clearly, the District Council's role with respect to decisions of the ZHE is not parallel to its role with respect to Planning Board decisions**. The Planning Board has original jurisdiction over the administration of subdivision regulations, and the District Council can hear appeals of those decisions only if an applicant or a party of record takes an appeal. It cannot, upon its own motion, make any decision or take the case away from the Planning Board. *See also Colao v. County Council of Prince George's County*, 109 Md. App. 431, 675 A.2d 148 (1996), *aff'd*, 346 Md. 342, 697 A.2d 96 (1997) (reciting process for comprehensive design zone applications when ZHE decision is merely recommendation that District Council may or may not adopt).
>
> Having discarded the District Council's assertion that the standard of review used in hearing an appeal of a ZHE decision is the same standard of review to be used here, we return our focus to what we believe to be the thrust of this case—determining the correct standard of review by the District Council in an appeal of a Planning Board decision to approve a cluster subdivision.

Curtis Regency Serv. Corp., 121 Md. App. 131−33, 708 A.2d 1062−63 (emphasis added).

We find *Curtis Regency* dispositive as to Applicant's appellate issue of appellate versus original jurisdiction, and we therefore reject Applicant's appeal. Moreover, we take appropriate administrative notice of provisions of §25-204 in the RDA, stating that "[a] contested application for a map amendment or special exception may not be granted or denied without written findings of material facts and conclusions." We also note that, if the final disposition by Maryland's highest court as to *Zimmer* restricts the District Council's review to an appellate review *only*,

meaning that our review of the disposition recommendation of the ZHE is limited *solely* to an assessment of whether it is arbitrary, capricious, illegal, or discriminatory, then that view is unduly restrictive, and it is likely at odds with the plain language of the RDA. *See, e.g.*, *Mossburg v. Montgomery County*, 329 Md. 494, 502, 620 A.2d 886, 890 (1993), *quoting Chevy Chase View v. Rothman*, 323 Md. 674, 685, 594 A.2d 1131, 1136 (1991) (RDA exclusive source of zoning authority in those areas of Prince George's County within the Regional District; thus, '"any enactment concerning zoning in the county, which is at variance with the Regional District Act, is inoperative within the district'").

Nevertheless, even if *Zimmer* were deemed applicable to the subject application, insofar as it is construed to limit our review of the subject application to an assessment of whether the the disposition recommendation of the ZHE was arbitrary, capricious, illegal, or discriminatory, then we find, based on our review of the record as set forth in the findings and conclusions set forth herein, that the ZHE's disposition recommendation is not arbitrary, capricious, illegal, or discriminatory.

- The ZHE erred as a matter of law denying the special exception application S.E. 4716, and in determining that the Use and Occupancy Permits for a Private Club on the subject property do not contemplate adult entertainment uses because Applicant has a vested right in the adult entertainment uses on the property, and because because the adult entertainment use dates back to 2001, at the time of the first Use and Occupancy permit issued, before CB-46-2010 became effective to define Adult Entertainment, as well as the special exception requirement established via CB-56-2011. Thus, Applicant may not now, as a matter of constitutional law, be deprived of its vested right in the Adult Entertainment uses on the property without either making the use nonconforming or amortizing Applicant's investment. *See* 02/09/2015 Tr., at 7−9.

As a preliminary matter, we disagree with Finding 23 in the July 8, 2014, disposition recommendation of the ZHE that "Applicant may likely prevail on its request for a certified nonconforming use," and the further statement therein that the ZHE "believe[s] Applicant's

