



Note: Staff reports can be accessed at www.mncppc.org/pgco/planning/plan.htm.

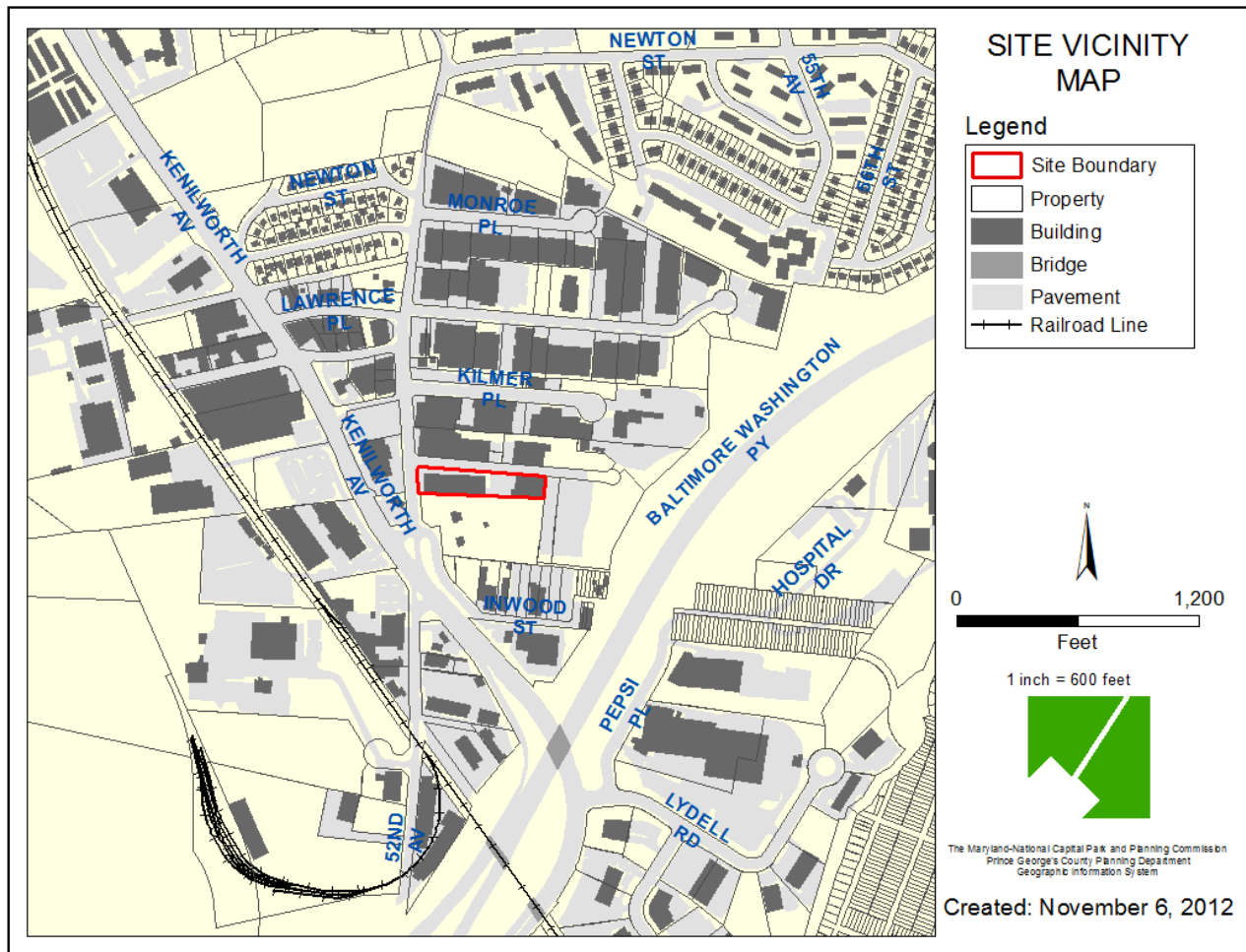
Special Exception

SE-4718

Application	General Data	
Project Name: D2 Fuego's Location: Located on the south side of Jackson Street, approximately 620 feet east of its intersection with 52nd Avenue. Applicant/Address: D2 Fuego's 5005 Jackson Street Bladensburg, MD 20781 Property Owner: Agu Agwo, LLC 5005 Jackson Street Bladensburg, MD 20781	Planning Board Hearing Date:	01/10/13
	Staff Report Date:	12/26/12
	Date Accepted:	05/31/12
	Planning Board Action Limit:	N/A
	Plan Acreage:	0.51
	Zone:	I-1
	Gross Floor Area:	4,999 sq. ft.
	Lots:	N/A
	Parcels:	p/o of 1
	Planning Area:	69
	Tier:	Developed
	Council District:	05
	Election District	02
	Municipality:	N/A
	200-Scale Base Map:	204NE04

