

Case No.: S.E. 4717

Applicant: CD#15CL2001, Inc.
d/b/a SHRINERS
CD#15CL2001, Inc., d/b/a
X4B SHRINERS UNITED,
d/b/a X4B Luxury Club

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 Application No. 4717, that permission to use approximately 4,200 square feet of the 9.3 acre Rosecroft Shopping Center in the C-S-C (Commercial Shopping Center) Zone, for adult entertainment, located along the south side of Brinkley Road, approximately 1,400 feet east of its intersection with Fisher Road, also identified as 3279 Brinkley Road, Fort Washington, Maryland, 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, 2}

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October 1, 2012, pursuant to the provisions of Ch. 426, 2012 Laws of Maryland, Article 28 §§1-101 through 8-127 are repealed and recodified at Md.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. 4717. *See also* § 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.

² 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*

FACTUAL AND PROCEDURAL BACKGROUND

On May 21, 2012, the Development Review Division of the Prince George's County Planning Department accepted, for processing, an application for special exception (S.E.) 4717, filed by CD#15CL2001, Inc., d/b/a SHRINERS CD#15CL2001, Inc., d/b/a X4B SHRINERS UNITED, d/b/a X4B Luxury Club (Applicant), Post Office Box 471647, District Heights, Maryland 20753, to operate an adult entertainment establishment in the C-S-C Zone (Commercial Shopping Center). *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 DISAPPROVAL of S.E. 4717. *See* Exhibit 12, 10/24/2012 TSR.

On November 8, 2012, after review of the Technical Staff Report, the Prince George's County Planning Board, instead of scheduling S.E. 4717 for public hearing, adopted staff's recommendation, and transmitted the subject application directly to the District Council/ZHE. *See* Exhibit 14, 11/9/2012 Ltr., Hirsch to Webb.

On June 14, 2013, Applicant, through counsel, filed a Complaint for Declaratory Judgment,

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 also* 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."

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-56-2011.³ Applicant alleges therein that the elimination of conforming locations, and the special exception requirements of this challenged legislation, constitutes 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.⁴ 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

³ CB-46-2010 is an ordinance concerning, Use and Occupancy Permits, which was enacted for the purpose of amending the definitions, and amending the requirements, and enforcement procedures for certain commercial or industrial uses in Commercial and Industrial Zones, and amending the enforcement procedures for violations of use and occupancy permit requirements. CB-56-2011 is an ordinance concerning, Use and Occupancy Permits, which was enacted for the purpose of amending the definitions, and amending the requirements, for certain commercial or industrial uses in Commercial and Industrial Zones.

⁴ 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.”

- **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 Exh. 27, 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 December 26, 2013, in addition to its pending federal litigation, Applicant also filed a Complaint for Declaratory Judgment, Interlocutory and Permanent Injunctive Relief in the Circuit Court for Prince George’s County, which has been assigned Civil Action at Law (CAL) number 13-38944. The Complaint sought to enjoin the enforcement of County Bills (CB) 46-2010 and 56-2011. A hearing was held and Applicant’s request to enjoin said bills was DENIED. CAL13-38944 has been stayed pending the outcome of Applicant’s federal litigation.

On January 29, 2014, February 19, 2014, and March 6, 2014, the ZHE held hearings on S.E. 4717.

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 denied. 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.

On January 22, 2015, the ZHE issued a written disposition recommendation in accordance with §27-127 of the Zoning Ordinance, which recommended approval of S.E. 4717, subject to certain conditions. *See* 01/15/2014 ZHE Disp. Recmd'n.

On February 9, 2015, the District Council elected to make the final decision in this matter, and oral argument was scheduled on May 11, 2015, which was continued because counsel for Applicant failed to appear.

On June 15, 2015, oral argument was held. At oral argument, counsel for Applicant conceded that the constitutionality of CB-46-2010 and CB-56-2011 was pending before the federal court, and that Applicant was exhausting administrative remedies. At the conclusion of oral argument, the District Council took this matter under advisement.

FINDINGS AND CONCLUSIONS

- Zoning Authority

The Prince George's County Council, by way of the express authority conferred by the Maryland General Assembly via the Regional District Act ("RDA"), sits as the District Council for that portion of the Maryland-Washington Regional District within Prince George's County. *See* §§ 14-101(f) and 22-101(b), of the Land Use Article. As such, the RDA designates the Prince George's County Council, sitting as the District Council, 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), and 22-407(a), of the Land Use Article. In so doing, the Legislature designates specific authority for the Council to make factual determinations and to adjudicate certain factual disputes in reaching a final decision in zoning cases.

