

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

**SPECIAL EXCEPTION
4719**

DECISION

Application:	Auditorium with Adult Entertainment
Applicant:	Music Studio 63 (Sole Proprietorship) d/b/a Grandma's South Carolina Catering
Opposition:	Camelia Styles, et. al.
Hearing Dates:	February 5, 2014, March 3, 2014 and March 28, 2014
Hearing Examiner:	Maurene Epps McNeil
Disposition:	Denial

NATURE OF REQUEST

(1) Special Exception 4719 is a request for permission to use approximately 16,700 square feet .38 acre improved with an approximately 2,500 square foot structure on land in the C-M (Commercial Miscellaneous)/DDO (Development District Overlay) Zone, located on the south side of East Capitol Street, southeast of Athena Street, and southwest of Yeoman Place, also identified as 5915 Athena Street, Capitol Heights, Maryland, for Adult Entertainment. Adult Entertainment is prohibited in the C-M Zone pursuant to Section 27-461(b) of the Zoning Ordinance, unless the following provisions in Footnote 58 apply:

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.

(2) The Technical Staff recommended denial and the Planning Board accepted Staff's recommendation as its own. (Exhibits 4 and 9)

(3) Several appeared in opposition to the request.

(4) The Applicant was asked to provide proof that the trade name "Grandma's South Carolina Catering" had been registered with the state, and a copy of its use and occupancy permit. The last of these items was submitted on May 15, 2014, and the record was closed at that time. (Exhibit 55)

FINDINGS OF FACT

Subject Property

(1) The subject property is improved with a one-story, 2,500 square foot building currently used as an Auditorium, Catering Establishment and Banquet Hall pursuant to Use and Occupancy Permit No. 13659-2003-01. (Exhibit 9, p. 4 and Exhibit 55) This permit included a notation that “no recreational establishment of a commercial nature” is allowed. Staff noted that this “was the use category under which adult entertainment was then classified.” (Exhibit 9, p. 6)¹ The Technical Staff Report includes an excellent history of the various zoning applications and permits that have been “issued”² for the property. (Exhibit 9, pp. 4-5)

(2) The property is located to the south of East Capitol Street (MD 214), to the southeast of Athena Street, and to the southwest of Yeoman Place. Athena Street and Yeoman Place terminate at the subject property (blocked by barricades). (Exhibits 29, 32 and 33; February 5, 2014, T. 42) Its primary access is from Athena Street, with a right-in, right-out driveway onto East Capitol Street. (February 5, 2014, T. 17)

(3) The property is not subject to the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because it is less than 40,000 square feet in size and has no prior tree conservation plan approvals. (Exhibit 31) There are no regulated environmental features on site. (February 5, 2014, T. 36) The property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (February 5, 2014 T. 43)

Neighborhood and Surrounding Use

(4) The neighborhood is defined by the following boundaries:

North and East-	East Capitol Street (MD 214)
South -	Old Central Avenue (MD 332); and
West -	Southern Avenue (The District of Columbia)

(5) The property is surrounded by the following uses:

North -	Across East Capitol Street is a single-family residence and undeveloped land in the R-20 (One-Family Triple-Attached Residential)/D-D-O Zone.
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¹ While I do not doubt Staff’s position, I must note that CB-56-2011 did not include “recreational establishment of a commercial nature” as one of the uses that could continue to provide adult entertainment under certain conditions, upon approval of a special exception. This suggests that the District Council believed that adult entertainment had been provided in auditoriums or private lodge prior to the adoption of CR-56-2011. (Exhibit 21) In fact, the District Council committee report notes that the bill was needed to “address existing business operating without an adult entertainment ... Use and Occupancy permit.” (Exhibit 22)

² Staff testified that the zoning history outlined in the report only reflects Staff’s approval of the various permits and is not proof that a final permit was approved and issued by the applicable County agency. (March 28, 2014 T. 62)

South -	Outdoor storage in the C-M/D-D-O Zone
East -	A vacant parcel in the C-M/D-D-O Zone
West -	Undeveloped land in the C-M/D-D-O Zone and single-family residences along Athena Street in the R-T (Townhouse)/D-D-O Zone

Master Plan/Sectional Map Amendment/General Plan

(6) The 2000 Sector Plan and Sectional Map Amendment for the Addison Road Metro Town Center and Vicinity recommends a service-commercial use for the site as part of Subarea1 – MD 214/Addison Road Urban Boulevard. The illustrative concept plan for Subarea 1 recommends removal of the site's existing access to MD 214. The 2010 Subregion 4 Master Plan retained the C-M zoning of the property. The property is also part of the Addison Road Metro Town Center Development District Overlay Zone ("DDOZ") that imposes design standards upon redevelopment, with certain exemptions. (2000 Sector Plan and Sectional Map Amendment for the Addison Road Metro Town Center and Vicinity, pp. 170-171; February 5, 2014 T.12).

