

R E S O L U T I O N

WHEREAS, the Prince George's County Planning Board has reviewed Certification of Nonconforming Use CNU-1143-2018, NICO Banquet Hall, requesting certification of a nonconforming use for an eating and drinking establishment with adult entertainment in accordance with Subtitle 27 of the Prince George's County Code; and

WHEREAS, after consideration of the evidence presented at the public hearings on October 18, 2018 and November 29, 2018, the Prince George's County Planning Board finds:

1. **Location and Field Inspection:** The subject property, which consists of Parcel 101 and Parcel 6, is located on the east side of Old Branch Avenue, approximately 300 feet east of the intersection of Allentown Road. The property addressed as 6306 Old Branch Avenue, Temple Hills, Maryland, is zoned Commercial Miscellaneous (C-M) within a Military Installation Overlay (M-I-O) Zone. The site is developed with a 10,444-square-foot, single-story, masonry commercial building on a 27,678-square-foot parcel. The uses include a contractor's office (Unit A), three auto repair shops with bays (Units E, F, & and H) and an eating and drinking establishment with adult entertainment use (Units B and C) which comprises 3,500 square feet of the gross floor area of the building and is the subject of this application. Access to the site is via ingress/egress on Old Branch Avenue, which connects to a 28-space asphalt parking lot.

2. **Development Data Summary:**

	<b>EXISTING</b>	<b>PROPOSED</b>
Zone	C-M / M-I-O	C-M / M-I-O
Acreage	0.86	0.86
Use(s)	Eating and Drinking Establishment/ w/ Adult Entertainment	Eating and Drinking Establishment w/ Adult Entertainment
Lot/Parcel	2	2

3. **History:** Pursuant to the Maryland State Department of Assessment and Taxation, the building on the subject site was constructed in 1977.

Per the applicant's statement of justification (SOJ) dated June 28, 2018, the Nico Banquet Hall is an established business owned by NICO Enterprises, LLC, that has continuously operated on the subject property as an eating or drinking establishment with adult entertainment since 2000. Previous Use and Occupancy Permits were approved and issued for a banquet hall, catering establishment and eating and drinking establishment in the C-M Zone.

Certificate of Occupancy Permit 4752-2000-00-U was issued for Unit C on May 1, 2000, for a banquet hall, catering, eating and drinking establishment. Permit No. 8318444-2000-U was approved for a catering and eating and drinking establishment on August 23, 2000.

Certificate of Occupancy Permit No. 29764-2002-00 was issued for Units B and C on November 14, 2002, which was approved for catering, food and drink services, and restaurant but thereafter revoked by the Prince George's County Department of Permits Inspections and Enforcement (DPIE). Permit No. 1143-2018-U, which was applied for but never issued and is on hold effective January 9, 2018, for an eating and drinking establishment with adult entertainment.

**Zoning Ordinance Enacted Legislation:** In 2000, adult entertainment was not defined or a listed use in the Zoning Ordinance. However, the use table specified that eating and drinking establishments could be classified as permitting no entertainment, permitting live entertainment with parking abutting residential, or all others. In addition, the Zoning Ordinance also provided a recreational or entertainment establishment of a commercial nature, if not otherwise specified, as a use.

In 2005, the Prince George's County Council initiated legislation to define, limit, and prohibit adult entertainment. The purpose was to clearly differentiate between nightclubs and other types of eating and drinking establishments that operate late at night with potentially adverse impacts on residential neighborhoods.

Prince George's County Council Bill CB-49-2005 (enacted on October 11, 2005) prohibited eating or drinking establishments of any type providing live adult entertainment in most commercial zones. Exceptions were made for establishments in the C-M Zone, which permitted eating or drinking establishments with adult entertainment subject to the approval of a Detailed Site Plan and subject to specific criteria including hours of operation, distance from a school or residentially-zoned land and conformance with the regulations on or before November 30, 2007.

County Council Bill CB-46-2010 (enacted on September 7, 2010) clarified the definitions for adult entertainment and catering (Section 27-107.01, 7.1 and 42.1), and County Council Bill CB-56-2011 (enacted on November 15, 2011) further defined adult entertainment; provided use and occupancy (U&O) requirements, and enforcement provisions for adult entertainment and eating or drinking establishments in commercial and industrial zones. Pursuant to CB-56-2011, Adult Entertainment as a use, is restricted to the Heavy Industrial (I-2) Zone (Section 27-475.06.06). Deadlines were established for applying for special exceptions for adult entertainment at specific types of existing businesses through this legislation. No restrictions were imposed with respect to the ability of an existing business to be certified as nonconforming.