Further, and pursuant to § 22-104 of the Land Use Article, the District Council may, by ordinance, adopt and amend the text of the zoning ordinance and may, by resolution or ordinance, adopt and amend the 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. Accordingly, in exercising its authority to regulate land use and zoning in the County, the District Council enacted certain procedural prescriptions within the County Zoning Ordinance, being also Subtitle 27 of the Prince George's Code. *See Prince George's County v. Ray's Used Cars*, 398 Md. 632, 635–36, 922 A.2d 495, 497 (2007). In conveying this expansive zoning authority, the Maryland Legislature also ceded substantial legislative prerogative upon the district councils in § 22-104 of the Land Use Article, in furtherance of its zoning powers and responsibilities.

In direct conformance with the RDA, the 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 of the Land Use Article. 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 the RDA, within §§ 22-202 and 22-206 of the Land Use Article.

Pursuant to § 22-202 of the Land Use Article, zoning laws in Prince George's County have the following effect:

(a) Scope of section. -- This section applies to any zoning law⁵ 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).

The RDA also vests with the District Council specific authority to regulate land use in the County in establishing procedures relative to special exceptions and variances, appeal of special exceptions, special exceptions for rubble landfill, and special exceptions for sand and gravel mining. *See* §§ 22-301, 22-310, 25-208, and 25-209, of the Land Use Article. Section 22-301 of the Land Use Article, which governs special exceptions, provides:

⁵ "Zoning law" is defined in §14-101(q) of the Land Use Article as follows:

(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.

(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.

Section 22-310 of the Land Use Article, which governs the appeal of a special exception, provides:

(a) To district council. -- Except as provided in subsection (b) of this section, the district council shall provide for the appeal of decisions of the zoning hearing examiner in special exception cases to the district council.

(b) Municipal corporation -- Voting. -- If a special exception is contrary to the recommendation of a municipal corporation that has any portion of the property subject to the special exception in the municipal boundaries, the district council shall require a two-thirds vote of all district council members to approve the special exception.

In turn, the District Council adopted local zoning provisions in the Zoning Ordinance in furtherance of the exercise of its ample authority supplied pursuant to the RDA. Section 27-102, PGCZO, provides overarching purposes of the Zoning Ordinance to guide 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.

The Zoning Ordinance regulates special exceptions pursuant to the general zoning authority the RDA. Regarding special exceptions, § 27-317, within Part 4 of PGCZO, provides:

A special exception **may** be approved, pursuant to §27-317(a), **if**.⁶

- (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;

⁶ See § 27-108.01, PGCZO, “Interpretations and rules of construction.”

(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).

(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).

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA. (Emphasis added).

- Subject Property

The site is located along the south side of Brinkley Road, approximately 1,400 east of its intersection with Fisher Road. The property consists of 9.3 acres in the C-S-C Zone and is known as the Rosecroft Shopping Center. This integrated shopping center was constructed in 1971 and has a gross leasable area of 113,095 square feet. Approximately 482 surface parking spaces and four loading spaces are provided on the site to serve the shopping center. The Rosecroft Shopping Center is part of the larger Rosecroft community which lies south of the Capital Beltway (I-495), north and west of Henson Creek, and north and east of Rosecroft Raceway. The use is located within an integrated shopping center which is defined in § 27-107.01(208) of the Zoning Ordinance as a group of three or more retail stores planned and developed under a uniform development scheme and served by common and immediate off-street parking and loading facilities.

The neighborhood is defined by the following boundaries:

North and West	Henson Creek
North and East	Rosecroft Raceway
South	Capital Beltway (I-495)

The property is surrounded by the following uses:

North	Brinkley	Road right-of-way
South		Huntley Square Condominiums in the R-18 Zone ⁷
East		Gas Station and Food or Beverage Store in C-S-C Zone
West		Brinkley House Apartments in the R-18 Zone

See Exh. 4 and 12, pp. 8 and 88.

The following permits have been issued for the property since its initial construction:

August 27, 1969 — Final Plat of Subdivision, WWW 72@35, was recorded in Land Records.

1971 — The shopping center was initially constructed per the approval of Building Permit No. 1375-71-CG.

December 1987 — Appeal No. 8974 was granted by the Board of Zoning Appeals for the requirement for a ten-foot-wide landscape strip and rear yard landscaping.

