

Case No.: S.E. 4718 & Variance 4718
Auditorium with Adult Entertainment
D2 Fuego's

Applicant: D2 Fuego's

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, that the Zoning Hearing Examiner's decision in Special Exception 4718 and Variance 4718, for permission to use approximately 4,999 square feet of an approximately 14,625 square foot GFA (Gross Floor Area) structure on land in the I-1 (Light Industrial) Zone, located on the south side of Jackson Street, approximately 620 feet east of its intersection with 52nd Avenue, also identified as 5005 Jackson Street, Unit "C", Bladensburg, Maryland, for Adult Entertainment, is:

DENIED, pursuant to §§27-127, 27-131, 27-132, 27-140, 141, and 142 of the Zoning Ordinance.

As the basis for this decision, the District Council adopts and incorporates by reference, as if fully stated herein, the findings, conclusions and decision of the Zoning Hearing Examiner, except as otherwise stated in Attachment A. *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596; 329 A.2d 428 (1974).

ORDERED this 18th day of November, 2013, by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Olson, Patterson
and Toles.

Opposed:

Abstained:

Absent: Council Member Turner.

Vote: 8-0

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: _____
Andrea C. Harrison, Chair

ATTEST:

Redis C. Floyd
Clerk of the Council

ATTACHMENT A

ORDER OF DENIAL – S.E. 4718 and Variance 4718

PROCEDURAL HISTORY, FINDINGS AND CONCLUSIONS

Procedural History

This application involves a request, by D2 Fuego's, the applicant, for permission, by special exception and variance, to use approximately 4,999 square feet of an approximately 14,625 square foot GFA (Gross Floor Area) structure on land in the I-1 (Light Industrial) Zone, located on the south side of Jackson Street, approximately 620 feet east of its intersection with 52nd Avenue, also identified as 5005 Jackson Street, Unit "C", Bladensburg, Maryland, for Adult Entertainment.

In May 2012, D2 Fuego's, pursuant to §27-296 of the Zoning Ordinance,¹ filed S.E. 4718 and Variance 4718 with the Planning Board.

In December 2012, Planning Board Technical Staff, pursuant to §27-311, filed its report in S.E. 4718 and Variance 4718. Technical Staff recommended DISAPPROVAL.

In April and May 2013, respectively, the Zoning Hearing Examiner (ZHE), pursuant to §§27-126, 127, 129, 302, 311, 312, 313, and 317, held an evidentiary hearing to consider S.E. 4718 and Variance 4718 and transmitted a written decision, with specific findings of fact and conclusions of law, to the District Council. The ZHE decision to the District Council recommended a disposition of DENIAL in S.E. 4718 and Variance 4718.

¹ See Prince George's County Code, Subtitle 27, Zoning Ordinance, (2008-09 ed., as amended) (hereinafter "§27- __").

See also §27-141 (The 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).

On April 19, 2013, prior to the ZHE decision in S.E. 4718 and Variance 4718, the applicant, through counsel, notified the Chief Zoning Hearing Examiner, Honorable Maurene Epps Webb,² as follows:

The Applicant in the above referenced Special Exception, by and through the undersigned counsel, **hereby gives notice that in the instant administrative proceedings, no federal issues are raised, directly or indirectly, and that, in connection with this Special Exception, the Applicant files this notice pursuant to England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 84 S. Ct. 461, 11 L.Ed. 2d 440 (1964), reserving its right to litigate any federal claims in federal court.** (Emphasis added.)

See April 19, 2013, Letter from Dennis Whitley, III, to Honorable Maurene Epps Webb.

On June 14, 2013, less than a month after the ZHE decision on May 20, 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. The applicant alleges that the elimination of conforming locations and the special exception requirements of this challenged legislation are in violation of the First Amendment of the United States Constitution and other relevant provisions of the United States Constitution, as well as the corresponding provisions of the Maryland Declaration of Rights. The 8 count federal complaint avers:

- **Count I** – The Restrictions Contained In The Challenged Subject Legislation Violate The Equal Protection Doctrine
- **Count II** – The Challenged Subject Legislation Represents An

² Prior to April 19, 2013, the Chief Zoning Hearing Examiner changed her name to Maurene Epps McNeil. The April 19, 2013, letter was also sent to Joyce B. Nichols, the Zoning Hearing Examiner who decided S.E. 4718 and Variance 4718, and Stan D. Brown, the People's Zoning Counsel.

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 June 17, 2013, the District Council took no action on S.E. 4718 and Variance 4718.

On June 19, 2013, five days after filing the federal complaint challenging both the federal and state constitutionality of CB-46-2010 and CB-56-2011, the applicant, through counsel, filed an appeal³ of the ZHE decision in S.E. 4718 and Variance 4718 with the Clerk of the County Council. The appeal stated as follows:

³ **Sec. 27-131. Oral argument and appeals from Zoning Hearing Examiner's decision.**

(b) **Form and content of request.**

(1) Exceptions, appeals, and requests for oral argument shall be submitted (in writing) to the Clerk of the District Council. A copy shall be sent by the submitter to all persons of record (by regular mail), and a certificate of service shall accompany the submission to the Clerk.