4. **Request:** The applicant requests certification of a nonconforming use for an eating or drinking establishment with adult entertainment located at 6306 Old Branch Avenue, Temple Hills, Maryland, 20748, which is zoned C-M in an M-I-O Zone. An eating or drinking establishment of any type providing adult entertainment is prohibited in commercial zones. The applicant's nonconforming status began on October 11, 2005 when CB-49-2005 went into effect and was further impacted by the enactment of CB-46-2010 and CB-56-2011, necessitating certification as

a nonconforming use.

5. **Master Plan Recommendation:** There are no significant recommendations regarding the subject property or proposed use in the *Plan Prince George's 2035 Approved General Plan* (Plan 2035) or the 2013 *Approved Central Branch Avenue Corridor Revitalization Sector Plan* (CR-24-2013). The property is within the M-I-O Zone, which governs development in areas impacted by height limitations, high noise levels, and high accident potential resulting from flight patterns at Joint Base Andrews. The subject site is in Imaginary Runway Surface E, with a maximum height limit range between 150 and 500 feet, depending on the location of the site. The existing building is 20 feet in height, and thus conforms to this requirement.

6. **Surrounding Uses:**

**North—** Property zoned C-M developed with a gas station.

**East—** Branch Avenue.

**West—** Old Branch Avenue and property beyond zoned C-M developed with a private club (Masonic Lodge).

**South—** Property zoned C-M developed with a vehicle repair shop.

7. **Certification Requirements:** Section 27-107(a)(166) of the Zoning Ordinance defines a nonconforming use as:

(A) The “Use” of any “Building,” “Structure,” or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the “Use”), provided that:

(i) The requirement was adopted after the “Use” was lawfully established; or

(ii) The “Use” was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.

(B) The term shall include any “Building,” “Structure,” or land used in connection with a “Nonconforming Use,” regardless of whether the “Building,” “Structure,” or land conforms to the physical requirements of the Zone in which it is located.

Certification of a nonconforming use requires that certain findings be made. Section 27-244 of the Prince George's County Zoning Ordinance sets forth the following specific requirements for certifying a nonconforming use:

(a) **In general.**

- (iii) The precise location and limits of the use on the property and

**within any building it occupies;**

- (D) A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.**

**Analysis**—The applicant has filed Permit No. 1143-2018-U and the subject application in order that they may be certified as a nonconforming use. Certification of a nonconforming use requires that certain findings be made. In accordance with Section 27-244(f) of the Zoning Ordinance, the Planning Board must first determine whether in fact, the use was legally established prior to October 11, 2005, when the use as an eating or drinking establishment with live adult entertainment within the C-M Zone was permitted subject to the approval of a detailed site plan, and upon the enactment of CB-46-2010 and CB-56-2011, which further prohibits adult entertainment within the C-M Zone. Secondly, there must be no break in operation for more than 180 days since the use became nonconforming.

The applicant submitted along with the application, plans showing the exact nature, size, and location of the building, structure, and use; a legal description of the property; the precise location and limits of the use on the property and within any building it occupies and a copy of the previously issued use and occupancy permit. The following documentary evidence is provided in support of the application to demonstrate the legal establishment of the business and continuous operation:

1. State Department of Assessments and Taxation issued Certificate of Good Standing dated January 31, 2018.
2. Prince George's County Government, Office of Finance – Treasury Division Tax Clearance Certificate dated January 26, 2018.
3. Certificate of Occupancy dated November 14, 2002.
4. Certificate of Occupancy dated May 1, 2000.
5. Capacity Certificate dated November 21, 2008.
6. Capacity Certificate dated November 21, 2008.
7. State of Maryland Trader's License dated October 12, 2000.
8. State of Maryland Trader's License dated May 1, 2001.
9. State of Maryland Trader's License dated August 26, 2002.
10. State of Maryland Trader's License dated April 3, 2003.

11. State of Maryland Trader's License dated April 23, 2004.
12. State of Maryland Trader's License dated May 24, 2005.
13. State of Maryland Trader's License dated April 19, 2006.
14. State of Maryland Trader's License dated May 13, 2008.
15. State of Maryland Trader's License dated April 1, 2009.
16. State of Maryland Trader's License dated March 29, 2010.
17. State of Maryland Trader's License dated July 6, 2012.
18. State of Maryland Trader's License dated April 30, 2013.
19. State of Maryland Trader's License dated April 28, 2014.
20. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2001.
21. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2002.
22. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2003.
23. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2004.
24. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2005.
25. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2006.
26. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2007.
27. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2009.
28. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2010.

29. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2011.
30. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2013.
31. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2014.
32. Maryland State Department of Health and Mental Hygiene Food Service Permit with an expiration date of March 31, 2015.
33. U.S. District Court of Maryland, Wet Sands, Inc., et al. v. Prince George's County, Maryland (MJG-06-2243) / International Nite Life Enterprises, Inc. v. Jack Johnson, et al. (MJG-06-2581).
34. U.S. District Court of Maryland, Thompson, et al. v. Offiah, et al. (8:10-cv-02683-AW) Second Amended Complaint.
35. Prince George's County Fire Prevention Unit Correction Order dated September 28, 2012.
36. Laura McFeely, et al. v. Jackson Street Entertainment, LLC 8:12-cv-01019-DKC in the U.S. District Court of Maryland – Amended Complaint filed April 18, 2012.
37. Laura McFeely, et al. v. Jackson Street Entertainment, LLC 8:12-cv-01019-DKC in the U.S. District Court of Maryland – Order noted September 15, 2014.
38. Invoice from Radio One, Inc. dated May 26, 2013.
39. Invoice from Komar Company, Inc. dated August 27, 2013 (withdrawn by the applicant at the hearing on November 29, 2018).
40. Invoice from ADT Security Services dated November 12, 2013.
41. E-mail between Cox, Inc. and Radio One, Inc. regarding weekly advertisement dated November 13, 2013.
42. Notice of Expired Registration from False Alarm Reduction Unit of Prince George's County dated August 28, 2013.
43. Invoice from CBS Radio dated April 16, 2014.
44. Invoice from Comcast dated May 7, 2014.

45. Advertisement flyers for 2014 events.
46. Advertisement flyers for 2015 events.
47. Advertisement flyers for 2016 events.
48. Advertisement flyers for 2017 events.
49. Radio advertisements (audio CD).
50. E-mail between Cox, Inc. and Radio One, Inc. regarding Labor Day radio advertisement dated August 27, 2014.
51. E-mail between Cox, Inc. and Radio One, Inc. regarding 4th of July radio advertisement dated July 1, 2014.
52. Claim Estimate from Erie Insurance dated March 4, 2015.
53. Special Utility Permit from DPIE issued January 8, 2016.
54. Permit for Major Utility Construction from WSSC issued March 8, 2016.
55. Work Approval from WSSC originally issued March 11, 2016.
56. Cease and Desist Letter from Dawit Abraham, Associate Director of DPIE dated April 1, 2016.
57. Complaint for Declaratory Judgment, Attorney's Fees and Trial by Jury in U.S. District Court of Maryland, Nico Enterprises, Inc., et al. v. Prince George's County, Maryland, Civil Action No. 8:15-cv-02832-DKC dated September 21, 2015.
58. County's Preliminary Motion to Dismiss and/or, in the Alternative, Motion for Summary Judgment in U.S. District Court of Maryland, Nico Enterprises, Inc., et al. v. Prince George's County, Maryland, Civil Action No. 8:15-cv-02832-DKC dated October 30, 2015.
59. Memorandum Opinion in U.S. District Court of Maryland, Nico Enterprises, Inc., et al. v. Prince George's County, Maryland, Civil Action No. 8:15-cv-02832-DKC dated May 13, 2016.
60. Notice of Appeal in U.S. District Court of Maryland, Nico Enterprises, Inc., et al. v. Prince George's County, Maryland, Civil Action No. 8:15-cv-02832-DKC dated June 10, 2016.
61. Unpublished Opinion in U.S. Court of Appeals for the Fourth Circuit, Nico Enterprises,



- Inc., et al. v. Prince George's County, Maryland, No. 16-1699 dated March 15, 2017.
62. Letter from Jessica Wright, Development Project Manager at WSSC dated May 31, 2016.
  63. Utility Quotation from Canova dated August 15, 2016.
  64. Bid Proposal from W.F. Wilson & Sons, Inc. dated August 23, 2016.
  65. Repair Estimate from Cunningham Lindsey dated September 29, 2016.
  66. Proposal from Commercial Interior Contracting, Inc. dated February 8, 2017.
  67. Price Proposal from D & A Contractors, Inc. dated May 15, 2017.
  68. Various cancelled checks written to repair contractors in 2017.
  69. Facebook Check-Ins at Club Exstasy from September 3, 2011 through June 7, 2016.
  70. Yelp Reviews for Club Exstasy from 2011 to 2013.
  71. Invoice from PBI Disaster Restoration, LLC dated November 13, 2014.
  72. Invoice from Kirila Earthworks dated March 4, 2016.
  73. Invoice from PBI Restorations dated May 11, 2016.
  74. Invoice from Servpro dated October 19, 2016.
  75. Comcast bill dated August 1, 2016.
  76. Receipt for Comcast payment dated November 21, 2016.
  77. Verizon bill dated August 14, 2016.
  78. Verizon bill dated October 14, 2016.
  79. Receipt for Verizon payment dated November 21, 2016.
  80. PEPCO bill dated October 31, 2016.
  81. PEPCO bill dated October 31, 2016.
  82. Receipt for PEPCO payment dated November 21, 2016.
  83. M-NCPPC Planning Board Resolution for CNU-15093-2015 Ebony Inn.