March 10, 1988 — Departure from Design Standards application, DDS-309 was approved by the Planning Board to waive the requirement for access to a loading space being within 50-feet of residentially-zoned land (PGCPB Resolution No. 88-104).

November 2, 2000 — Detailed Site Plan application, DSP-00036 was approved by the Planning Board for the Rosecroft Shopping Center Day Care Facility. The day care was approved for up to 100 children to occupy approximately 14,280 square feet in the southwest corner of the shopping center (PGCPB Resolution No. 00-202).

September 21, 2006 — Use and Occupancy Permit No. 37380-2006-U-01 was approved by the Maryland-National Capital Park and Planning Commission (M-NCPPC) Permit Review Section per the submitted documentation from the applicant and Section 27-101.01(49) of the Zoning Ordinance. The permit was approved

⁷ R-18 Zone consists of Multifamily Medium Density Residential. See § 27-109. The purposes of the R-18 Zone are: (A) To make available suitable sites for multifamily developments of low and moderate density and building bulk; (B) To provide for this type of development at locations recommended in a Master Plan, or at other locations which are found suitable by the District Council; (C) To provide for this type of development at locations in the immediate vicinity of the moderate-sized commercial centers of the County; and (D) To permit the development of moderately tall multifamily buildings, provided they are surrounded by sufficient open space in order to prevent detrimental effects on the use or development of other properties in the general vicinity. See § 27-436.

to allow CD#15CL2001INC. (Doing business as Shriners United) to operate a 4,200-square-foot private club in the C-S-C Zone.

October 4, 2006 — During the inspection for the issuance of Use and Occupancy Permit 37380-2006-U, the Department of Environmental Resources (DER) issued a correction order to the applicant due to a change in the use group of the building to a different type of assembly use (from a church to a private club). DER required the applicant to amend the use and occupancy permit to a building permit and obtain the services of a Fire Protection Specialist that could prepare a detailed plan for the review of the County Fire Engineer.

November 9, 2006 — Building Permit 45960-2006 was approved by M-NCPPC for a private club and the permit was further amended on May 16, 2007 through the approval of Permit 45960-2006-CU-01 to add the “doing business as X4B name” to the permit.

August 10, 2007 — Use and Occupancy Permit No. 45960-2006-CUW was issued by the County to the Shriners CD#15CL2001, Inc. (operating as X4B Shriners United) to operate a 4,200-square-foot private club per the submitted documentation to the M-NCPPC Permit Review Section and in accordance with Section 27-107.01(49) of the Zoning Ordinance.

- Application for Special Exception

S.E. 4717 is a request for permission to use the subject property for Adult Entertainment. Adult Entertainment is prohibited in the C-S-C Zone unless:

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. (Emphasis added).

See § 27-461 (b), Footnote 58, CB-56-2011.

- The 2007 Use and Occupancy Permit

During the review of the use and occupancy permit, the M-NCPPC Permit Review Section requested from the Applicant evidence demonstrating that the proposed use met the definition of a private club as stated in Section 27-107.01(49) of the Zoning Ordinance. The Applicant complied and submitted Articles of Incorporation and a tax-exempt determination from the Internal Revenue Service (IRS). The Applicant also submitted a letter from the IRS dated March 23, 2005, which determined that the applicant, CD#15CL2001, Inc., was exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. Organizations exempt under Section 501(c)(3) of the Internal Revenue Code are further classified as either public charities or private foundations. The Internal Revenue Service (IRS) determined that the applicant, CD#15CL2001, Inc., **was a public charity**. The Applicant additionally submitted documentation stating that the Shriners United was an auxiliary group of the Masonic Lodge. A copy of the retail lease between the landlord of the Rosecroft Shopping Center and CD#15 CL2001,INC., doing business as the Shriners United, was also submitted. Paragraph (L) within the lease agreement states the following:

Permitted Use of Premises: Non-Profit, Charitable Masonic Fraternal Organization. Tenant will utilize space primarily to hold lodge meetings, conduct educational classes, hold fund raisers, and provide receptions/parties for members. As a secondary use, Tenant will rent out space to other Fraternal, Masonic Groups to hold the same types of events as described above. At some events, alcoholic beverages may be brought in by the group. Tenant will meet all County ABC requirements for “one day” usage of alcoholic beverages and carry the necessary insurance.

Whether the applicant operates in accordance with their signed lease agreement with the owner of the shopping center would appear to be a private legal matter between the two parties. However, the lease agreement with the shopping center was submitted to M-NCPPC staff during the review of the use and occupancy permit to further clarify how the proposed use intended to operate at this location. The use of adult entertainment was not one of the “permitted uses” that was proposed at the time.