(2) **Exceptions, appeals, and requests for oral argument shall be numbered in sequence and shall specify the error which is claimed to have been committed by the Examiner. Those portions of the record relied upon to support the claim shall be specified.** (Emphasis added.)

Please accept this letter as my client's, D2, **appeal** of the Zoning Hearing Examiner's (hereinafter "ZHE") decision in the above-referenced special exception. **It is my client's position that the instant matter should be remanded back to the ZHE for a written decision addressing whether the Applicant can raise and the ZHE may decide a constitutional challenge to CB-46-2010 and CB-56-2011 based on the Maryland Constitution.** Whether the above-referenced Council Bills were constitutional was raised in the opening statement and in the Supplement to Statement of Justification, but the ZHE did not address the issue in her decision. It should also be noted that the constitutional challenge to the Council Bills were not addressed despite the fact that the ZHE allowed and the Prince George's County Office of Law filed a Response in Opposition to the Supplement to Statement of Justification. (Emphasis added.)

See June 19, 2013, Letter from Dennis Whitley, III, to Redis Floyd, Clerk of the County Council.

On September 27, 2013, the Clerk of the County Council sent notification to all persons of record that oral argument was scheduled, on applicant's appeal, for Monday, October 28, 2013, at 1:30 p.m.

On October 28, 2013, the District Council held oral argument in S.E. 4718 and Variance 4718. After the case was called on the agenda, the applicant, through counsel, requested a remand to the ZHE. The request for remand was as follows:

MR. WHITLEY: Good afternoon, Madam Chair, Mr. Vice Chair, Members of the District Council. For the record, Dennis Whitley, III, here on behalf of the applicant. **We're here for one reason and one reason only.**

MR. WHITLEY: Like I said, **we're here for one reason and one reason only.** The Zoning Hearing Examiner in her decision failed to address the applicant's primary issue being raised at that hearing, and that's the constitutionality of CB-56-2011. We're here requesting that the case be sent back to Madam Examiner to address that specific issue. Again, if the statute is not constitutional, everything that's been done basically is of no effect. I've made the argument previously when you were considering this statute that the only way that you can get rid of a non-conforming

use is either amortization or it has to be abandoned. None of those have happened in this case or any other cases where Special Exceptions have been addressed or have been filed. So the same is going to come up again and again.

Again, with this particular client, I am here because I have to exhaust my administrative remedies. Once that's done, if we don't get a favorable result, we're free to go across the street to the courthouse, but we, in an effort to make the record as transparent as possible, I think that it's clear that the Court needs to be made aware whether or not the ZHE considered the argument and what her position was in the argument. If she did not believe that it was a good argument, she could have noted that in her decision. If she believes that there are some other legal ramifications that allow her to make her decision without addressing that argument, again she could have put it in her decision.

I think it's, it may be a grave error for her not to address it at all once we get across the street.

MR. WHITLEY: Again, Your Honor, my primary argument is that the issue of constitutionality was not addressed. If you're saying that it's your opinion that the ZHE should not have addressed that argument and that this body is not required to address that argument, that's fine. I just need to make my record. *See* (10/28/13 Tr.) (Emphasis added.)

Despite being notified in September that oral argument will be held on October 28, 2013, in S.E. 4718 and Variance 4718, based on applicant's appeal, the applicant, through counsel- other than the request for remand-alleged no other error to have been committed by the ZHE in her decision.

The District Council, pursuant to §27-131, directed staff, by motion (9-0), to prepare an order of denial. *See* (10/28/13 Tr.)

For purposes of clarity, we shall restate the applicant's request on appeal and respond accordingly.

Request on Appeal

- It is my client's position that the instant matter should be remanded back to the ZHE for a written decision addressing **whether the Applicant can raise and the ZHE may decide a constitutional challenge to CB-46-2010 and CB-56-2011 based on the Maryland Constitution.**
- **Whether the above-referenced Council Bills were constitutional** was raised in the opening statement and in the Supplement to Statement of Justification, but the ZHE did not address the issue in her decision. It should also be noted that the constitutional challenge to the Council Bills were not addressed despite the fact that the ZHE allowed and the Prince George's County Office of Law filed a Response in Opposition to the Supplement to Statement of Justification. (Emphasis added.)

See June 19, 2013, Letter from Dennis Whitley, III, to Redis Floyd, Clerk of the County Council.

We also find relevant to our disposition of this matter, admissions made by the applicant.

In July 2012, the applicant, through counsel, admitted as follows:

I am writing to you on behalf of our client, D2-Fuego, regarding the above-referenced Special Exception and related Variance for adult entertainment. As you are aware, said application was formally accepted by the Maryland-National Capital Park & Planning Commission on or before June 1, 2012. **Notwithstanding the acceptance of this application, this letter is meant to respectfully request that the processing of the instant Special Exception (and related Variance) be placed on hold until and after the applicant has the opportunity to request and process a forthcoming application for certification of a nonconforming use.** As you may be aware, the subject property operated as a banquet hall (with adult entertainment) pursuant to a valid Use & Occupancy permit issued by Prince George's County. As such, the applicant is entitled to continuation of its current legal use pursuant to Article 28 of the Maryland Annotated Code and the Maryland Constitution.

