

R E S O L U T I O N

WHEREAS, the Prince George's County Planning Board has reviewed Certification of Nonconforming Use Application No. CNU-61161-2016, Mile High Restaurant, 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 hearing on May 18, 2017, the Prince George's County Planning Board finds:

- A. **Location and Field Inspection:** The subject property, Lot 30, is located on the north side of Aaron Lane, approximately 870 feet east of the intersection of Old Branch Avenue and Aaron Lane in Clinton. The property, 6420 Aaron Lane, is zoned Commercial Miscellaneous (C-M) in a Military Installation Overlay (M-I-O) Zone. The site is developed with a 7,940-square-foot, single-story, masonry commercial building on a 57,125-square-foot parcel. Access to the site is via ingress/egress on Aaron Lane, which connects to a 67-space asphalt parking lot.

- B. **Development Data Summary:**

	EXISTING	APPROVED
Zone	C-M / M-I-OZ	C-M / M-I-OZ
Acreage	1.31	1.31
Use(s)	Restaurant w/ Adult Entertainment	Restaurant w/ Adult Entertainment
Lot	1	1

- C. **History:** Per the Maryland State Department of Assessments and Taxation, the building was built in 1963.

Per the justification statement, the Mile High Restaurant is an established business owned by KYOO, LLC and KO-ME, LLC that has continuously operated on the subject property as an eating or drinking establishment with adult entertainment since 1981.

Permit 10518-2002-CU/01 was approved for a restaurant on June 6, 2002.

Yochelson Subdivision, Lots 29 and 30; Re-subdivided February 2005; Recorded as Plat REP205-1.

Permit 41084-2004-CGU/02, effective March 8, 2005, was approved for a restaurant with live entertainment beyond 11:00 p.m.

Permit 23864-2008-U, on hold since September 16, 2008, is for a night club/supper club/restaurant with live entertainment.

Permit 29171-2008-U, approved September 30, 2008 and effective December 4, 2008, for a nonconforming eating and drinking establishment with live entertainment and music and patron dancing past midnight with a legal occupancy of 200 persons.

Zoning Ordinance Enacted Legislation: 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 the C-M Zone.

County Council Bill CB-46-2010 (enacted on September 7, 2010) and CB-56-2011 (enacted on November 15, 2011) clarify the definitions, use and occupancy (U&O) requirements, and enforcement provisions for adult entertainment and eating or drinking establishments in commercial and industrial zones. The use of live adult-oriented dancing is restricted to the Light Industrial (I-1) Zone. Deadlines for applying for special exceptions for existing businesses were established. No restrictions were imposed with respect to the ability of an existing business to be certified as nonconforming.

- D. **Master Plan Recommendation:** The property is within the M-I-O Zone vicinity, which governs development in areas impacted by height limitations, high noise levels, and high accident potential resulting from flight patterns at Joint Base Andrews. It 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 application is consistent with the Plan Prince George's 2035 Approved General Plan, but is not aligned with the residential mixed-use recommendation of the 2013 *Approved Central Branch Avenue Revitalization Sector Plan*.
- E. **Request:** The applicant requests certification of a nonconforming use for an eating or drinking establishment with adult entertainment on a property 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 nonconforming status began on October 11, 2005 when CB-49-2005, prohibiting the use in commercial zones, went into effect and was further impacted by the enactment of CB-46-2010 and CB-56-2011, necessitating eventual certification as a nonconforming use.
- F. **Surrounding Uses:**
- | | |
|---------------|---|
| North— | Vacant property and property developed with a fast food restaurant zoned C-M. |
| East— | Property developed with a contractor's office with outside storage zoned C-M. |
| West— | Property developed with a vehicle repair shop zoned C-M. |
| South— | Across Aaron Lane, developed property zoned Light Industrial (I-1). |

G. Definition of a Nonconforming Use:

- (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 Requirements: 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.**
 - (1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).**
- (b) Application for use and occupancy permit.**
 - (1) The applicant shall file an application for a use and occupancy permit in accordance with Division 7 of this Part.**
 - (2) Along with the application and accompanying plans, the applicant shall provide the following:**
 - (A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;**

- (B) Evidence that the nonconforming use has not ceased to operate for more than 180 consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;**
- (C) Specific data showing:**
 - (i) The exact nature, size, and location of the building, structure, and use;**
 - (ii) A legal description of the property; and**
 - (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—Certification of a nonconforming use requires that certain findings be made. In accordance with Section 27-244(f), 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 of any type providing live adult entertainment in the C-M Zone was prohibited, and upon the enactment of CB-46-2010 and CB-56-2011, which further prohibits adult entertainment in the C-M Zone. Second, there must be no break in operation for more than 180 days since the use became nonconforming.