Purpose of Application	Notice Dates	
Request special exception for adult entertainment in the I-1 Zone. A variance is also requested from the 1,000-foot minimum setback requirement from residentially-zoned land (Section 27-475.06.06(b)).	Informational Mailing	04/10/12
	Acceptance Mailing:	Pending
	Sign Posting Deadline:	N/A

Staff Recommendation			Staff Reviewer: John Ferrante Phone Number: 301-952-3665 E-mail: John.Ferrante@ppd.mncppc.org
APPROVAL	APPROVAL WITH CONDITIONS	DISAPPROVAL	DISCUSSION
		X	



December 26, 2012

TECHNICAL STAFF REPORT

TO: The Prince George's County Planning Board
The Prince George's County District Council

VIA: Jimi Jones, Zoning Supervisor, Development Review Division

FROM: John Ferrante, Senior Planner, Zoning Section, Development Review Division

SUBJECT: **Special Exception Application No. SE-4718**
D2 Fuego's

REQUEST: **Adult Entertainment in the I-1 Zone**
Variance from Section 27-475.06.06 of the Zoning Ordinance

RECOMMENDATION: **DISAPPROVAL**

NOTE:

The Planning Board has scheduled this application to be reviewed on the agenda date of January 10, 2013. If the Planning Board decides to hear the application, it will be placed on a future agenda.

Any person may request the Planning Board to schedule a public hearing. The request may be made in writing prior to the agenda date or in person on the agenda date. All requests must specify the reasons for the public hearing. All parties will be notified of the Planning Board's decision.

You are encouraged to become a person of record in this application. The request must be made in writing and addressed to the Prince George's County Office of the Zoning Hearing Examiner, County Administration Building, Room 2184, 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772. Questions about becoming a person of record should be directed to the Hearing Examiner at 301-952-3644. All other questions should be directed to the Development Review Division at 301-952-3530.

FINDINGS

- A. **Location and Field Inspection:** The site is located along the south side of Jackson Street, approximately 620 feet east of its intersection with 52nd Avenue. The subject use is located in a warehouse that contains a total of three units. The property consists of approximately 0.51 acre in the I-1 (Light Industrial) Zone.

Per information derived from the Maryland Department of Assessments and Taxation, the entire gross floor area of the building consists of approximately 14,625 square feet, and it was constructed in approximately 1979.

The site plan that was submitted by the applicant with Permit 32364-2012-U demonstrates that 38 parking spaces are existing in the parking lot to support the three warehouse units that make up the building. Two of the spaces are compact spaces and no parking spaces are provided for the physically handicapped. The parking lot is located on the west side of the building and has direct access to Jackson Street.

- B. **Development Data Summary:**

	EXISTING	PROPOSED
Zone(s)	I-1	I-1
Use(s)	Auditorium w/150 seats (9,500 sq. ft)	Adult Entertainment (4,999 sq. ft.)
Acreage	0.51	0.51
Lots	None	None
Parcels	p/o 1	p/o 1
Variance	No	Yes

- C. **History:** 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 Maryland-National Capital Park and Planning Commission (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 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 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 formally accepted by the Planning Department. Comments that outlined the required site plan revisions and the other documents that were needed 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 their status.

October 16, 2012—Jimi Jones, Supervisor of the Zoning Section, sent an e-mail to the applicant's attorney reminding them that the scheduled hearing date is rapidly approaching and that materials needed for the review and processing of the special exception application have not been submitted to the Planning Department, and that a staff report will be issued without this information if need be.

November 1, 2012—Use and Occupancy Permit 32364-2012-U was placed on hold by the Permit Review Section and written comments are 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.

At the time of the writing of the subject staff report, a nonconforming use application had not been submitted by the applicant or formally accepted by the Planning Department.

- D. **Master Plan Recommendation:** 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.

- E. **Request:** The applicant seeks approval of a special exception application to operate a 4,999-square-foot adult entertainment establishment in the I-1 Zone, and a variance from the 1,000-foot minimum setback requirement from residentially-zoned land contained in Section 27-475.06.06(b) of the Zoning Ordinance.