As the nonconforming use application is processed, please do not hesitate to contact me with any questions or comments regarding the same. Thank you in advance for your continued assistance with this matter. (Emphasis added.)

See July 19, 2012, Letter from Robert J. Antonetti, Jr., to Mr. John Ferrante, Reviewer, Zoning Section, Maryland-National Capital Park & Planning Commission.

In November 2012, the applicant, through counsel, admitted, in relevant part, as follows:

I am writing to you on behalf of my client, AGU AGWO, LLC (d/b/a D2-Fuego), regarding its application for special exception for adult entertainment (i.e. SE-4718) and related variance (i.e. V-4718). * It has come to my attention that the Planning Board desires to schedule a public hearing for review of the instant special exception application in January, 2013. To this end, it is critical to note that the applicant has filed for a new use and occupancy permit with the Prince George's County Department of Environmental Resources on or about October 18, 2012. The purpose for filing this new use and occupancy permit is to begin the application process for obtaining approval of a legal non-conforming use pursuant to the Zoning Ordinance. Again, the subject auditorium use has legally existed since 2001, and sufficient evidence exists to demonstrate that the adult entertainment use at the premise was never abandoned by the operator. Thus, my client intends to first proceed with the processing of its legal non-conforming use application and respectfully requests that the above referenced special exception matter be stayed until final disposition of the non-conforming use matter.**

To further bolster the necessity for this request, the Maryland Court of Appeals has held that the approval of a special exception use (regardless of whether or not said approval is actually implemented on a property) extinguishes previous non-conforming uses. *See Purich v. Draper Properties*, 395 Md. 694 (2006). **It should be noted that the applicant only submitted a special exception application request in order to comply with the deadline requirement set forth in §27-473(b), footnote 56, requiring special exception applications to be filed and accepted prior to June 1, 2012 for existing adult entertainment establishments.** By filing a special exception application, my client did not intend to extinguish its right to seek certification of its legal non-conforming use. Given this situation my client should have every opportunity to first obtain certification of its legal non-conforming use prior to proceeding with its special exception application.

See November 26, 2012, Letter to Elizabeth M. Hewlett, Chairperson, Prince George's County Planning Board, RE: Request for Stay of Planning Board Proceedings for Special Exception 4718 and V-4718, D2-Fuego.

For the reasons set forth below, the applicant's sole request to remand S.E. 4718 and Variance 4718 to the ZHE, to address the constitutionality of CB-46-2010 or CB-56-2011 in her decision, will be DENIED.

The applicant relies on *Prince George's County v. Ray's Used Cars*, 398 Md. 632, 922 A.2d 495 (2007), for the proposition that it was required to exhaust administrative remedies, *i.e.*, filing S.E. 4718 and Variance 4718, and in the process, raise the constitutionality of CB-46-2010 and CB-56-2011, before resorting to the Circuit Court. (4/1/13 Tr. at 46-48.) We do not disagree with the holding in *Ray's Used Cars*. We find however that *Ray's Used Cars* is inapplicable to the facts of S.E. 4718 and Variance 4718. First, in *Ray's Used Cars*, the applicant did not first exhaust administrative remedies before resorting to the Circuit Court on the issue on constitutionality. Second, *Ray's Used Cars* reiterated a well-established principle in Maryland law that if a case can properly be disposed of on a non-constitutional ground, there is no need to reach a constitutional issue. *Ray's Used Cars*, 398 Md. 632, 653-654, 922 A.2d 495, 508 (2007).

The applicant readily admits that S.E. 4718 and Variance 4718 was only submitted in order to comply with the deadline requirement set forth in §27-473(b), footnote 56, requiring special exception applications to be filed and accepted prior to June 2012, for existing adult entertainment establishments. The applicant also readily admits that S.E. 4718 and Variance 4718 should be stayed until it is first afforded the opportunity to seek certification of its alleged legal non-conforming use because, under *Purich v. Draper Properties*, 395 Md. 694 (2006), the approval of S.E. 4718 and Variance 4718-regardless of whether or not said approval is actually implemented on its property-extinguishes previous non-conforming uses.

We will not endorse the applicant's legal gymnastics. It is clear from the record that the applicant, by its own admission, did not want S.E. 4718 and Variance 4718 to be approved, regardless of the constitutionality of CB-46-2010 or CB-56-2011, because it would extinguish any alleged non-conforming use on the subject property. *See Purich v. Draper Properties*, 395 Md. 694 (2006). *See also* July 19, 2012, Letter from Robert J. Antonetti, Jr., to Mr. John Ferrante, Reviewer, Zoning Section, Maryland-National Capital Park & Planning Commission and November 26, 2012, Letter to Elizabeth M. Hewlett, Chairperson, Prince George's County Planning Board, RE: Request for Stay of Planning Board Proceedings for Special Exception 4718 and V-4718, D2-Fuego.

