

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION
4721**

DECISION

Application:	Auditorium with Adult Entertainment
Applicant:	Upscales Ballroom and Party Equipment Rental
Opposition:	Laura Pettaway, et.al.
Hearing Date:	February 12, 2014
Hearing Examiner:	Joyce B. Nichols
Disposition:	Denial

NATURE OF REQUEST

(1) Special Exception 4721 is a request for permission to use approximately 7,675 square feet of an approximately 27,200 square foot structure (Luskin's Branch Plaza), on approximately 2.95 acres of land, in the C-S-C (Commercial Shopping Center) Zone, located on the north side of Bexley Place, approximately 100 feet east of its intersection with St. Barnabas Road (MD 414), Suitland, Maryland for an Auditorium with Adult Entertainment. As Adult Entertainment is prohibited in the C-S-C Zone pursuant to §27-461(b), this Application is being treated as a request for an Auditorium, which is permitted in the C-S-C Zone, with the caveat that an Auditorium with a valid Use & Occupancy Permit including activity which meets the definition of Adult Entertainment (§27-107.1(a)(7.1)) may continue upon approval of a Special Exception. §27-461 fn 58

(2) As the Applicant essentially failed to file any evidence in support of its Application, the Planning Board did not schedule a public hearing, and in lieu thereof, adopted the recommendation of the Technical Staff. (Exhibit 13). The Technical Staff, after review of the limited information submitted by the Applicant during the evidentiary hearing before the Zoning Hearing Examiner, again recommended denial of the Application. (Exhibits 11 and 35)

(3) At the conclusion of the evidentiary hearing, the record was left open for the inclusion of a myriad of documents by the Applicant, including a signed Application. By letter dated March 25, 2014 your Examiner advised the parties that the required documents had not been filed and that the record closing date would be extended to April 4, 2014. (Exhibit 34) On April 4, 2014 the County Office of Law filed its Response in Opposition to the Applicants Statement of Justification submitted during the evidentiary hearing. (Exhibit 36) To date, the Applicant has failed to provide any of the required documentation, including an Application signed by the property owner as required by §27-296(b)(1)(F) or a Site Plan in compliance with Parts 4 and 11 of the Zoning Ordinance. The record was closed on September 5, 2014.

LEGAL ARGUMENTS

Motion to Stay Proceedings

(1) By letter dated November 26, 2012 (Exhibit 12) the Applicant requested a Stay of the instant proceedings. The Applicant subsequently filed a Motion for a Preliminary Injunction (CA No. DKC 13-1722) in the United States District Court for the District of Maryland. On March 5, 2014, Judge Chasanow issued her Memorandum Opinion denying the Applicant's Motion for a Preliminary Injunction/Temporary Restraining Order. Thus this Application is ripe to proceed.

Constitutionality of CB-56-2011

(2) CB-56-2011 must be read pursuant to the general principles of statutory construction. *See Koste v. Town of Oxford*, 431 Md. 14, 17-18 (2013)¹ The District Council is generally authorized by state law to promulgate, adopt and amend local zoning laws. *See* MD. CODE ANN., Land Use §22-104. Under the same state law, “[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.” MD. CODE ANN., Land Use §22-113. When read as a whole, the Land Use Article of the Annotated Code contemplates that the District Council is vested with authority to establish reasonable regulations pertaining to nonconforming uses. This principle was recognized by the Court of Appeals in *County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 443 A.2d 114 (1982), a case addressing the Regional District Act. CB-56-2011 merely modifies the Table of Uses for the C-S-C Zone, an act on its face that is not repugnant to the Regional District Act.

No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses. §27-461(a) *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 list 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.” *See also* §27-241. There is no dispute that these provisions predate the enactment of CB-56-2011. Thus, for the Applicant to have a vested right in its alleged nonconforming use it needed to maintain a valid use and occupancy permit that expressly permitted adult entertainment activities. §27-108.01(a)(15)² These requirements cannot be viewed as constitutionally

¹ (“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 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 quotation and citation omitted).