See Exhibit 12, 10/24/2012 TSR.

On September 19, 2006, the Permit Review Section issued written comments to the Applicant for Use and Occupancy Permit 37380-2006-U, which requested clarification of the proposed use pursuant to the definition of a private club in accordance with § 27-107.01(49) of the Zoning Ordinance. Comments provided the Applicant with the definition of a private club as it was listed in the Zoning Ordinance at that time, and further named two examples of non-profit private clubs that are only open to bona fide members and guests (the Knights of Columbus and the American Legion). Comments further stated that if the proposed use did not meet the definition of a private club, further clarification on how the proposed hall will be used must be submitted by the Applicant in order to determine the correct use and whether the use should be considered an auditorium or a recreational establishment of a commercial nature.

Obtaining a use and occupancy permit for a recreational establishment of a commercial nature on this property would have required the Applicant to obtain approval of a special exception application. However, the Applicant chose to apply for a use and occupancy permit for a private club. Private clubs such as the Knights of Columbus and the American Legion are legitimate examples of a non-profit establishment for only bona-fide members and guests. If the Applicant intended to have adult entertainment at this location, to be open to any member of the general public who pays their membership fee on a given night, and to operate for a profit, it was deliberately withheld from the County. *See Exhibit 12, 10/24/2012 TSR.*

On May 14, 2007, (two days prior to the issuance of the approved permit below), the Applicant indicated as follows:

“Because the facility for our temple location was not up to code for assembly we were required to submit a CUW Construction permit application (I will enclosed a copy of the Job Card) and do

Hundreds of thousands of dollars in construction. The unforeseen costs requires us to tighten up were we can.

To keep costs down with the Lodge/Shrine signage we would only be using the Temple name. We were instructed by the Graphic Design contractor that the U&O permits should have the Temple name (X4B) added as DBA (doing business as) to prevent any confusion with them obtaining they're permit to do wording or signage on any of the construction.

That is the extent of any change. If using the Temple name is a problem and we must use the SHRINERS UNITED X4B CD INC. We will but it will bump our costs up. But if adding the DBA will cause further difficulties we can just keep it as it is."

See May 14, 2007 Ltr. from Eric Hudson to Mary Hampton.

The "APPROVED PERMIT" issued on May 16, 2007 provides as follows:

Existing Uses
CHURCH
Proposed Uses
PRIVATE CLUB

See Exh. 7. In 2007, the permit was issued for a "PRIVATE CLUB" as defined in the Zoning Ordinance, § 27-107.01 (49), which provided

Club or Lodge, Private: An establishment providing facilities for entertainment or recreation for only bona fide members and guests, and not operated for profit.

In 2010, pursuant to the adoption of CB-46-2010, the County defined "adult entertainment"

as

Adult Entertainment: Adult Entertainment means any exhibition, performance or dance of any type conducted in a premise where such exhibition, 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 public region by another person, with the intent to sexually arouse or excite another person.

See § 27-107.01 (7.1), CB-46-2010 and CB-56-2011. The adoption of CB-46-2010 also added language to the definition of a “PRIVATE CLUB” to exclude adult entertainment. § 27-107.01 (49) now provides

(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**. (Emphasis added).

See CB-46-2010, § 27-107.01 (49).

- Constitutionality of County Bills

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. Applicant advanced no sufficient argument as to why we must invoke the

constitutional exception in this matter.⁸ In fact, in direct contradiction to that position, the bills at issue here provide 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.

- Applicant Not Eligible For Special Exception

First, the Applicant claims to be a private club but does not operate as a private club. The membership agreement includes the following statement:

X4B Luxury Hall is an auxiliary hall for members of CD 15 CL 2001 Inc. and vouched for members residing in the metropolitan area choosing willfully to contribute to widows, orphans, Time to Heal, and single mothers. X4B Luxury Hall is a strictly private club for private members only, and isn't open to the public. With exceptions of dues, contributions, and donations, there are no admission fees, alcohol sold or public functions. **We are strictly private and exist for the purpose solely of our members.**

See Exh. 46.