We find that the ZHE resolution of the constitutionality of footnote 56 of CB-56-2011 was not necessary for a proper disposition of S.E. 4718 and Variance 4718 because footnote 56 merely calls for the same evidence or requirements to establish a legal non-conforming use. If the applicant, by its own admission, has a legal non-conforming use, then the applicant should have filed an application or certification of a legal non-conforming use and provide the required evidence to support its contention. The applicant however, elected to file an application for a special exception, as a place holder, instead of a certification of a legal non-conforming use. After substantial delay, the applicant requested a stay of the special exception in order to first file a certification of legal non-conforming use.

Constitutionality of CB-46-2010 or CB-56-2011 does not resolve the burning controversy for D2 Fuego's. Throughout the pendency of S.E. 4718 and Variance 4718, the applicant failed to provide the ZHE with any evidence of a valid use and occupancy permit in the I-1 Zone that included activity that meets the definition of adult entertainment prior to or after the adoption of CB-56-2011. And there is also no evidence in the record that the applicant filed for certification

of a non-conforming use in the I-1 Zone with supporting documentation that it had a valid use and occupancy permit that included activity that meets the definition of adult entertainment prior to or after the adoption of CB-56-2011. *See Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 461-462, 758 A.2d 995, 1008 (2000) (the constitutional exception should not be applied when the judicial decision on the facial validity of an enactment is not likely to terminate the controversy).

The record readily supports the ZHE decision without the necessity to reach the constitutionality of CB-46-2010 or CB-56-2011. The applicant has not met its burden regarding S.E. 4718, and the proposed use and variance would substantially impair the intent, purpose, or integrity of the 2009 Port Towns Sector Plan and Sectional Map Amendment.⁴ *See HNS Dev., LLC v. People's Counsel for Balt. Cnty.*, 425 Md. 436, 457-58 (2012) (a finding that a proposed special exception does not comport with an applicable master plan is an independent basis to support a local zoning authority's decision to deny a special exception). *See Broadcast Equities, Inc.*, 360 Md. 438, 451 n.8, 758 A.2d 995, 1002 n.8 (2000) (recognizing in Maryland that it is not necessary for the administrative body to reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground); quoting *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, e.g., Harryman v. State*, 359 Md. 492, 503 n.6, 754 A.2d 1018, 1024 n.6 (2000); *Thrower v. 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 there cited.

⁴ Given the applicants' admissions, in writing, and in particular, that the approval of a special exception will extinguish previous non-conforming uses, (a future desired and intended application yet to be filed by the applicant) we could reasonably infer that the applicant intentionally elected not to satisfy or conform to the requirements of a special exception under the Zoning Ordinance.

Finally, we decline to remand this matter to the ZHE because of the applicant's pending federal litigation concerning the constitutionality of CB-46-2010 and CB-56-2011. Less than a month after the ZHE decision on May 20, 2013, which denied S.E. 4718 and Variance 4718 on the merits, the applicant 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). *See* (10/28/13 Tr.) The complaint challenges the federal and state constitutionality of CB-46-2010 and CB-56-2011. Four days after the federal complaint was filed, the applicant also appealed the ZHE decision to the District Council.

On September 13, 2013, at a hearing in the United States District Court before the Honorable Deborah K. Chasnow (Judge Chasnow), the applicant and the County fully briefed the federal and state constitutional claims concerning CB-46-2010 and CB-56-2011. At the time of that hearing, the applicant's appeal was pending before the District Council.

At oral argument on October 28, 2013, and during the pendency of a written decision from Judge Chasnow on the constitutionality of CB-46-2010 and CB-56-2011, the applicant requested a remand to the ZHE to address a state constitutional challenge to CB-46-2010 and CB-56-2011 despite its pending federal litigation on the same constitutional challenge. We view the applicant's request as a delay tactic to avoid a final decision on the merits of S.E. 4718 and Variance 4718 during the pendency of its federal litigation.

In light of the above facts, we decline to remand this matter to the ZHE given the applicant's pending federal litigation concerning the federal and state constitutionality of CB-46-2010 and CB-56-2011.⁵

In conclusion, for the benefit of all parties, the District Council adopts and incorporates below, the findings, conclusions and decision of the ZHE. *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596; 329 A.2d 428 (1974).