² Nothing in the uses described in Permit No. 2122-2010-CU, “ok for a 750 sq. ft. party rental, a 7,675 sq. ft. Auditorium with 218 seats with no adult oriented uses, lap dancing, Go-Go’s, public dances, etc. and an exercise class with up to 40 students at any one time, but not operating at the same time” remotely lends itself to the conclusion that Adult Entertainment activities were permitted, even under a theory that Adult Entertainment was implied because it is of “like kind or character” to permitted uses. (Exhibit 32(d))

impermissible restrictions since the use and occupancy permit predates the enactment 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) (“the 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”); and, *Powell v. Calvert Co.*, 368 Md. 400, 795 A.2d 96 (2002) (In the absence of a vested right, a board must apply the law in effect at the time the case is heard). Here, the requirements for a valid use and occupancy permit predate the Applicants alleged “lawful” use, and cannot remotely be construed as a requirement that effectively precludes continuation of the business. CB-56-2011 merely incorporates these longstanding regulations into its update of the Table of Uses.

It is incumbent upon the Applicant to establish in the record of this proceeding that it was operating the property in a “then-lawful manner.” *Dembo, supra*. The standard for a nonconforming use holds:

The law is well established that a nonconforming use exists if a person utilizes property in a certain manner that is **lawful** before and up to the time of the adoption of a zoning ordinance, though the then-adopted zoning ordinance may make that previously lawful use non-permitted.

Purich v. Draper Properties, Inc., 395 Md. 694, 708, 912 A.2d 598, 607 (2006) (Emphasis added). Unfortunately, the Applicant has failed to establish that it was operating lawfully prior to the passage of CB-56-2011. *Infra*. To the extent that the Applicant argues that it has a legal nonconforming use, and that such argument is relevant to the instant proceedings, it has failed to carry the burden of proof to establish those facts in the record. §27-142.

FINDINGS OF FACT

Subject Property

(1) The Adult Entertainment use, t/a Upscales Ballroom, occupies a 7,675 square foot unit in the Luskin’s Branch Plaza, which was constructed in 1978. The uses in the Shopping Center currently consist of a hair and nail salon, two churches, several vacant units, and the instant Adult Entertainment use.

Neighborhood and Surrounding Uses

(2) The property is surrounded by public rights-of-way on three sides that include St. Barnabas Road (MD 414) to the west, Bexley Place to the south and Old Branch Avenue to the east. The neighborhood contains a mixture of commercial uses within the immediate area of the site, but beyond to the north, south, and east is predominately residential in nature and includes detached single-family dwellings, attached single-family dwellings, and multifamily dwellings that are located in various residential zones.

- (3) The neighborhood is defined by the following boundaries:

North— Silver Hill Road (MD 458)

South— St. Barnabas Road (MD 414)/Branch Avenue (MD 5) interchange

East— Henson Valley Stream Park

West— St. Barnabas Road (MD 414)

- (4) The subject property is surrounded by the following uses:

North— A dry cleaning business and a detached single-family dwelling in the C-S-C Zone.

South— Across Bexley Place are single-family dwellings in the C-M (Miscellaneous Commercial) Zone.

East— Across Old Branch Avenue is undeveloped land and an apartment building in the R-10 (Multi-Family High Density Residential) Zone.

West— Across St. Barnabas Road is a church in the M-X-T (Mixed Use-Transportation Oriented) Zone.

Master Plan and Sectional Map Amendment

- (5) The April 2008 *Approved Branch Avenue Corridor Sector Plan and Sectional Map Amendment* recommended a commercial land use for the subject property and retained the property's C-S-C Zoning designation.

- (6) The property is located in the Developed Tier. The vision for Developed Tier is a network of sustainable transit-supporting, mixed-use, pedestrian-oriented, medium- to high-density neighborhoods.