constitutional arguments are premature at this time." *See* 07/08/2014 ZHE Disp. Recmd'n, at 6. On the contrary, we note the long-settled premise of administrative law in Maryland that, when sitting as an administrative agency, we are fully competent to resolve issues of constitutionality and to make determinations as to the validity of statutes or ordinances in adjudicatory administrative proceedings that are subject to judicial review. *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 451 n.8, 758 A.2d 995, 1002 n.8 (2000). This administrative capacity necessarily includes such determinations as to constitutionality of an enactment as applied, as well as to determinations as to constitutionality of an enactment as a whole. *Insurance Commissioner v. Equitable*, 339 Md. 596, 622, 664 A.2d 862, 875 (1995). In fact, the validity of this administrative agency capacity is buttressed by the Maryland courts, which have consistently held that exclusive or primary administrative remedies must be pursued, and exhausted, before resorting to the courts, [even in] in cases presenting constitutional issues. *See, e.g., Maryland Reclamation v. Harford County*, 342 Md. 476, 491−92, 677 A.2d 567, 575 (1996) (holding that, in a zoning case, appellant's "failure to exhaust administrative remedies, before bringing this judicial review action, applies to the federal constitutional issues as well as the state constitutional and nonconstitutional issues"); *Goldstein v. Time-Out Family Amusement*, 301 Md. 583, 591, 483 A.2d 1276, 1281 (1984); *Arnold v. Prince George's County*, 270 Md. 285, 294, 297, 311 A.2d 223, 227−29 (1973); *Agrarian, Inc. v. Zoning Inspector*, 262 Md. 329, 331−32, 277 A.2d 591, 592−93 (1971); *Poe v. Baltimore City*, 241 Md. 303, 216 A.2d 707 (1966); *Baltimore v. Seabolt*, 210 Md. 199, 123 A.2d 207 (1956); *Tanner v. McKeldin*, 202 Md. 569, 577, 97 A.2d 449, 453 (1953); *Hoffman v. City of Baltimore*, 197 Md. 294, 305−06, 79 A.2d 367, 372 (1951). *See also Public Service Comm'n v. Wilson*, 389 Md. 27, 88−93, 882 A.2d 849, 885−89 (2005). Furthermore, where a constitutional issue is raised during an administrative

agency adjudicatory proceeding, and the resolution of that issue is necessary for a proper disposition of the case, the agency's failure to decide the constitutional issue constitutes error. *Montgomery County v. Broadcast Equities, Inc.*, *supra*, 360 Md. at 451 n.8, 758 A.2d at 1002 n .8; *Maryland Reclamation v. Harford County*, 342 Md. at 491−92, 677 A.2d at 575. However, the Court of Appeals pointed out in the *Broadcast Equities* opinion, that **where the administrative agency might afford the plaintiff relief on non-constitutional grounds, it is unnecessary to rule on the constitutional issue**. **That is, the firmly established principle of Maryland law is that we will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground**. *Ashford v. State*, 358 Md. 552, 561, 750 A.2d 35, 40 (2000), *quoting State v. Lancaster*, 352 Md. 385, 404 n.13, 631 A.2d 453, 463 n.13 (1993). *See generally Harryman v. State*, 359 Md. 492, 503 n.6, 754 A.2d 1018, 1024 n.6 (2000); *Thrower v. State Bureau of Support Enforcement*, 358 Md. 146, 149 n.2, 747 A.2d 634, 636 n.2 (2000); *Dorsey v. State*, 356 Md. 324, 342, 739 A.2d 41, 51 (1999), and cases therein cited (emphasis added).

Applicant advanced no sufficient argument as to why the ZHE, or the District Council, must invoke the constitutional exception in this matter.[9] In fact, in direct contradiction to that position, CB-56-2011 provides a special exception process and for administrative relief on non-constitutional grounds. As a result, we need not reach the constitutionality of CB-56-2011, as S.E. 4716 may properly be decided on a non-constitutional ground, that is, that Applicant could have submitted a legally sufficient application to satisfy the legal requirements of the Zoning

[9] As it relates to the constitutionality of CB-56-2011, we take administrative notice of the fact that, in parallel litigation, before the United States District Court for the District of Maryland, the Honorable Deborah K. Chasnow, has retained jurisdiction over the constitutionality of CB-56-2011. *See* 02/09/2015, Tr., at 9 (Applicant's counsel conceded at oral argument that the constitutionality of CB-56-2011 is currently before the federal court, and that "this case is going to be decided in Annapolis or in Richmond"). *See also* U.S. Dist. Ct. Case No. 13-1722-DKC.

Ordinance.

We further disagree with Finding 22 of the ZHE within the July 8, 2014, disposition recommendation as to the merits of the application for certification of a nonconforming use filed by Applicant as to the adult entertainment uses at the subject property and characterization that it "is proper, since it has been held that where there was a valid use of property and a subsequent change in zoning invalidated such use, the change does not apply to the legal nonconforming use." *See* 07/08/2014 ZHE Disp. Recmd'n, at 6. As explained in more detail below, Applicant cannot show how it can meet the threshold requirements to establish a nonconforming use under Maryland law.