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

**SPECIAL EXCEPTION
4718**

**VARIANCE
4718**

DECISION

Application:	Auditorium with Adult Entertainment
Applicant:	D2 Fuego's
Opposition:	Town of Cheverly, et.al.
Hearing Date:	April 1, 2013
Hearing Examiner:	Joyce B. Nichols
Disposition:	Denial

NATURE OF REQUEST

(1) Special Exception 4718 is a request for permission to use approximately 4,999 square feet of an approximately 14,625 square foot GFA (Gross Floor Area) structure on land in the I-1 (Light Industrial) Zone, located on the south side of Jackson Street, approximately 620 feet east

⁵ We recognize that the U.S. District Court possesses supplemental jurisdiction to hear applicant's state law claims. *See Powell v. Aegis Mortg. Corp.*, 2007 U.S. Dist. LEXIS 2114 (D. Md. Jan. 11, 2007) (A district court possesses supplemental jurisdiction to hear state law claims that form part of the same case in which another claim raises a federal question. The outer limit of this standard is set by 28 U.S.C.S. § 1367(a). Pursuant to § 1367(a), when a plaintiff has alleged both federal and state claims, a district court may exercise supplemental jurisdiction over the state claims if they form part of the same case or controversy as the federal claim). If Judge Chasnow does not exercise supplemental jurisdiction, the applicant *may* pursue its state law claims in the Circuit Court on the constitutionality of CB-46-2010 and CB-56-2011. If the U.S. District Court does exercise supplement jurisdiction, unless directed otherwise by Judge Chasnow, our decision to deny the applicant's request for remand and affirmance of the ZHE decision remains the same regardless of whether the federal litigation resolves the state constitutional issue because S.E. 4718 and Variance 4718 were properly disposed of on non-constitutional grounds.

of its intersection with 52nd Avenue, also identified as 5005 Jackson Street, Unit “C”, Bladensburg, Maryland, for Adult Entertainment. As Adult Entertainment is prohibited in the I-1 Zone pursuant to §27-473(b), this Application is being treated as a request for an Auditorium, which is a permitted use in the I-1 Zone, with the caveat that an Auditorium with a valid Use and 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. §27-473 ftn 56

(2) The Technical Staff recommended denial (Exhibits 8 and 61) and the Planning Board (Exhibit 2) did not take a position as the Applicant did not submit a completed Application until it was provided during the Zoning Hearing Examiner’s evidentiary hearing on April 1, 2013.

(3) The record was kept open for the submittal of a variety of documents, including a register of I-2 (Heavy Industrial) Zoned land available to operate Adult Entertainment as a permitted use. Upon notification by Applicants Counsel on May 2, 2013, that the Applicant refused to provide any evidence on available I-2 Zoned land or any other documents, not yet submitted, the record was closed on May 5, 2013.

FINDINGS OF FACT

Subject Property

(1) The subject property is improved with a 14,625 warehouse, constructed in 1979, which has been divided into three (3) separate units. The instant Application is a request to utilize a 4,999 square foot portion of Unit “C”. The 15 parking spaces provided onsite are enclosed by an eight-foot high fence (a six (6) feet high, sight-tight, chain link fence with two (2) feet of razor-wire on top) having no gate or any other form of vehicle access to the parking compound. (Exhibit 24(a)) A minimum of 83 parking spaces are required for the entire structure, including the use of Unit “C” as an Auditorium with Adult Entertainment. The subject property is located approximately 850 feet northwest of the Prince George’s Hospital located in Cheverly.

Neighborhood and Surrounding Use

(2) The neighborhood comprises a large triangular-shaped industrial area which primarily consists of warehouse and manufacturing type uses that are situated in the I-1 and I-2 (Heavy Industrial) Zones. The industrial area is centered along 52nd Avenue and is east of Kenilworth Avenue (MD 201), between the Bladensburg municipal boundary to the north and the Baltimore-Washington Parkway to the east and the southeast.

The neighborhood boundaries are as follows:

North -	The Bladensburg municipal boundary line.
South -	The Kenilworth Avenue (MD 201) and Baltimore-Washington Parkway interchange.
East -	The Baltimore-Washington Parkway.
West -	Kenilworth Avenue (MD 201).

The property is surrounded on all sides by industrial uses in the I-1 Zone.

Master Plan and Sectional Map Amendment

(3) The 2009 Approved Port Towns Sector Plan and Sectional Map Amendment recommends an industrial land use for the subject property and retained the property's I-1 zoning designation.

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

(4) 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:

November 6, 1958 - Final Plat of Subdivision WWW 33@84 was recorded in Prince George's County Land Records.

April 27, 2001 - The Applicant for Building/Use and Occupancy Permit 9620-2001-CU submitted written documentation stating that the proposed uses at this location are:

- a. Private parties in compliance with all applicable laws and regulations, with no audience participation.
- b. Receptions
- c. Private Meetings
- d. Conferences
- e. Trade Shows

Food is catered. No cooking on premises. 110-seat capacity.

April 30, 2001 - Building/Use and Occupancy Permit 9620-2001-CU was approved by the Maryland-National Capital Park and Planning Commission (M-NCPPC) for an interior alteration for a 9,500-square-foot auditorium with up to 110 seats for the sole use of private meetings, conferences, trade shows, and private parties with no audience participation. The written approval on this permit specifically stated that the approval did not include public dances, a dance hall, Go-Go's, or a recreational establishment of a commercial nature.