History

- (7) Numerous permits have been issued for the property since its initial construction. The following provides a partial list of permits or approvals that may have impacted or altered the approved site plan for the property, or that specifically relate to the subject Application:

July 15, 1970— The Planning Board disapproved Zoning Map Amendment A-8244, requesting the rezoning of the property from the R-10 Zone to the C-2 (General Commercial Existing) Zone (PGCPB Resolution No. 70-241).

October 7, 1970— The District Council disapproved a request for C-2 Zoning on the subject property, but approved Zoning Map Amendment A-8244

rezoning the subject property from the R-10 Zone to the C-1 (Local Commercial Existing) Zone, subject to the condition that there will be no drive-in restaurant or service station built on the property (Conditional Zoning Resolution No. 471-1970).

- March 24, 1977—** Final Plat of Subdivision, NLP 96@86, was recorded in the Prince George's County Land Records.
- May 31, 1977—** Departure from Design Standards DDS-77 was approved by the Planning Board to waive the requirement for the Shopping Center that access to a loading space not be within 50 feet of residentially-zoned land and that the driveway leading to the loading space is a minimum of 22 feet in width. (PGCPB Resolution No. 88-104).
- June 20, 1977—** Building Permit 10064-77-CGU was approved authorizing the new construction of the Shopping Center. Information derived from the Maryland Department of Assessments and Taxation indicates that the Shopping Center was fully constructed some time in 1978.
- November 20, 2003—**Detailed Site Plan DSP-03044 was approved by the Planning Board for a Day Care Center with up to 224 children to occupy approximately 10,800 square feet in the Shopping Center. An 8,400-square-foot outdoor play area was also required to be provided on the property. (PGCPB Resolution No. 03-252).
- April 26, 2004—** The District Council, after a full review of the administrative record and after a public hearing, approved Detailed Site Plan DSP-03044 and affirmed PGCPB Resolution No. 03-252 for a 10,800-square-foot Day Care Center to be located in the Shopping Center. However, the total enrollment of the Day Care Center was reduced by the District Council to no more than 170 children. Based on a site visit conducted on November 16, 2012, it does not appear that the Day Care Center is still operating in the Shopping Center.
- March 17, 2010—** Building/Use and Occupancy Permit 2122-2010-CU was approved by the Maryland-National Capital Park and Planning Commission (M-NCPPC) for a 7,675-square-foot auditorium with 218 seats, a 750-square-foot party equipment rental store, and an exercise class with up to 40 students at any one time; provided the exercise class does not operate at the same time as the auditorium. This approval specifically stated that it did not include adult orientated uses, lap dancing, Go-Go's, or public dances, etc.
- September 22, 2011** -Use and Occupancy Permit 26682-2011-U was placed on hold by the M-NCPPC Permit Review Section and written comments were

issued to the Applicant. This permit proposed a dance/auditorium/banquet hall and rental sales and service in the C-S-C Zone for Upscales Ballroom and Salon, LLC. From the documentation in the file, it appears that the Applicant applied for this permit because a County Inspector did not feel that the prior issued permit included a detailed description of the uses that were being proposed at this location.

- July 10, 2012—** The Zoning Section received a letter from the Applicant's attorney requesting that the processing of the subject Special Exception Application be placed on hold until the Applicant has the opportunity to request and process a forthcoming Application for Certification of a Nonconforming Use.
- October 10, 2012—** Jimi Jones, Supervisor of the Zoning Section, sent an e-mail to the applicant's attorney stating that, per their earlier phone conversation that day, they have been advised that Special Exception Applications SE-4721 and SE-4719 for the proposed Adult Entertainment uses are scheduled to be reviewed by the Planning Board on December 6, 2012. Mr. Jones further stated that the required site plans and documents needed to process the Applications are still outstanding and that Staff will continue to move forward with their review regardless of their status.
- October 16, 2012—** Jimi Jones, Supervisor of the Zoning Section, sent an e-mail to the Applicant's attorney reminding them that the scheduled hearing date is rapidly approaching and that materials needed for the review and processing of the Special Exception Application have not been submitted to the Planning Department, and that a Staff Report will be issued without this information if need be.
- October 31, 2012—** Use and Occupancy Permit 32363-2012-00 was placed on hold by the M-NCPPC Permit Review Section and written comments were issued to the applicant's attorney. This permit proposed the use of a "nonconforming" auditorium and rental service in the C-S-C Zone for Upscales Ballroom and Party Equipment Rental.