Rather, and contrary to Finding 22 of the ZHE, above, we find that Applicant has no vested right to the proposed Adult Entertainment use on the subject property. We take administrative notice that the approval for both Use and Occupancy permits, 19557-2001-00 and 3802-2007-01, for the subject property issued on August 17, 2001, and April 27, 2007, respectively. We take further administrative notice that both permits approvals occurred well before provisions of CB-46-2010 and CB-56-2011—Ordinances enacted by the Council pursuant to its broad zoning regulatory authority that, among other things, defined Adult Entertainment as a use in the County and established special exception requirements for certain existing businesses with Adult Entertainment in the C-S-C and C-M Zones—took effect on October 25, 2010, and January 3, 2012, respectively. These regulations must be read in accordance with longstanding principles of statutory construction. *See Koste v. Town of Oxford*, 431 Md. 14, 17−18 (2013)[10]. As thoroughly discussed herein, the RDA vests broad authority in the district

[10] ("We…do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context

councils to promulgate, adopt, and amend local zoning laws. *See* §22-104 of the RDA. In like fashion, the RDA also provides that "[a] person may continue, and appropriate licenses may be issued to the person for, a lawful nonconforming use existing on the effective date of the respective zoning laws in the metropolitan district." *See* §22-113, RDA. In reading these provisions *in pari materia*, the RDA plainly imparts ample authority to establish reasonable regulations pertaining to nonconforming uses. As a result, we find that the provisions of CB-56-2011 serve only to modify the Table of Uses for the Commercial Zones, specifically the C-S-C Zone which is at issue for the subject application, and constitutes an enactment not directly inapposite to the RDA.

Further, the Zoning Ordinance flatly proscribes any use in a Commercial Zone not expressly permitted in the corresponding Table of Uses for the Commercial Zones. *See* §§27-107.01(a)(166) (requiring that nonconforming use be "lawfully established" prior to enactment of the regulation), 27-114 ("No land, building, or structure shall be used in any manner which not allowed by this Subtitle"), 27-461(a)(7) ("All uses not listed are prohibited"), 27-253(a) (prohibiting use of any building, structure, or land, or the conversion of any such use "unless a use and occupancy permit certifying compliance with this Subtitle has been issued for the activity by the Building Inspector"), Zoning Ordinance. *See also County Comm'rs of Carroll County v. Zent*, 86 Md. App. 745, 759 fn. 9, 587 A.2d 1205, 1212 fn.9 (1991) (permissive zoning ordinances list the uses permitted and all other uses are prohibited).

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of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope") (internal quotations and citations omitted).

Reading the longstanding provisions of County zoning law, above, in context with the regulatory provisions of CB-56-2011—being a comparatively recent enactment—in order for Applicant to make a valid claim as to any vested right in an alleged nonconforming use, it must have a valid use and occupancy permit that expressly permitted adult entertainment activities. §27-108.01(a)(15), Zoning Ordinance[11] Also, the requirements of CB-56-2011 cannot be viewed as constitutionally impermissible restrictions, since the subject use and occupancy permits long predate the January 3, 2012, effective date of CB-56-2011. *See Mayor and City Council of Baltimore v. Dembo, Inc.*, 123 Md. App. 527, 542, 719 A.2d 1007, 1015 (1998) ("majority rule follows the view that a nonconforming use business acquires no exception from subsequently enacted licensing requirements, provided such requirements do not effectively preclude continuation of the business"); *Powell v. Calvert Co.*, 368 Md. 400, 795 A.2d 96 (2002) (in absence of a vested right, board must apply law in effect at the time case is heard). The requirements for a valid use and occupancy permit **predate** Applicant's alleged "lawful" use; as a result, it cannot be construed as a requirement that effectively precludes continuation of the business. The provisions of CB-56-2011 merely incorporated these longstanding regulations into its update of the Table of Uses.