84. M-NCPPC Planning Board Resolution for CNU-61169-2016 Mustangs Restaurant.
85. M-NCPPC Planning Board Resolution for CNU-61161-2016 Mile High.
86. Affidavit of Aarin Roozen dated February 20, 2018.
87. Affidavit of Michael L. Smith dated February 27, 2018.
88. Affidavit of Doguy Kamara dated March 22, 2018.
89. Affidavit of Guy Black dated March 5, 2018.
90. Affidavit of Asim Bajwa dated March 16, 2018.
91. M-NCPPC staff review comments dated January 18, 2018, indicating that certification of a nonconforming use is required for 6306 Old Branch Avenue, Temple Hills, MD.
92. A site plan prepared by RDA Engineering showing:
  - a. The exact nature, size, and location of the building, structure, and use;
  - b. A legal description of the property;
  - c. The precise location and limits of the use on the property and within any building it occupies.
93. Subsequent to the initial filing of this application, the applicant also submitted Maryland Trader's Licenses dated March 28, 2007 and February 2, 2018.
94. At the hearing before the Planning Board, the applicant and other witnesses also submitted the exhibits listed and included in the record with the hearing transcript.

The required findings of the Planning Board are further described in Section 27-244(f)(4)(A) as follows:

**(4) Planning Board Action**

- (A) The Planning Board may decide to either grant or deny certification of the use as nonconforming. If it decides to certify that a nonconforming use actually exists and has continuously operated and upon finding, within the administrative record for the application, that the use to be certified as nonconforming has no outstanding Code violations with the Department of Permitting, Inspections, and Enforcement regarding the property, other than failure to have a use and occupancy permit.**

Although significant evidence of the continuous use as a banquet hall and/or an eating and drinking establishment since 2000 has been provided with this application, the original use and occupancy permit (Permit No. 4752-2000-00) for Unit C, issued May 1, 2000 and revoked use and occupancy permit (Permit No. 29764-2002-00) for Units B and C issued November 14, 2002, do not indicate any entertainment or dancing use as part of the approvals. Further, with the submittal of the permit application in 2002, the applicant submitted a letter dated September 11, 2002 (Roozen to Ferrate) regarding the banquet hall proposed use which indicated the intent to host social events, gatherings, receptions, banquets and meetings and that the facility would prepare and provide food and drink for its users. The letter specifically indicated the facility would not hold “public dances or Go-Gos.” The letter failed to indicate the venue would provide entertainment of any kind.

At the Planning Board hearings, held October 18, 2018 and November 29, 2018, the Planning Board heard extensive testimony from several witnesses. The witnesses for the applicant testified to the existence of adult entertainment throughout the period since 2000, but none of the witnesses provided any direct evidence concerning the lawful establishment of the adult-entertainment use. Several community-based witnesses testified in support of the staff’s recommendation to deny the application, but none of these witnesses had any specific information concerning whether the adult-entertainment use was lawfully established. Testimony from planning staff, and William Edelen with the Enforcement Division of DPIE, raised a number of discrepancies and contradictions in the evidence presented by the applicant.

The permit and licensing evidence submitted by the applicant lacked any indication of an approved entertainment or dancing use on the subject property. The applicant submitted copious examples and anecdotal information regarding the actual use of the property for adult entertainment, but none of these items established that the adult entertainment was in fact established both lawfully and continuously as an “eating and drinking establishment with adult entertainment” from the period of May 1, 2000 to the present. The applicant referenced three prior CNU cases to bolster his argument that the instant CNU was lawfully established and continuous, but Counsel to the Board pointed out that CNU matters are heavily fact-specific and that all three prior cases had distinct facts, different from each other as well as the instant case. In each of the prior cases cited by the applicant, the Board considered documentary evidence from disinterested 3rd parties, such as liquor board permits, affidavits from inspectors, or building permits which specified adult entertainment or dancing approved for the premises.