Applicant's Request

(8) The Applicant is seeking approval of SE 4721 to operate an Auditorium with Adult Entertainment through the validation of an existing Use and Occupancy Permit for an Auditorium (2122-2010-CU). (Exhibits 32 (a)-(d))

LAW APPLICABLE

(1) An Auditorium which includes Adult Entertainment is permitted by Special Exception in the C-S-C Zone in accordance with §27-461(b)(5) fn 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.

(2) §27-107.1 (a)(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, 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.

(3) §27-107.1(a)(21.1) defines an Auditorium:

(21.1) **Auditorium:** A room or building used for the gathering of people seated as an audience; open to the general public, with or without an admission charge, and used primarily for public speaking, theatrical production; excluding any form of patron dancing or adult entertainment.

(4) The conditions precedent for all Special Exceptions are provided in §27-317 as follows:

(a) A Special Exception may be approved if:

(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).

(5) The burden of proof in any zoning case shall be the Applicants. §27-142

CONCLUSIONS OF LAW

(1) The Applicant submitted the instant Application for Special Exception to the Zoning Section, M-NCPPC, for processing on May 31, 2012. §27-461 fn 58 requires "Applications for adult entertainment must be filed and accepted by June 1, 2012." The submitted Application was not complete, was not signed by the property owner, and lacked the necessary Site Plans, Statement of Justification, and other documents and data required for the referral and review process. §27-296 details those items required to be submitted in an Application for a Special Exception, the majority of which were not provided until the February 12, 2014 evidentiary hearing, and many of which were not provided at all.

(2) §27-296 requires in pertinent part:

(a) **General.**

* * * * *

(3) All applications shall be on forms provided by the Planning Board. All information shall be typed, except for the signatures of all owners.

* * * * *

(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.

(4) To date, more than 2 years after the Application was required by law to be filed, the Applicant has failed to comply with the requirements of §§27-296(b)(1)(F) and 27-296(c).

(5) Upon receipt of the Pre-application Form for SE 4721 (Exhibit 4(a)), the Applicant was provided with the specific Application guidelines and forms. (Exhibit 4(b)) The Applicant

provided none of the 10 specific submittal requirements for a Special Exception Application, Exhibit 4(c), prior to the evidentiary hearing.

(6) By failing to provide the State Ethics Commission Affidavits required by item 10, the Application is in violation of the Prince George's County Land Use Ethics Law (State Government Article, §§15-829 to 15-835, Ann. Code of Md., "Public Ethics Law"). The Applicant continues to be in violation of the Public Ethics Law.

(7) Exhibit 4(c) is the M-NCPPC, Development Review Division, Zoning, Special Exception and Departures Checklist. Of "I- REVIEW OF BASIC REQUIREMENTS:", "A. DOCUMENTS REQUIRED:", "B. PROPERTY SURVEY REQUIREMENTS:" and "C. SITE PLAN and LANDSCAPE PLAN REQUIREMENTS:", A, B, and C are required for Special Exception Applicants. (Exhibit 4(c), pp. 1-3) The Applicant failed to provide any of this myriad of required documents and information prior to the evidentiary hearing, but did pay the filing fee required under "C". (Exhibit 5)

(8) The unsigned Application Form (required by §27-296(b)) was the only document or evidence provided by the Applicant prior to the evidentiary hearing. Exhibit 1 identified those provisions of the Zoning Ordinance which the Applicant was required to satisfy. "I-Review of Basic Requirements," "II-SITE PLAN REVIEW" and "III-STATEMENT OF JUSTIFICATION REVIEW" of the Checklist, Exhibit 4(c), could not be performed as required by the Technical Staff as the Applicant refused to provide the required evidence.

