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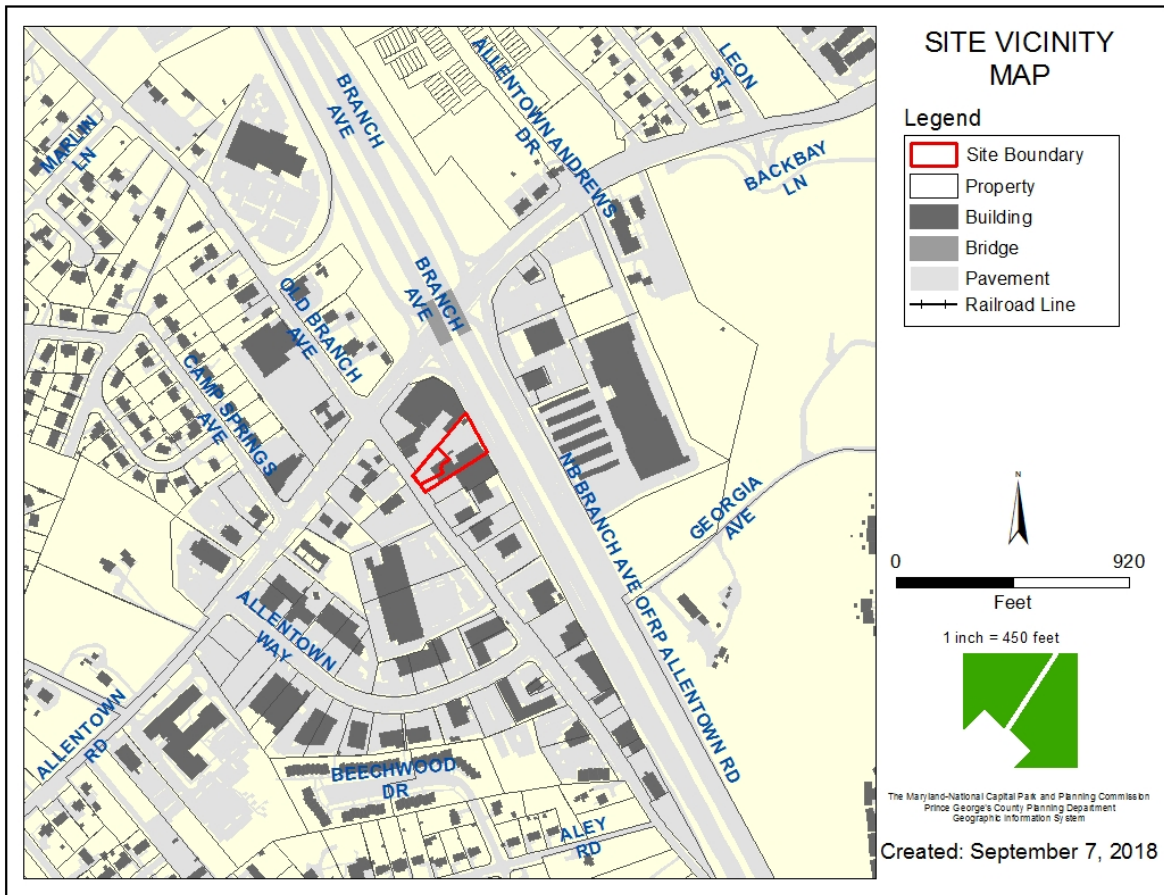
Certification of Nonconforming Use

CNU-1143-2018

Application	General Data	
Project Name: NICO Banquet Hall Location: Along the east side of Old Branch Avenue, approximately 300 feet south of its intersection with Allentown Road. Applicant/Address: NICO Banquet Hall 6306 Old Branch Avenue Temple Hills, MD 20748 Property Owner: Roozen Enterprise, LLC 517 10 th Street NE Washington, DC 20002	Planning Board Hearing Date:	10/18/18
	Staff Report Date:	10/03/18
	Date Accepted:	07/03/18
	Planning Board Action Limit:	N/A
	Plan Acreage:	0.86
	Zone:	C-M/M-I-O
	Gross Floor Area:	3,500 sq. ft.
	Lots:	N/A
	Parcels:	2
	Planning Area:	76B
	Council District:	08
	Election District	09
	Municipality:	N/A
	200-Scale Base Map:	208SE05