But the Applicant through Mr. Darnaby stated that one must be a member to enter the Club when it hosts an Adult Entertainment event. *See* Feb. 19, 2014 T. 11. One becomes a member by paying all, or a portion, of its annual membership fee (currently set at \$240); showing identification (proof of age); and completing a membership agreement. The Applicant submitted redacted copies of Membership Agreements Membership Agreements, signed and dated by members that were completed on various dates in 2013, a blank Member Agreement form, and a membership card. *See* Exhs. 46, 47, 48; Feb. 19, 2014 T. 11. At oral argument, counsel for the Applicant indicated that anyone (not limited to bona fide members) may enter the premise regardless of membership

⁸ 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-46-2010 and CB-56-2011. *See* U.S. Dist. Ct. Case No. 13-1722-DKC.

status for as little as \$5.00 to view adult entertainment activity and **NEVER** return to the premise; and **NEVER** pay the balance of its alleged membership fees.

By definition, a private club is only open to bona fide members and guests and it is not operated for profit. The Applicant advertises this facility as being open to the general public. Typical private clubs, such as the American Legion and the Knights of Columbus do not typically offer pay at-the-door events on a daily basis and their memberships require that certain criteria be met. What's more, the Program & Services advertisement demonstrates that the facility is OPEN to the public; and the facility is NOT STRICTLY PRIVATE BECAUSE IT DOES NOT EXIST SOLELY FOR ITS MEMBERS. *See* Exh. 43.

If we assume that the Applicant, in 2007, obtained a lawful permit that meets the definition of adult entertainment subsequently defined by § 27-107.01 (7.1), CB-46-2010 or CB-56-2011, we find however, that the Applicant does not operate the facility or premise in accordance with the definition of a private club pursuant to the Zoning Ordinance. Therefore, we DENY S.E. Application No. 4717 because the Applicant does not operate the facility or premise in accordance with the Zoning Ordinance definition of a private club and consequently is ineligible to apply for special exception.

Second, even if we assume that the Applicant operated the facility as a private club in accordance with the definition of the Zoning Ordinance, we find that the Applicant has no vested rights in a use and occupancy permit to confer eligibility for it to file for a special exception application after the law changed. One basic requirement for a vested right is that a lawful permit was obtained. *See Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 994 A.2d 842, 2010 Md. LEXIS 75 (2010) (noting that in order to obtain a vested right in an existing zoning use, a 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). Even if we assume the Applicant meets the definition of a private club, we find that the Applicant did not, in 2007, obtain a valid use and occupancy permit that included activity that meets the definition of adult entertainment subsequently defined by § 27-107.01 (7.1), CB-46-2010 or CB-56-2011. Nor could it be reasonably concluded, from the record, that the 2007 Permit was issued for activity that included adult entertainment. *See* § 27-461(a) (No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses); § 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 also 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 lists the uses permitted and all other uses are prohibited.) Further, § 27-253(a) 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.” There is no dispute that these provisions predated the adoption of CB-46-2010 and CB-56-2011. Therefore, for the Applicant to have a vested right in its alleged adult entertainment use it needed to maintain a valid use and occupancy permit that expressly permitted adult entertainment activities. §27-108.01(a)(15).⁹

In *Powell v. Calvert Co.*, 368 Md. 400, 795 A.2d 96 (2002), the Court of Appeals held that in the absence of a vested right, a board must apply the law in effect at the time the case is heard. Therefore, even if we assume that the Applicant is a private club, we find that the Applicant did not obtain, in 2007, a valid use and occupancy permit that included activity that meets the

⁹ Nothing in the uses described in Applicant's Use and Occupancy Permit (Exh. 7) “ok for private club” remotely lends itself to the conclusion that Adult Entertainment activities were permitted.

definition of adult entertainment subsequently defined by CB-46-2010 / CB-56-2011 / § 27-107.01 (7.1), which is a prerequisite to filing for a special exception application. Consequently, we DENY S.E. Application No. 4717 because the law at the time this case was heard *excludes* adult entertainment at a private club.

NOW, THEREFORE, IT IS HEREBY ORDERED, after review of the administrative record and disposition recommendation of the Zoning Hearing Examiner for Special Exception Application No. 4717, that permission to use approximately 4,200 square feet of the 9.3 acre Rosecroft Shopping Center in the C-S-C (Commercial Shopping Center) Zone, for adult entertainment, located along the south side of Brinkley Road, approximately 1,400 feet east of its intersection with Fisher Road, also identified as 3279 Brinkley Road, Fort Washington, Maryland, is DENIED

Ordered this 22nd day of June, 2015, by the following vote:

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

Opposed:

Abstained:

Absent: Council Members Franklin and Turner

Vote: 7-0

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