The applicant submitted the following documentary evidence in support of the application to demonstrate the legal establishment of the business and continuous operation:

1. State of Maryland Liquor License for 2013-2014, 2014-2015, 2015-2016, and 2016-2017.
2. Department of Health and Mental Hygiene Permit for Food Service Facility for 2014, 2015, 2016, and 2017.
3. State of Maryland Trader's and Restaurant License for 2015 and 2016.
4. Board of License Commissioners for Prince George's County certificate of passing Underage Prevention Check dated October 26, 2016.

5. State of Maryland Special Entertainment Permit for 2012-2013, 2013-2014, 2014-2015, 2015-2016, and 2016-2017.
6. Facebook Notification Post Advertisements dated September 28, 2010, October 25, 2010, November 25, 2011, January 6, 2012, April 3, 2012, May 22, 2012, June 21, 2012, November 12, 2012, January 19, 2013, February 9, 2013, April 29, 2013, November 29, 2013, December 20, 2013, June 24, 2014, September 11, 2014, October 2, 2014, and February 3, 2015.
7. Prince George's County Board of License Commissioners Inspector Reports dated June 15, 2012, July 26, 2012, August 23, 2012, September 22, 2012, October 19, 2012, November 17, 2012, December 28, 2012, May 10, 2013, June 19, 2013, August 2, 2013, September 19, 2013, September 20, 2013, September 29, 2013, December 4, 2013, December 9, 2013, December 20, 2013, January 3, 2014, March 13, 2014, March 21, 2014, May 26, 2014, June 23, 2014, August 7, 2014, September 29, 2014, December 30, 2014, June 25, 2015, February 26, 2016, and May 20, 2016.
8. Prince George's County Liquor Board various Data Collection Forms dated December 14, 2012, January 10, 2014, March 8, 2014, September 13, 2014, October 11, 2014, November 3, 2014, December 6, 2014, December 14, 2014, January 11, 2015, February 21, 2015, March 7, 2015, April 17, 2015, May 2, 2015, May 31, 2015, September 11, 2015, October 23, 2015, November 1, 2015, and June 18, 2016.
9. Washington Post article from August 14, 1981 about nude dancing at the Ebony Inn.
10. Letter from Sam G. Habib to the Board of License Commissioners dated August 25, 1981, requesting approval of "mud wrestling" as a new form of entertainment.
11. Letter from Patricia A. Hincken to Sam G. Habib dated September 9, 1981, confirming a conditional approval of "mud wrestling" as a new form of entertainment.
12. Letter from Sam G. Habib to the Board of License Commissioners dated October 8, 1981, requesting approval of a weekly wet t-shirt contest.
13. Letter from Sam G. Habib to the Board of License Commissioners dated October 10, 1981, requesting approval of Go-Go dancing.
14. Letter from Sam G. Habib to Ms. Pat Hincken dated November 19, 1981 requesting approval of an indefinite extension of mud wrestling as entertainment.
15. Letter from Patricia A. Hincken to Sam G. Habib dated December 10, 1981, confirming approval of an indefinite extension for mud wrestling as entertainment.