Purpose of Application	Notice Dates	
Certification of a nonconforming use for an eating and drinking establishment with adult entertainment.	Informational Mailing	01/17/18
	Acceptance Mailing:	04/16/18
	Sign Posting Deadline:	09/18/18

Staff Recommendation		Staff Reviewer: Ivy Thompson Phone Number: 301-952-4326 E-mail: Ivy.Thompson@ppd.mncppc.org	
APPROVAL	APPROVAL WITH CONDITIONS	DISAPPROVAL	DISCUSSION
		X	



THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

PRINCE GEORGE'S COUNTY PLANNING BOARD

TECHNICAL STAFF REPORT:

TO: The Prince George's County Planning Board

VIA: Sherri Conner, Acting Supervisor, Subdivision and Zoning Section,
Development Review Division

FROM: Ivy R. Thompson, Senior Planner, Urban Design Section, Development Review Division

SUBJECT: **Certification of Nonconforming Use Application No. CNU-1143-2018
Nico Banquet Hall**

REQUEST: **Certification of a nonconforming use for an eating and drinking establishment with
adult entertainment.**

RECOMMENDATION: **DISAPPROVAL**

NOTE:

The Planning Board has scheduled this application for a public hearing on the agenda date of October 18, 2018. The Planning Board also encourages all interested persons to request to become a person of record for this application.

Requests to become a person of record should be made in writing and addressed to The Maryland-National Capital Park and Planning Commission, Development Review Division, 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772. Please call 301-952-3530 for additional information.

FINDINGS

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:**

	EXISTING	PROPOSED
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 catering establishment and eating and drinking establishment in the C-M Zone.

Certificate of Occupancy Permit 4752-2000-00-U was issued 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 on November 14, 2002, which was approved for catering, food and drink services, and restaurant. Permit No. 1143-2018-U, which is on hold effective January 9, 2018, is 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 night and potentially adversely impact 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 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.**
 - (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). Any person making use of or relying upon the certification that is violating or has violated any conditions thereof, or that the use for which the certification was granted is being or has been exercised contrary to the terms or conditions of such approval shall be grounds for revocation proceedings in accordance with this Code.**
- (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 between the time the use became nonconforming and the date when the application is submitted, or that conditions on 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—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. 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.
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.

Although significant evidence of the establishment and continuous use as an eating and drinking establishment since 2000 has been provided with this application, the only evidence submitted of the adult entertainment use prior to 2005 was provided via affidavit of the Manager, Aarin Roozen, indicating operation with adult entertainment since 2002. However, the current use and occupancy permit (Permit No. 29764-2002-00), issued November 14, 2002, does not indicate any entertainment use as part of the approval. Further, with the submittal of the permit application in 2002, the applicant submitted a letter dated September 11, 2002 (Roozen to Ferrate) regarding the

proposed use which indicated the intent to operate a banquet hall 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 did not indicate the venue would provide entertainment of any sort and a copy of the letter has been provided in the back-up of this staff report.

Given the permit evidence, which lacks any indication of an entertainment use on the subject property, staff believes the applicant has not 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 May 1, 2000 to the present.

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.**

At the time of the writing of this staff report, DPIE had not provided comments indicating the status of violations for the subject site.

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 and 2002, which notes the banquet hall/catering/eating and drinking establishment uses, does not list any type of entertainment as a use. This is further supported by documentary evidence in the permit file, which fails to specify that the applicant intended to have any entertainment use. Therefore, the supporting evidence provided corroborating adult entertainment as a use at the subject property is not enough to indicate that it was a legally established use.

CONCLUSION

Based upon the technical interpretation of 27-244 for certification of a nonconforming use there is not sufficient evidence to suggest and support the applicant's argument that the use as an eating or drinking establishment providing live adult entertainment was legally established. Therefore, it is recommended that Certification of Nonconforming Use Application No. CNU-1143-2018 be DENIED as a certified nonconforming use.