It is incumbent upon the Applicant to establish in the record that it was operating the property in a "then-lawful manner." *Dembo, supra*, 123 Md. App. at 542, 719 A.2d at 1015. The law is rather well-established that a nonconforming use may **only** exist where person utilizes property in a certain manner that is **lawful** before, and up to, the time of the adoption of a zoning

[11] Nothing in the uses described in Use and Occupancy Permit No.'s 19557-2001-00 or 3802-2007-01, "private club with offices," or "ok for private club with a maximum of 65 seats," remotely lends itself to a conclusion that Adult Entertainment activities were permitted, even under a specious assumption that Adult Entertainment was implied due to its "like kind or character" to the permitted uses.

ordinance, even though the subsequently adopted zoning ordinance may render that previously lawful use non-permitted. *See Purich v. Draper Properties, Inc.,* 395 Md. 694, 708, 912 A.2d 598, 607 (2006) (emphasis added). Based on the evidence in the administrative record before us, we find Applicant has not established that it was operating lawfully prior to the effective date of CB-56-2011. Finally, to the extent that Applicant argues that it has a legal nonconforming use and, provided we find that such argument is relevant, then Applicant failed to meet its required burden of proof to establish those facts in the record in order to meet its burden of persuasion. *See* §27-142, Zoning Ordinance. *See also* 07/08/2015 ZHE Disp. Recmd'n, at 7−8; Exhibit 5; Exhibit 6; Exhibit 12, 10/24/2012 TSR at 4−5, 7−8, 10; Exhibit 52; Exhibit 53.

On the other hand, we find that the ZHE correctly found, and the evidence in the administrative record plainly supports, that Applicant did not have or maintain a valid use and occupancy permit expressly permitting any adult entertainment use. Even if this finding was absent from the record, for the reasons stated above, we further find that Applicant, through pursuit of the special exception approval process available at law, may obtain relief on non-constitutional grounds, and it is therefore unnecessary to rule on the constitutionality of CB-56-2011.

Likewise, the ZHE also did not err in holding, as a matter of law, that the Use and Occupancy Permits for a Private Club and Office issued for the subject property are limited to the uses set forth by Applicant in 2001 and 2007, respectively. *See* 07/08/2014 ZHE Disp. Recmd'n, at 7−8; Exhibit 12, 10/24/2012 TSR, at 7−8. What's more, and contrary to Applicant's assertion, we find no fault with the ZHE's assessment concerning Applicant's testimony, in that if the subject property has had adult entertainment uses since 2001, then its use and occupancy permits were obtained unlawfully. *See* 07/08/2014 ZHE Disp. Recmd'n, at 11. Moreover, the

only uses contemplated for the Use and Occupancy Permits for a Private Club for the subject property those uses declared by Applicant in its 2001 and 2007 applications—for a "Private Club and Offices, Club/Private. Rec., No Sales or Storage," and a "Private Club" for "classes, small receptions, and official gatherings, and rest area for elderly." *Id.* *See also* Exhibit 12, at 39−43; §§27-114 ("No land, building, or structure shall be used in any manner which not allowed by this Subtitle"), 27-461(a) ("No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses"), 27-461(a)(7) ("All uses not listed are prohibited"), Zoning Ordinance.

Likewise, a fundamental element of vested rights in Maryland is a show that lawful permits were obtained. *See Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 994 A.2d 842 (2010) (in order to obtain a vested right in an existing zoning use, property owner must initially obtain a valid permit); *Marzullo v. Kahl*, 366 Md. 158, 191, 783 A.2d 169, 188 (2001) (stating that the first requirement to obtain a vested right is that the claimant has a valid permit); *Rockville Fuel & Feed Co. v. Gaithersburg*, 266 Md. 117, 127, 291 A.2d 672, 677 (1972) (stating that "'vested right' could only result when a lawful permit was obtained and the owner, in good faith, has proceeded with such construction under it"). The doctrine of vested rights has a constitutional foundation, and "rests upon the legal theory that when a property owner **obtains a lawful building permit**, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations." *Prince George's County v. Sunrise Dev't Ltd. Partnership*, 330 Md. 297, 312, 623 A.2d 1296, 1304 (1996) (emphasis added); *see also Town of Sykesville v. West Shore Communs*., 110 Md. App. 300, 316, 677 A.2d 102, 111 (1996); *Prince George's County v. Equitable Trust Co., Inc*., 44 Md. App. 272, 278, 408 A.2d 737, 741 (1979). Simply put, based on the evidence in the

administrative record, Applicant has not shown it ever had a lawfully issued use and occupancy permit for adult entertainment, regardless of whether such activity was a defined use in the Zoning Ordinance. *See* §§27-114 ("No land, building, or structure shall be used in any manner which not allowed by this Subtitle"), 27-461(a) ("No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses"), 27-461(a)(7) ("All uses not listed are prohibited"), Zoning Ordinance. We, therefore, find Applicant's appeal on this issue meritless.