(9) §27-311 requires: "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."

(10) §27-307 requires:

At 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.

(11) §25-202 of the Land Use Article, Annotated Code of Maryland, also requires that the Technical Staff Report be filed at least 30 days prior to the scheduled evidentiary hearing.

(12) §27-308 requires:

At 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.

(13) The collective purpose of these citations to provide due process and fundamental fairness to all parties. By requiring the Applicant to provide full disclosure of its case 30 days prior to the evidentiary hearing, all parties are provided the opportunity to prepare a meaningful response or rebuttal.

(14) In the instant Application, the M-NCPPC accepted an empty shell of an Application, that being merely an unsigned Application form and the filing fee, on the very last day (May 31, 2012) such an Application could be accepted prior to the June 1, 2012 deadline established by §24-461(b)(5) fn 58. (Exhibit 1)

(15) On November 19, 2012 the Technical Staff issued its required Report in Special Exception 4721 recommending disapproval. In discussing the condition precedent findings of §27-317 Staff states:

As noted previously, the Applicant in this case has not submitted the Statement of Justification and plans necessary to process the Application. This places their request in an untenable position, since Section 27-142 of the Zoning Ordinance places the burden of proof in any zoning case squarely on the Applicant. It is not Staff's responsibility to adduce facts based on our independent understanding of the case. However, Section 27-311 of the Zoning Ordinance requires Staff to produce a Staff Report in a timely manner, and further requires Staff to make a recommendation in that report. Based on the Applicant's refusal to provide the necessary information, Staff is compelled to recommend disapproval of the Application. (Exhibit 11, p. 9)

(16) After reviewing the Technical Staff Report and the complete lack of any evidence presented by the Applicant, the Planning Board decided against holding a public hearing and expeditiously adopted the Technical Staff's recommendation of denial. (Exhibit 13)

(17) The proposed Site Plan submitted at the evidentiary hearing, Exhibit 27, is not in conformance with the minimum Parking and Loading Requirements of Part 11 of the Zoning Ordinance.

(18) The Technical Staff reviewed the revised plans, documents, and exhibits for SE 4721, submitted at the evidentiary hearing before the Zoning Hearing Examiner on February 12, 2014. Referrals to internal and external divisions and agencies were not sent out.

“Site Plan

The Site Plan provided by the Applicant is obviously a third or fourth generation permit plan with numerous ink pen deletions and other markings, overlain with typed dimensions and annotations. It is not legible and cannot be considered adequate by Staff for analysis.

Parking

The Site Plan that was submitted by the Applicant demonstrates that 106 parking spaces are required to serve the proposed adult entertainment establishment. The Site Plan claims to show 130 parking spaces on the subject property, however, it is difficult to tell whether they conform to the requirements of Part 11. Inexplicably, the Site Plan shows

only the 106 spaces for adult entertainment, disregarding the other uses in the center, in direct conflict with Part 11 of the Zoning Ordinance which requires that:

Section 27-570 Multiple Uses

Except in the M-X-T Zone, where two (2) or more uses are located in the same building or on the same lot, the total number of spaces required by each use shall be provided.

The Applicant has known, based on staff comments at the time of pre-review of this Application that a departure was required, but has apparently not felt a pressing need to obtain either. Further delaying the disposition of this case does not serve the purposes of the Zoning ordinance; it serves only the Applicant's desire to continue operating." (Exhibit 35)

(19) In the spring of 2010, the Applicant applied for Construction and Use and Occupancy Permit 2122-2010 stating:

This use of this tenant is for party equipment rental, an auditorium and an exercise class. The tenant name is Upscale Ballroom and Party Equipment Rental. The party equipment rental will be 750 square feet, including bathrooms and closets and will be used as an area setup for rental of an event for this location and outside along with some storage.