16. Letter from Patricia A. Hincken to Sam G. Habib dated November 1, 1982, confirming approval of weekly a wet t-shirt contest.
17. KO-ME LLC payroll records summary for 2011 dated March 4, 2011, June 10, 2011, and December 23, 2011.
18. KO-ME LLC payroll records summary for 2012 dated January 20, 2012, June 8, 2012, and December 21, 2012.
19. KO-ME LLC payroll records summary for 2013 dated January 18, 2013, June 7, 2013, and December 20, 2013.
20. KO-ME LLC payroll records summary for 2014 dated January 31, 2014, June 6, 2014, and December 19, 2014.
21. KO-ME LLC payroll records summary for 2015 dated January 30, 2015, June 5, 2015, and December 31, 2015.
22. KO-ME LLC payroll records summary for 2016 dated June 3, 2016 and November 18, 2016.
23. KO-ME LLC W-2 and Earnings Summaries for 2012.
24. KO-ME LLC W-2 and Earnings Summaries for 2013.
25. Letter to Granville Templeton, Esq. from the Board of License Commissioners dated March 25, 2008, approving the transfer application for a Class B+, Beer, Wine and Liquor license.
26. Cease and Desist Letter from DPIE dated November 16, 2016, for all adult entertainment activities by Monday, November 21, 2016.
27. Letter to the Board of License Commissioners from Sam G. Habib dated August 25, 1981 (duplicate of exhibit 10).
28. Letter from McNamee Hosea to Franklin D. Jackson dated August 8, 2012, requesting a meeting to discuss House Bill (HB) 1050.
29. Letter to Robert J. Kim from the Board of License Commissioners dated September 4, 2012, indicating agreement to operate in compliance with HB 1050.
30. Department of Permits, Inspections and Enforcement Zoning Violation Notice citing violation of Sections 27-253(a)(1) and 264(1)(b) dated January 21, 2015, for all unauthorized adult entertainment activities.

31. The Washington Post article dated September 15, 2011, about an employee suing the Mile High Club owner.
32. The Washington Examiner article dated November 28, 2012, about an employee suing the Mile High Club owner.
33. Comptroller of Maryland Admission and Amusement Tax Returns for 2013.
34. Comptroller of Maryland Admission and Amusement Tax Returns for 2014.
35. Comptroller of Maryland Admission and Amusement Tax Returns for 2015.
36. Comptroller of Maryland Admission and Amusement Tax Returns for 2016.
37. Comptroller of Maryland Sales and Use Tax information for 2012.
38. Comptroller of Maryland Sales and Use Tax information for 2013.
39. Comptroller of Maryland Sales and Use Tax information for 2014.
40. Comptroller of Maryland Sales and Use Tax information for 2015.
41. Comptroller of Maryland Sales and Use Tax information for 2016.
42. WSSC water and sewer bills and recaps for 2011.
43. WSSC water and sewer bills and recaps for 2012.
44. WSSC water and sewer bills and recaps for 2013.
45. WSSC water and sewer bills and recaps for 2014.
46. WSSC water and sewer bills and recaps for 2015.
47. WSSC water and sewer bills and recaps for 2016.
48. Washington Gas bills for 2011.
49. Washington Gas bills for 2014.
50. Washington Gas bills for 2015.
51. Verizon bill dated January 20, 2011.

52. Verizon bill dated December 20, 2014.
53. Verizon bills dated January 20, 2015, June 20, 2015, and November 20, 2015.
54. Verizon bill dated April 20, 2016.
55. PEPCO bill dated February 1, 2011.
56. PEPCO bills dated January 28, 2014, June 26, 2014, and December 23, 2014.
57. PEPCO bills dated January 30, 2015 and June 30, 2015.
58. PEPCO bill dated July 1, 2016.
59. FOIA request letter to Prince George's County dated December 15, 2016, for Joint Action Group inspection reports, all fire inspection reports, DPIE/DER inspection reports, all county inspection reports and log entries for the Health and Police Department.
60. Prince George's County, Department of Environmental Resources, Permits and Review Division, Use and Occupancy Permit 29171-2008-00 for a Night Club/Supper Club/Restaurant, Nonconforming Use.
61. Affidavits from property owners, patrons, performers and vendors from 1981 to present.
62. Certificate of Good Standing for KO-ME, LLC.
63. Motley v. KO-ME LLC, CAL 11-26757, Circuit Court for Prince George's County, Maryland, wherein the Plaintiff alleged that she worked as an exotic dancer for the Applicant from January 2008 to February 2010.
64. Ashe v. KO-ME LLC, CAL 12-37323, Circuit Court for Prince George's County, Maryland, wherein the Plaintiff alleged that she worked as an exotic dancer for the Applicant from October 2009 to August 2011.
65. Clements v. KO-ME LLC, CAL 11-23437, Circuit Court for Prince George's County, Maryland, wherein the Plaintiff alleged that she worked as an exotic dancer for the Applicant from April 2010 to August 2011.
66. Fax from Board of License Commissioners with adult entertainment chart stating the Mile High has written permission to provide adult entertainment since December 2, 1981.
67. E-mail dated April 8, 2008, from the Board of License Commissioners to County Attorney's Office stating that Mile High had written permission to provide adult entertainment since December 2, 1981.