December 14, 2009 - Building/Use and Occupancy Permit 32159-2009-CU was approved by the (M-NCPPC) for an interior alteration for a 9,500-square-foot auditorium with up to 150 seats for the sole use of sit-down meetings/conferences only per dictionary definition with no audience participation per written documentation submitted by the Applicant. Prior Permit 9620-2001-CU and the requirement of an updated parking

schedule are referenced on the written approval. It is unclear if this permit was ever issued by the Department of Environmental Resources (DER).

May 2, 2012 - Use and Occupancy Permit No. 20227-2011-03 was placed on hold by the M-NCPPC Permit Review Section. Several comments were issued to the Applicant concerning the parking space shortages that pertained to the property. The comments below were issued to the Applicant concerning the proposed use listed on the permit Application:

- The proposed use on the revised permit Application is for an auditorium. If this use is not operating in accordance with the definition of an auditorium per CB-56-2011 and is providing adult entertainment per CB-56-2011 the proposed use is Adult Entertainment and should be reflected on the permit Application.
- The permit Application must indicate the proposed use is Adult Entertainment (not an auditorium per CB-56-2011). The use requires a Special Exception. Therefore, the permit Application cannot be approved until a Special Exception Application is approved. Updated permit comments will reflect the Special Exception requirement once a revised permit Application is received for the proposed adult entertainment use. Also the parking requirements will change from 1 parking space for every 4 seats as required for an auditorium, to 1 parking space for every 80 square feet as required for the use of adult entertainment. Remember – Footnote 56 indicates Applications for adult entertainment must be filed and accepted by June 1, 2012.

May 31, 2012 - The subject Special Exception Application was submitted to by the Planning Department. Comments that outlined the required Site Plan revisions and the other documents that were needed to complete the Application for the referral process were issued to the Applicant in writing.

July 9, 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 the Special Exception Application for the proposed Adult Entertainment use is scheduled to be reviewed by the Planning Board on January 10, 2013. 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 the Applicants failure to submit a completed Application.

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.

November 1, 2012 - Use and Occupancy Permit 32364-2012-U was placed on hold by the Permit Review Section and written comments were issued to the Applicant. This permit proposed the use of a Nonconforming Auditorium in the I-1 Zone. The Permit Review Section stated within their written comments to the Applicant that the use must be certified as a Nonconforming Use by the Planning Board before the permit Application can be approved.

November 26, 2012 - The Applicant's attorney submitted a letter to the Planning Board requesting that the processing of the subject Special Exception and Variance Application be placed on hold until the Applicant has the opportunity to request and process a forthcoming Application for certification of a nonconforming use. (Exhibit 8)

May 5, 2013 -To date the Applicant has not filed an Application for nor pursued certification of a Nonconforming Use.

Applicants Request

(5) The Applicant is seeking approval of S.E. 4718 to operate an Auditorium with Adult Entertainment through the validation of an existing Use and Occupancy permit for an Auditorium permitting Adult Entertainment. The Applicant is also requesting a Variance from §27-475.06.06(B) as the subject property is located approximately 850 feet from residentially utilized or zoned land.

LAW APPLICABLE

(1) An Auditorium is a permitted use in the I-1 Zone. §27-473 An Auditorium which includes Adult Entertainment is permitted as a Special Exception in the I-1 Zone in accordance with §27-473 ftn 56 as follows:

Any existing establishment in the I-1 or U-L-I 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.

(2) Section 27-317 provides 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).

(3) Section 27-475.06.06 provides additional requirements for Adult Entertainment as follows:

(a) The hours of operation shall be limited to 5:00 P.M to 3:00 A.M.

(b) The establishment shall be located at least one thousand (1,000) feet from any school, or any other building or use providing adult entertainment and at least one thousand (1,000) feet from any residential zone or land used for residential purposes in any zone.

(4) Section 27-107.01(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.

(5) Section 27-107.01(a)(7.1) defines Adult Entertainment as follows:

(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.

(6) 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 on May 31, 2012. §27-473 ftn 56 requires “Applications for adult entertainment must be filed and accepted by June 1, 2012.” The submitted Application was not complete 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 evidentiary hearing on April 1, 2012:

(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.

(2) Indeed, Exhibit 1 (the Application Form) requires the name and signature of both the Applicant and the property owner, basic information the Applicant failed to provide as required by §27-296. The subject property was purchased by AGU/AGWO, LLC on November 30, 2010, (Exhibit 36) with Uwabunkeonye Celestine Offiah identified as its "sole member and manager". (Exhibits 67 and 68) It is clear from a cursory review of Mr. Offiah's signature on Exhibit 68 that he has not signed the Application Form on behalf of the property owner. (Exhibit 1)^{6,7,8}

(3) On October 10 and 16, 2012, the Supervisor of the Zoning Section sent e-mails to the Applicant's attorney reminding them that the scheduled hearing date was rapidly approaching and that a completed Application had not been filled with M-NCPPC, and that the Technical Staff Report would be issued regardless of whether the Applicant continued to refuse to provide the statutory information for a Special Exception Application. The Technical Staff Report was issued on December 26, 2012, without the majority of the statutorily required Applicant submittals and the Applicant finally provided the information required for an Application for a Special Exception during the evidentiary hearing before the Zoning Hearing Examiner on April 1, 2013. The Applicants failure to submit an Application in accordance with all requirements of law until the evidentiary hearing was obviously a delaying tactic and effectively deprived the public and State and local agencies from having an opportunity to review the proposed Application as required by law. Given the facts of this Application it is clear that the Applicant has failed to apply for a Special Exception which was "filed and accepted by June 1, 2012".