On the other hand, we find that the ZHE correctly found, and the evidence in the administrative record plainly supports, that Applicant did not have or maintain a valid use and occupancy permit expressly permitting any adult entertainment use. Even if this finding was absent from the record, for the reasons stated above, we further find that Applicant, through pursuit of the special exception approval process available at law, may obtain relief on non-constitutional grounds, and it is therefore unnecessary to rule on the constitutionality of CB-56-2011.

The ZHE findings are supported by specific exhibits, testimony, and legal authority within the Zoning Ordinance. *See People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 85−87, 956 A.2d 166, 194−95 (2008) *citing People's Counsel for Baltimore Co. v. Mangione*, 85 Md. App. 738, 751−52, 584 A.2d 1318, 1324−25 (1991) (evaluation of evidence in special exception application not balanced with formulaic precision; finder of fact must judge credibility of each witness and apply to evidence presented). *See also Anderson v. Sawyer*, 23 Md. App. 612, 620−22, 329 A.2d 716, 722−23 (1974) (finding testimony of expert no more probative value than layman in evaluation of evidence as to special exception application).

- The ZHE erred in the use of the approval of DSP-13014 by the District Council as a basis to recommend denial of the S.E. 4716, as the ZHE concluded that approval of DSP-13014 constitutes an amendment of the Development District Overlay (D-D-O) Zone

> applicable to the subject property. Applicant further alleges the Council authority under State and County law sufficient to prohibit uses by conditions of approval for a detailed site plan to amend the D-D-O Zone that, by virtue of adoption of that site plan application, change the underlying zoning classification assigned to the subject property and establish conditions which prohibited certain uses as conditions of approval. *See* 08/01/2014 Ltr., Whitley to Floyd, at 1−2; 02/09/2015 Tr., at 7−9.

Applicant avers that the Council is not legally authorized to rezone property through approval of a detailed site application seeking amendments to an applicable D-D-O Zone on the property. Applicant further contends that, in its approval of the site plan application, the Council is also unauthorized to attach conditions of approval to any rezoning that was effectuated by approving a detailed site plan, nor may its unauthorized rezoning be a basis to disapprove a special exception application for a conditional use on the property. We disagree, for the reasons set forth below.

As discussed in the our findings and conclusions above, the proposed site of the adult entertainment use is subject to the requirements D-D-O Zone Development District Standards that were approved in the 2009 *Marlboro Pike Sector Plan and SMA*, because the use restrictions therein prohibit adult entertainment and the use is not in harmony the vision for the Development District. We find persuasive the conclusions on this point within the Technical Staff Report, wherein it was noted that the District Council approved detailed site plan application DSP-13014 at the request of the present owner of the shopping center, resulting in a change to the zoning classification for the subject property from I-1 / D-D-O Zone to the C-S-S / D-D-O Zone. *See* Exhibit 31(a), 01/13/2014 Supp. TSR, at 1−2. Notwithstanding, while the change in zoning category for the underlying zone eliminated the need for Applicant to pursue a variance in conjunction with its special exception application, it did not affect the recommendation of disapproval by the Technical Staff, as follows:

> "The District Council could have chosen to add the C-S-C / D-D-O Zones to the CB-56-2011, but [it] did not. The presumption is that the Council, relying on Section 27[-]548.22(b) of the Zoning Ordinance, found that such uses **"are incompatible with, or detrimental to, the goals of the Development District and purposes of the D-D-O Zone."**

See Exhibit 31(a), 01/13/2014 Supp. TSR, at 2 (emphasis in original).

Additionally, staff noted in its supplemental report that the "District Council's order of approval for DSP-13014 lists auditoriums and clubs or private lodges as prohibited uses for the site, although these uses are already prohibited uses in the C-S-C / D-D-O Zone within the Low-Intensity Business Park Character Area" of the 2009 *Marlboro Pike Sector Plan and SMA*. *See* Exhibit 31(a), 01/13/2014 Supp. TSR, at 2.