Section 27-107.01(7.1) of the Zoning Ordinance 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.**

The underlying permit the applicant references (9620-2001-CU) was approved for a 9,500-square-foot auditorium with up to 110 seats. However, Permit 32159-2009-CU was approved for the same facility, but increased the seat count to 150 seats. On November 18, 2009 during the review of Permit 32159-2009-CU, the applicant's attorney submitted a letter stating that the square footage of the proposed use is 5,200 square feet. However, the site plan shows the use as being 9,500 square feet in size. The current special exception application states the proposed use is 4,999 square feet in size. Obviously, there appears to be some discrepancies on the size of the proposed use. Further, the site plans that were submitted and approved with Permit 9620-2001-CU (April 31, 2001) and 32159-2009-CU (December 14, 2009) were for a 9,500 square-foot unit that was located within a warehouse that is situated at the corner of 52nd Avenue and Jackson Street. This building contained a total of four units that were all 9,500 square feet in size.

The site plan that was submitted by the applicant with Permit 32364-2012-U demonstrates that the proposed adult entertainment use is located in a building on Jackson Street that is situated 620 feet east of its intersection with 52nd Avenue. This building is approximately 14,625 square feet in size and contains a total of three units.

While all of the above mentioned permits and the current special exception application were submitted for the address of 5005 Jackson Street, the site plans that were submitted for the prior permits and for the special exception application appear to be for two separate buildings located on two separate properties.

Permits 9620-2001-CU and 32159-2009-CU were reviewed for the purposes of complying with parking and loading requirements, and other zoning requirements on a property that appears to be to the west of where the applicant currently proposes the subject special exception use. None of the prior use and occupancy permits that were approved for auditorium were for a 4,999-square-foot unit that is located on Jackson Street, approximately 620 feet east of its intersection with 52nd Avenue where the applicant appears to be currently located.

Footnote 56 within Section 27-473 of the Zoning Ordinance states the following;

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.

On April 25, 2001 during the review of Permit 9620-2001-CU, the Permit Review Section issued comments to the applicant asking them to submit a written statement to clarify their intended use at this location. On April 27, 2001, the applicant submitted written documentation stating that the proposed uses at this location were as follows:

- a. Private parties in compliance with all applicable laws and regulations, with no audience participation.
- b. Reception
- c. Private Meetings

- d. Conferences
- e. Trade Shows

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

On April 30, 2001, the Permit Review Section subsequently approved the permit. The written approval on the 2001 permit specifically stated that the approval did not include public dances, dance hall, Go-Go's, or a recreational establishment of a commercial nature. Obviously, the use of adult entertainment was not one of the applicant's proposed uses per the written statement they submitted for this permit.

On November 13, 2009 during the review of Permit 32159-2009-CU, the Permit Review Section issued comments to the applicant asking them to submit another written statement to clarify their intended use at this location. On November 18, 2009, the applicant's attorney submitted written documentation stating that their 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.

Both of these permits were building permits that proposed interior alterations to the layout of the existing building. As a result, both the Permit Review Section and the Department of Environmental Resources (DER), Fire Review Section, requested that renderings be submitted for Permit 32159-2009-CU that demonstrated the proposed work to the interior of the building.

Interior renderings were initially submitted by the applicant for Permit 32159-2009-CU that demonstrated a bar area, a DJ area, and a dance floor area. It appeared that the applicant's intended use was not consistent with the definition of an auditorium which strictly included meetings and seated events only with no audience participation. Further, having a bar, DJ, and dance floor areas were certainly not consistent with the applicant's written statement indicating that the proposed use was for sit down meetings, conferences, and trade shows.

As a result, the Permit Review Section requested that the applicant submit a revised written statement that truly demonstrated what their proposed intended use was at this location per the interior renderings they submitted, and to revise the permit application to clearly indicate the correct proposed intended use. However, the applicant submitted a revised interior rendering that removed the bar area, DJ area, and dance floor. With a new interior rendering submitted and written documentation from the applicant stating that their proposed use was consistent with the definition of an auditorium, Permit 32159-2009-CU was approved by the Permit Review Section for an auditorium (per the written definition of an auditorium) with up to 150 seats for sit-down meetings, conferences, and with no audience participation. It is unclear if the 2009 permit was ever issued by DER, as the applicant references the 2001 permit as being the underlying "valid" permit for the purposes of complying with Footnote 56 within Section 27-473(D)(6) of the Zoning Ordinance.

Although the applicant has an issued use and occupancy permit for an auditorium, there appears to have been some misrepresentation on the applicant's behalf at the time of the use and occupancy permit as to what their ultimate intentions were in operating at this location. Had the applicant disclosed that they intended to have adult entertainment at this location and to be open to any member of the general public who pays their admission fee on a given night, then the use

would have not been consistent with the definition of an auditorium, and would have therefore been prohibited.

However, the applicant chose to apply for a use and occupancy permit for an auditorium and continued to provide the Permit Review Section with documentation for every permit stating that they proposed to operate as an auditorium per its written definition. The Permit Review Section's written approval on the 2001 use and occupancy permit states that the approved use solely includes private meetings, conferences, trade shows, and private parties with no audience participation. The Permit Review Section's written approval on Permit 32159-2009-CU was for an auditorium (per the written definition of an auditorium) with sit-down meetings, conferences, and with no audience participation. Lap dancing is a form of audience participation.