The auditorium will be 7,675 square feet and the use will include 218 seats for wedding, birthday parties, celebrations, etc. The site will not be providing foods or drinks, the celebrating party will bring their own, there will be no adults oriented use, lap dancing, Go-Go's, public dances at this location, and the music will operate pass the hours of 12:00 a.m. but will be for the weddings, birthdays, celebrations, etc. functions only.

The exercise class will be done as a separate rental and will not operate at the same time as the auditorium and there will be no more than 40 persons at any one time for the classes. (Exhibit 32(b))

(20) Construction and Use and Occupancy Permit 2122-2010 was issued on July 14, 2010 to Upscale Ballroom and Party Equipment Rental to operate "Auditoriums, Rental Service" with the express limitation "O.K. for a 750 sq. ft. party equipment rental, a 7,675 sq. ft. Auditorium with 218 seats with no adult oriented uses, lap dancing, Go-Go's, public dances, etc. and an exercise class with up to 40 students at any one time, but not operating at the same time" at 3900 Bexley Place #B. (Exhibit 32(d))

(21) The Applicant testified during the evidentiary hearing that the Applicant has always used the subject property for Adult Entertainment. If this is true, the Applicant committed fraud in obtaining Use and Occupancy Permit 2122-2010 by specifically misrepresenting his ultimate intentions for the use of the subject property. At no time during the Use and Occupancy Permit process did the Applicant disclose that he intended to have Adult Entertainment (whatever its form or definition) at the subject property. Had the Applicant done so, any Application for a Use

and Occupancy permit for an Auditorium would have been denied. It is obvious that the Applicants testimony is based on whatever is most financially advantageous for him at that moment. The Applicants current admission that he intended to operate Adult Entertainment when he applied for the Use and Occupancy permit in 2010, and then proceeded to utilize the property for Adult Entertainment, rendered the Use and Occupancy Permit null and void *ab initio*.

(22) The Use and Occupancy Permit for an Auditorium for the subject property is limited to the uses as set forth by the Applicant in 2010 – weddings, birthday parties and similar celebrations. The Applicant does not have a valid Use and Occupancy Permit for an Auditorium which included activity that meets the definition of Adult Entertainment in order to seek relief pursuant to §27-461(b)(5) fn 58.

(23) The neighbors testified as to the detrimental effect this adult business operation has had upon their residential neighborhood. (T. pp. 104-127)

(24) The proposed use and Site Plan are not in harmony with the purposes of the Zoning Ordinance. §27-317(a)(1)

(25) The proposed use is not in conformance with all of the requirements and regulations of the Zoning Ordinance. §27-317(a)(2)

(26) The proposed use will adversely affect the health, safety and welfare of residents or workers in the area as testified to by the neighbors, citizens and County Police and Fire Officials. (T. passim) §27-317(a)(4)

(27) The Applicant failed to adduce any evidence to support a finding that Adult Entertainment on the subject property will not be detrimental to the use or development of adjacent properties or the general neighborhood. §27-317(a)(5)

(28) The Application does not propose the disturbance of any environmentally regulated features. §27-317(a)(7)

(29) The Application is in violation of the minimum parking and loading requirements of Part 11 of the Zoning Ordinance.

(30) The Application is in violation of §27-296. The Applicant was given additional time after the evidentiary hearing in February to obtain the property owner's signature on the Application and has failed to provide the property owners consent to this Application. (T.p. 151) It is a basic premise of real property rights that a piecemeal land use Application cannot be granted on another's property without that property owner's express consent.

DISPOSITION

Special Exception 4721 is DENIED.