In conclusion, for the reasons stated above, we find: (1) that the proposed use is not in harmony with the purposes stated in §27-317(a)(1) of the Zoning Ordinance; (2) that the proposed use is not in conformance with all of the requirements and regulations of the Zoning Ordinance, §27-317(a)(2); and (3) that the proposed use will adversely affect the health, safety, and welfare of residents or workers in the area as stated by the testimony of Ms. Margaret White during the public hearing before the ZHE. *See* §27-317(a)(4), Zoning Ordinance. *See also* 02/09/2015 Tr., *passim*; 07/08/2014 ZHE Disp. Recmnd'n, at 6−7; 02/06/2014 Tr., at 182−83, 185. Applicant, thus, has failed to adduce sufficient evidence to support a finding, or to otherwise persuade us that Adult Entertainment uses on the subject property will not be detrimental to the use or development of adjacent properties, or to the general neighborhood. §27-317(a)(5), Zoning Ordinance.

As discussed, *infra*, before us is the denial of a special exception case. As stated in Maryland cases, the Applicant's burden "assumes not merely the lesser burden of generating a fairly debatable issue so as to permit a ruling in its favor but the significantly greater burden of

actually dispelling fair debate by proof so clear and decisive as legally to compel a ruling in its favor." *B. P Oil, Inc. v. Bd. of Appeals*, 42 Md. App. 576, 580, 401 A.2d 1054 (1979). What's more, in two special exception cases, the Court of Special Appeals of Maryland has stated, "It is the applicant . . . who bears the burden of persuading the administrative board that the desired use will not adversely affect the neighborhood." *See Futoryan v. City of Baltimore*, 150 Md. App. 157, 172, 819 A.2d 1074 (2003), *quoting Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974), *rev'd on other grounds, People's Counsel for Baltimore Co. v. Loyola College of Md.*, 406 Md. 54, 956 A.2d 166 (2008). Moreover, *Anderson* Court stated that a special exception applicant "has the burden of adducing testimony" to show, "to the satisfaction of the board," that the proposed use "would be conducted without real detriment to the neighborhood" and "would not actually adversely affect the public interest." *Anderson*, 23 Md. App. at 617, 329 A.2d 716.

The Court, in *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26, *cert. denied*, 370 Md. 269, 805 A.2d 265 (2002), where a zoning line extension was denied, gave a lengthy review of the burden of proof issue. In conceding that the applicant had met the burden of production, the *Angelini* Court held that the zoning board was still entitled not to approve the applicant's request:

> The appellant [or applicant] undertook to persuade the Board to alter [the zoning boundary]. It was the appellant who thereby became the proponent of the proposition on the table for debate, and it was the appellant, therefore, to whom was allocated the burden of persuasion. In this case, the Board was simply not persuaded. It is never the case that the Board must be either (1) persuaded by the appellant to act or (2) persuaded by the opponents not to act. What would happen, in so Manichean a world, if the Board were not persuaded by either side? There is only one burden of persuasion, and it points in only one direction. In abstract theory, [opposition parties] are not required to present any evidence at all, let alone substantial evidence."

144 Md.App. at 376−77, 798 A.2d 26 (internal quotes and citations omitted).

Additionally, the stated precedent upon which the *Angelini* court based its decision is *Pollard's Towing, Inc. v. Berman's Body Frame, Inc*., 137 Md. App. 277, 289−90, 768 A.2d 131 (2001), holding in pertinent part, as follows:

> In this case, all that was required was that the Board be not persuaded that there was a need for additional towing services. To the extent its finding was weightier than that, the incremental weight was surplusage. For less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something. These decisions indicate that the burden of persuasion remains with the applicant and that the opposition has no evidentiary burden at all, in cases where the zoning agency denies the application.

Pollard, 137 Md. App. at 289−90, 768 A.2d 131(internal citations omitted).

NOW, THEREFORE, IT IS HEREBY ORDERED, after review of the administrative record, that permission to use approximately two units within the Forestville Plaza Shopping Center, or approximately 4,000 square feet of an 18.17-acre shopping center property in the C-S-C (Commercial Shopping Center) / D-D-O (Development District Overlay) Zone, located at the northeast corner of Forestville Road and Marlboro Pike, also identified as 7752 and 7754 Forestville Road, Forestville, Maryland, as a Private Club with Adult Entertainment, be and the same is hereby DENIED.

Ordered this 9th day of March, 2015, by the following vote:

In Favor: Council Members Davis, Franklin, Glaros, Harrison, Lehman, Patterson, Taveras, Toles and Turner.

Opposed:

Abstained:

Absent:

Vote: 9-0

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

By: _____
Mel Franklin, Chairman

ATTEST:

_____
Redis C. Floyd
Clerk of the Council