The applicant never disclosed their intended use of adult entertainment. But rather, the applicant stated in writing that the intended use was to have private meetings, trade shows, and conferences at this location. As a result, it is staff's opinion that the occupancy permits were obtained fraudulently and are, therefore, not in harmony with the purposes of this Subtitle.

It also appears that the applicant is located in a different building and property than that shown on their approved use and occupancy permit. It should also be noted that, per information derived from the Maryland Department of Assessments and Taxation, the legal ownership of the property that was used to obtain the original use and occupancy permit has changed several times since 2001. The applicant has not produced an issued use and occupancy permit that has the current occupant and the current property owner listed on it.

- F. **Neighborhood and Surrounding Uses:** 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.

Staff would submit that 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.

- G. **Specific Special Exception Requirements:** The specific special exception requirements for the use are contained in Section 475.06.06 of the Zoning Ordinance.

Section 27-475.06.06. Adult Entertainment.

- (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.**

The applicant has requested a variance from Section 27-475.06.06(b) of the Zoning Ordinance because the establishment is not located at least 1,000 feet from a residential zone. A variance of 150 feet is requested from the 1,000-foot minimum setback requirement from residentially-zoned land. The subject property is located 850 feet from the nearest residentially-zoned land.

According to measurements taken from PGAtlas, a residentially-zoned area comprising an undeveloped portion of the county-owned Prince George's General Hospital property is approximately 850 feet southeast of the establishment. The applicant states that the land is not used for residential purposes.

Since site plans were not submitted for the referral process, staff has no general notes or other written assurances that the hours of operation limitations provided in Section 27-475.06.06(a) will be complied with.

- H. **Parking Regulations:** The required parking for the proposed adult entertainment establishment is one parking space for every 80 square feet of gross floor area. The applicant has not provided the site plans that were required for the referral process. However, the site plan that was submitted by the applicant with Permit 32364-2012-U demonstrates that 63 parking spaces are required to serve the proposed adult entertainment establishment and only 38 spaces are provided on the site. The plan further states that the Planning Board's approval of a Departure from Parking and Loading Standards (DPLS) application would be required in order to waive 25 of the parking spaces that are required to serve the proposed use. A DPLS application has not been submitted by the applicant and the site is clearly unable to provide the required numbers of parking spaces that are needed just to support the proposed use. Further, the site plan did not include any of the parking requirements for the other two units in the building that share common parking and loading facilities with the proposed use, and loading space requirements were not provided for any of the three units that make up the building.

As a result, staff is unable to find conformance with the minimum parking and loading requirements in Part 11 of the Zoning Ordinance that are required to support the proposed special exception use and the property as a whole.

- I. **Prince George's County Landscape Manual Requirements:** The application is exempt from the 2010 *Prince George's County Landscape Manual* pursuant to Section 1.1(b) which states:

Existing conditions on a developed site not in conformance with the requirements of this manual that were otherwise lawful on December 13, 2010, and not the subject of any building or grading permit, may continue as a matter of right.

Tree Canopy Coverage: The application does not propose 1,500 square feet or greater disturbance and, is therefore, not subject to the requirements of the Tree Canopy Coverage Ordinance.

J. **Zone Standards:** No new construction or increase in gross floor area is being proposed through the subject special exception application. However, site plans were not submitted by the applicant for the special exception process. Therefore, compliance with I-1 zoning standards is unable to be fully determined at this time.

K. **Required Findings for Variance Request:** Section 27-230(a) of the Zoning Ordinance states that a variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

- (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;
- (2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and
- (3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

A statement of justification for the variance request was not submitted by the applicant for the referral process.

L. **Required Findings:** Section 27-317(a) of the Zoning Ordinance provides that a special exception may be approved if:

- (1) The proposed use and site plan are in harmony with the purposes 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 Tree Conservation Plan.
- (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.

Discussion: As noted previously, the applicant in this case has not submitted the statement of justification and plans necessary to process this application. This places their request in an untenable position, since Section 27-142 of the Zoning Ordinance places the burden of proof in any zoning case squarely on the applicant. It is not staff's responsibility to adduce facts based on our independent understanding of the case. However, Section 27-311 of the Zoning Ordinance requires staff to produce a staff report in a timely manner, and further requires staff to make a

recommendation in that report. Based on the applicant's refusal to provide the necessary information, staff is compelled to recommend denial of the application.

CONCLUSION

Based on the preceding analysis and findings, staff recommends DISAPPROVAL of Special Exception Application No. SE-4718.