⁶ Quantum Entertainment Group, LLC, whose name crops up occasionally in this record, is yet another alter ego of Uwabunkeonye Celestine Offiah (Exhibit 69) and is in good standing with the State of Maryland, Department of Assessments and Taxation (Exhibit 55) as is AGU/AGWO, LLC. (Exhibit 43 and 44)

⁷ AGU/AGWO, LLC has not filed an Affidavit as required by Md. Code Ann., State Government, §§15-289 to 15-835 (Supp. 2001) nor have any of the principals of AGU/AGWO, LLC.

⁸ The Lease Agreement between AGU/AGWO, LLC and D2 is signed as follows: Ofobuiké N. Okeh for AGU/AGWO, LLC and Uwa Offiah for D2. (Exhibit 52) The Applicant has also submitted Exhibit 54 which purports to list the members of AGU/AGWO, LLC as Ofobuiké Okeh, Theophila Miram Anigboyu and Uwa Offiah. The Applicant has failed to reconcile this disclosure with its previous legal filings. (Exhibits 67 and 68) Thus D2 appears to be yet another alter ego of AGU/AGWO, LLC. Additionally, these persons have not filed the required affidavits.

(4) §27-308 requires that the original Special Exception Application file be made available for public examination at least 30 days prior to the evidentiary hearing and §27-303 of the Zoning Ordinance and §25-202 of the Land Use Article require that the Technical Staff Report also be filed at least 30 days before the scheduled evidentiary hearing.

(5) Although the Applicant alleges that Adult Entertainment has been offered at the subject site for as long as the Applicant has occupied Unit C, the record is devoid of any evidence presented by the Applicant to support a finding as required by §27-107.1(a)(7.1) that the Applicant has been offering persons who are unclothed/scantily clothed or participating in touching, either with the intent to sexually arouse or excite another person.

(6) The Applicant concedes that its Application is not in conformance with the minimum parking and loading requirements of Part 11 of the Zoning Ordinance but urges that there are ways which the Applicant could pursue which could possibly result in the Applicant's conformance with Part 11. Such an argument is specious and speculative. The Applicant must meet its burden of proof at this time and concedes that it has failed to do so.

(7) On April 27, 2001, the Applicant D2 applied for Building/Use and Occupancy Permit, 9620-2001-CU, identifying the owner of the property as Aaron Teitel. Mr. Teitel sold the property on February 13, 2001, to Amarjit and Rajinder Deol and was, therefore, not the owner of the subject property as identified by the Applicant. (Exhibit 23 and 28)

(8) Building/Use and Occupancy Permit 9620-2001-CU was approved by the M-NCPPC for an interior alteration for a 9,500 square foot Auditorium with up to 110 seats with the use limited to "private meetings, conferences, trade shows and private parties with no audience participation. This approval does not include public dances, a dance hall Go-Go's, or a recreational establishment of a commercial nature per written documentation from the Applicant". Lap dancing obviously involves audience participation. (Exhibits 8 p. 20, 36-39 and 70)

(9) In its Application for 9620-2001-CU the Applicant provided written documentation that the only uses proposed for this use are:

- (a) Private parties in compliance with all applicable laws and regulation, with no audience
- (b) Receptions
- (c) Private Meetings
- (d) Conferences
- (e) Trade Shows

Food is catered. No cooking on premises. 110 seat capacity. (Exhibit 8, p. 21)

(10) The Site Plan submitted as the basis for 9620-2001-CU is for a 9,500 square foot unit located within a 38,000 square foot warehouse containing a total of four (4) 9,500 square foot units and located at the corner of 52nd Avenue and Jackson Street. (Unit "A" 1st Floor - 9,500

square feet, Unit “A” 2nd Floor - 9,500 square feet, Unit “B” - 9,500 square feet and Unit “C” - 9,500 square feet) (Exhibits 8, p. 20 and 70)

(11) The Site Plan in the instant Special Exception Application is for a use to be located on Jackson Street within a building containing three (3) units totaling 14,625 feet in its entirety located approximately 620 feet east of 52nd Avenue and the Special Exception requested is limited to 4,999 square feet in Unit “C”. (Exhibit 13) §27-253(c) 9620-2001-CU cannot serve as the basis for §27-473 ftn 56 as the approved Site Plan for 9620-2001-CU is not for the subject property.