Mr. Edelen, Ms. Deborah Gallagher and Ms. Sherri Conner all testified regarding the “low-priority” Health Department permit held by the applicant which allowed the sale of pre-packaged food only, not preparation of food on-site. In fact, the applicant’s evidence which included a letter to DPIE in 2002 (Roozen to Ferrante) stating that the facility would prepare food for its customers is directly contradicted by the “low-priority” permit held by the applicant, prohibiting the preparation of food on-site. The applicant never explained this discrepancy, and instead argued an interpretation that an eating and drinking establishment that only sells packaged foods could also house adult entertainment, a conclusion disputed by the three above-referenced technical permit reviewers, inspectors and planners.

Further, Mr. Edelen’s testimony indicated that a review of the permit history of the premises revealed a number of expired permits, revoked permits, and permits which are subject to final inspection of construction work that was never completed or approved after the fire in October 2014. The only valid permit in effect at the time of the hearing was Use and Occupancy Permit #4752-2000-00 for Unit C issued to the former owner of the property. Mr. Edelen stated that “final approval for the existing use has not been granted to re-open” after the fire, due to the work that was never finally inspected and approved by DPIE. As a result, Mr. Edelen testified that the building should not currently be occupied. The applicant’s response was to point out that the applicant currently only has a violation for operating without a valid Use and Occupancy Permit and that no other violations have been issued by the DPIE. Mr. Edelen acknowledged that it is not DPIE practice to issue multiple violations while a proceeding to correct an issue, such as a CNU application, is pending.

## DISCUSSION

Pursuant to Section 27-114 Uses in General, “No land, building, or structure shall be used in any manner, which is not allowed by this Subtitle.” In 2000, at the time the applicant indicates the subject site was operating as an eating and drinking establishment with adult entertainment, it appears the Zoning Ordinance may have allowed entertainment within an eating and drinking establishment under the classification of “all others” or as a separate use under recreational or entertainment establishment of a commercial nature. On October 11, 2005, legislation was enacted specifically indicating adult-oriented performances were permitted subject to detailed site plan approval and subject to certain location criteria within the C-M Zone. Any legally existing adult-entertainment use in the C-M Zone which did not have detailed site plan approval or meet the locational criteria would have become nonconforming.

The use was further defined and prohibited via legislation enacted in 2010 and 2011. The applicant’s exhibits, specifically Exhibits 3 and 4, Certificate of Occupancy Permits issued in 2000 and 2002; Exhibits 7–19, Maryland Traders Licenses issued 2000–2015 (includes supplemental licenses submitted); Exhibits 20–32, Maryland Department of Health and Mental Hygiene Food Service Permit issued 2003–2015; Exhibits 44–48, Advertising flyers distributed 2014–2017; and Exhibits 86–90, Affidavits, all establish that the Nico Banquet Hall has operated since 2000. However, the use and occupancy permit issued in 2000, which notes the banquet hall/catering/eating and drinking establishment uses, does not list any type of entertainment as a use and the permit issued in 2002 has since been

revoked. This is further supported by documentary evidence in the permit file and testimony of Mr. Edelen, Ms. Gallagher and Ms. Conner, which fails to specify that the applicant was ever approved to have any adult entertainment or dancing use. Further the low-priority Health Department permit issued to the applicant over the years and as described by Mr. Edelen for pre-packaged food sales would not support an adult-entertainment use as it was only available with an eating and drinking establishment. In addition, operations within the building should have ceased due to the October 2014 fire, until final inspections of construction work were completed by DPIE, which to date still have not been completed. Therefore, the supporting evidence provided by the applicant and testimony presented at the hearing was not sufficient to establish that an eating and drinking establishment with adult entertainment was a legally established use that operated continuously since May 2000.

## CONCLUSION

Based on the Prince George's County Zoning Ordinance, Section 27-244(b)(2)(B) for certification of a nonconforming use, the Planning Board finds that there is not enough evidence to support the applicant's argument that the use as an eating or drinking establishment providing live adult entertainment was legally established and/or that the use has continued both lawfully and without interruption (in excess of 180 days).

NOW, THEREFORE, BE IT RESOLVED, that pursuant to Subtitle 27 of the Prince George's County Code, the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission adopted the findings contained herein and DISAPPROVED the above-noted application.

BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council for Prince George's County, Maryland within thirty (30) days of the final notice of the Planning Board's decision.

\* \* \* \* \*

This is to certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Washington, seconded by Commissioner Bailey, with Commissioners Washington, Bailey, and Geraldo voting in favor of the motion, and with Commissioners Doerner and Hewlett opposing the motion at its regular meeting held on Thursday, November 29, 2018, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 10th day of January 2019.

Elizabeth M. Hewlett  
Chairman

By Jessica Jones  
Planning Board Administrator

EMH:JJ:IRT:gh