68. M-NCPPC staff review comments dated December 6, 2016, indicating that certification of a nonconforming use is required for 6420 Aaron Lane, Clinton, MD.
69. 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.

The applicant has, therefore, submitted documentary evidence demonstrating the commencement and continuous operation of the subject use of “eating or drinking establishment with adult entertainment” from the period of October 11, 2005 to the present.

DISCUSSION

The adult entertainment use was allowed through 2005, when legislation was enacted prohibiting the use in commercial and mixed-use zones, and further defined with specific use venues via legislation enacted in 2010 and 2011. The applicant’s exhibits, specifically, Exhibit 60, the Nonconforming Use and Occupancy Permit 29171-2008-00 for a Night Club/Supper Club/Restaurant; Exhibit 66, the fax from the Board of License Commissioners with an adult entertainment chart stating the Mile High has had written permission to provide adult entertainment since December 2, 1981; and Exhibit 67, E-mail communication between the Prince George’s County Attorney’s Office and the Board of License Commissioners Office dated April 3-8, 2008, all establish that the Mile-High Restaurant has operated with a liquor license since before 1960 and with adult entertainment since December 1981.

County Council Bill CB-49-2005, enacted by the County Council on October 11, 2005, prohibits eating or drinking establishments of any type providing live adult entertainment in all commercial zones, while providing an exception for those properties zoned C-M meeting specific criteria. Thus, the subject property became nonconforming on October 11, 2005 when the use was prohibited. The applicant applied for and was granted a U&O Permit, 29171-2008-U, on September 30, 2008, effective December 4, 2008, for a nonconforming eating and drinking establishment/nightclub with live entertainment and music and patron dancing past the hours of 12:00 midnight, with a legal occupancy of 200 persons per Permit 41084-2004-CGU/02, based upon the documentation of continuous operation.

The nonconforming status of the subject use was further impacted with the enactment of CB-46-2010 (September 7, 2010) and CB-56-2011 (November 15, 2011), which defines adult entertainment, clarifies the definition of live adult entertainment, the U & O requirements, and enforcement provisions for adult entertainment and eating or drinking establishments in both commercial and light industrial zones. Deadlines for applying for special exceptions for existing businesses were

established. However, Footnote 58 explicitly states, “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. (CB-56-2011).” A night club/supper club/restaurant with adult entertainment is not identified as a venue requiring a special exception, nor has any prohibition been imposed upon such a venue’s ability to be certified as a nonconforming use. Therefore, pursuant to both Maryland and County law, the subject property is exempt from that requirement. Given that the subject property has a valid “Use and Occupancy Permit, No. 29171-2008-U, effective December 4, 2008, for a night club/supper club/restaurant with live entertainment including topless dancers based upon the existing use and documentation of continuous operation,” which is not a noted use/venue in Footnote 58, the Mile-High Restaurant meets the requirements for certification as a nonconforming use.

CONCLUSION

The applicant requests certification of a nonconforming use for an eating and drinking establishment with adult entertainment on a property zoned C-M in a M-I-O Zone. An eating or drinking establishment of any type providing adult entertainment is prohibited outside of the I-1 Zone. The nonconforming status began on October 11, 2005 when County Council Bill CB-49-2005, prohibiting the use in commercial zones, went into effect and was further impacted with the enactment of both CB-46-2010 (September 7, 2010) and CB-56-2011 (November 15, 2011). The applicant has demonstrated that the use of an eating or drinking establishment of any type providing live adult entertainment was legally established prior to October 11, 2005, and that said use has operated as such without interruption.

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 APPROVED 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.

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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 Hewlett voting in favor of the motion, and with Commissioners Doerner and Geraldo absent at its regular meeting held on Thursday, May 18, 2017, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 8th day of June 2017.

Patricia Colihan Barney
Executive Director

By Jessica Jones
Planning Board Administrator

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