(12) Subsequently, Building/Use and Occupancy Permit 32159-2009-CU was applied for, to perform “interior renovation for a 9,500 square foot Auditorium with 150 seats for sit-down meetings/conferences only per dictionary definition with no audience participation per written documentation” provided by the Applicant. (Exhibits 8, p. 20 and 70) On November 18, 2009 the Applicants attorney clarified that the intended use was to operate as an Auditorium as specifically defined in the dictionary as either (a) A large room to accommodate an audience in a building; or (b) A building for public meetings. (Exhibit 8, p. 34) Notwithstanding the Applicants affirmations that the use would be traditional Auditorium, the Applicant submitted proposed interior alterations which included a bar area, a DJ area and a dance floor. Once again this Application was internally inconsistent – the stated use and the proposed alterations were in conflict. It is unclear whether this permit was ever issued by the Department of Environmental Resources as the Applicant in the instant Application is utilizing the 2001 permit as being the underlying “valid” permit for the purposes of complying with Footnote 56 of §27-473(D)(6).

(13) On December 3, 2010, the subject property was sold to AGU/AGWO, LLC and a series of Building/Use and Occupancy Permits, 20227-2011-00, 20227-2011-01, 20227-2011-02 and 20227-2011-03, were applied for, identifying the property owner as AGU/AGWO, LLC and the occupant as Quantum Entertainment, LLC. None of these permits for Auditoriums with the caveat “the space CANNOT be used as a dance hall, bar with live entertainment, night club or use that have characteristics similar to that of a night club (i.e., cabarets). The space is approved for a banquet type use with a table and chair layout for sit down” were issued. (Exhibit 41(a)-(d))

(14) On October 18, 2012, Quantum Entertainment, LLC again applied for a Use and Occupancy Permit 32364-2012-00 for an Auditorium at the subject location and this Application was put on hold November 1, 2012, due the Applicant’s inability to meet the parking space requirements.

(15) The Applicant testified during the evidentiary hearing that the Applicant has used the subject property for Adult Entertainment since 2001. If this is true, the Applicant has consistently committed fraud in the myriad of Applications for Use and Occupancy permits by specifically misrepresenting their ultimate intentions for the use of the subject property. At no time did the Applicant disclose that they intended to have Adult Entertainment (whatever its form or definition) at the subject property and to be open to the general public for an admission fee every night. Had the Applicant done so, instead of the uses which they claimed to be

operating, any Application for a Use and Occupancy permit for an Auditorium would have been denied.

(16) The use of Adult Entertainment has received various violations issued by the County Police and Fire Departments and is consistently in violation of its occupancy limits. (Exhibits 29-34, 41, 49 and 50)

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

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

(19) The proposed use will substantially impair the integrity of the 2009 Approved Port Towns Sector Plan and Sectional Map Amendment. (Exhibit 63) §27-317(a)(3)

(20) The proposed use will adversely affect the health, safety and welfare of residents or workers in the area as testified to by the Town of Cheverly, citizens, the County Police Department and the County Fire Department. T. passim, (Exhibits 25-34, 46) §27-317(a)(4)

(21) 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)

(22) The Applicant has not obtained a Letter of Exemption from the Woodland Conservation Ordinance and does not have a Type II Tree Conservation Plan. §27-317(a)(6)

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

(24) The Applicant does not propose 1,500 square feet or greater tree canopy disturbance and is, therefore, not subject to the requirement of the Tree Canopy Coverage Ordinance.

(25) The Applicant testified that although its current hours of operation exceed the permitted hours of operation of 5:00 p.m. to 3:00 a.m., the Applicant would change its hours of operation to comply with §27-475.06.06(a)

(26) As the subject property is located within 850 feet of land in a residential zone (Prince George's Hospital), a variance has been requested from §27-475.06.06(b)

(27) The subject property does not have exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions relative to its location within 1,000 feet from land in a residential, or residentially used, zone. §27-230(a)(1)

(28) The Applicant has provided no evidence that the strict Application of the Zoning Ordinance will result in peculiar and unusual practical difficulties to, or exceptional hardship upon, the owner of the property. The Applicant was given the opportunity to provide evidence of I-2 Zoned land, which permits Adult Entertainment, but refused to do so. §27-230(a)(2)

(29) As the Applicant has not met its burden regarding its Special Exception Application, the proposed variance would substantially impair the intent, purpose, or integrity of the 2009 Port Towns Sector Plan and Sectional Map Amendment. §27-230(a)(3)

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

(31) Exhibit 24(b), submitted by the Applicant at the April 1, 2013, evidentiary hearing, demonstrates that canopies and four-foot high iron fences have been constructed along the frontage of the building overtop the existing sidewalk and extending right up to the curb line of Jackson Street. No permits were found to be approved to construct these canopies, and the expanded gross floor area that is created by these canopies is not being accounted for as part of the proposed Adult Entertainment use. Neither the fence nor the canopies are shown on the Applicant's Site Plan. (Exhibit 13) Variances would appear to be required for these structures, as well as the eight-foot-high fence that was constructed along the frontage of the parking compound, as they do not appear to meet the required setbacks from Jackson Street.

DISPOSITION

S.E. 4718 is DENIED.

Variance 4718 is DENIED.