(7) The property is located in the Developed Tier, described in the 2002 General Plan. The vision for the Developed Tier is a network of sustainable transit-supporting, mixed-use, pedestrian-oriented, medium- to high-density neighborhoods.

Applicant's Request

(8) The Applicant is seeking approval to allow it to continue operation of an Auditorium/Catering Establishment/Banquet Hall with Adult Entertainment. Applicant submitted a Site Plan that shows the boundaries of the Special Exception use but does not clearly provide other information, since a lot of information on the Site Plan appears to be handwritten onto the older plan submitted for the Use and Occupancy Permit. (Exhibit 28) The Site Plan indicates that 17 parking spaces are provided. However, Applicant is required to provide 30 parking spaces because Section 27-568 (a)(4) of the Zoning Ordinance requires 1 space per 80 square feet of gross floor area for the requested use. The parking spaces on the Site Plan do not appear to be striped. (Exhibit 28; March 28, 2014 T. 78)

(9) Applicant and a representative of the Department of Permits, Inspections and Enforcement ("DPIE") also submitted several pictures of the site and facility. (Exhibits 30 (a) – (d), 32, 33, 34, 35 (a)-(c), 47(a)-(d), 48, 49 and 50)

(10) The Permit Review Section provided the following comment while reviewing Applicant's Use and Occupancy Permit 32362-2012-U(for certification of a nonconforming auditorium) on November 2, 2012:

This permit application is for auditorium/catering establishment with banquet facilities in the C-M Zone of the Addison Road Metro Town Center Development District Overlay Zone. An auditorium which is a room or building used for the gathering of people seated as an audience; open to the general public, with or without an admission charge, and used primarily for public speaking, theatrical production; excluding any form of patron dancing or adult entertainment. An auditorium in the C-M DDO Zone is permitted. Prior permit 13659-2003-CU/01 was approved for a 56 seat auditorium/catering establishment with banquet facilities issued on 7/21/03. The applicant must submit a detailed description of how this use will operate. This letter must include if there will [be] music and patron dancing past the hours of 12:00 am, will there be food served/supplied and/or if there be any adult oriented uses or performances and the number of seats within [the] auditorium. 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. [SE4719] was applied for the adult entertainment use per 27-461 footnote 58 and is currently pending. Since prior permit 13659-2003-CU/01 was issued for auditorium/catering establishment with banquet facilities only, this subject permit must be certified as a nonconforming use to be heard before the Prince George's County Planning Board....

(Exhibit 14, p. 31)

(11) Daniel Irving, owner of Music Studio 63, testified that he leases the building for \$4,000 monthly. His current lease was signed on April 1, 2009, for a twenty (20) year term. (Exhibit 41; March 28, 2014 T. 5-6) The lease states that the tenant's use of premises will be "strip club"/"banquet hall". He testified he has offered entertainment that satisfies the definition of adult entertainment (i.e. nude dancing, table dancing, and lap dancing) since 2003. (March 28, 2014 T. 7-9) On "numerous" occasions DPIE inspectors (formerly Department of Environmental ("DER") inspectors) have visited the site while it was offering adult entertainment, but he has not been cited for any zoning violation. (March 28, 2014 T. 10-11) Applicant submitted a copy of an article dated August 29, 2004, as further indicia that it has been providing adult entertainment since 2003. (Exhibit 53) Applicant operated a similar use somewhere on Central Avenue but was informed that it was not the proper location for the use. Mr. Irving noted that he was told by a representative of DER in 2003 that the subject location would be the proper place to have a strip club. (March 28, 2014 T. 48)

(12) Mr. Irving also pointed out that in the application for its 2003 Use and Occupancy Permit, its attorney noted that the facility would be used as follows:

Our client has informed us that you are requiring a statement detailing the proposed use of the banquet hall with his application. Please provide me with the statutory authority for this request. I am not aware of any provision in the Prince George's County Code which requires that such a statement be included with an application for a banquet hall. As such, the following letter is submitted under protest and only in accordance with the statutory authority which requires it.

Grandma's South Carolina Catering & Banquet Hall (GSCC&BH) will be a family-owned company whose philosophy will be to promote entertainment to all segments of the community. The activities that will be sponsored are designed to promote safety, health, education, cultural, spiritual and social, as well as economic growth. Our client's vision is to empower our community to achieve higher or enriched levels of development and to enhance our community's quality of life.

To this end, GSCC&BH proposes to open and operate a venue in Prince George's County where activities fostering its philosophy can be showcased. It is anticipated that these activities will include educational seminars, private parties, banquets, weddings and receptions, theatrical stage performances, art exhibitions, poetry readings, graduation ceremonies, youth dance recitals, community and corporate business meetings. The use of the facility will not include activities specifically forbidden by the Prince George's County Zoning Ordinance. The proposed venue will be named Grandma's South Carolina Catering & Banquet Hall located at 5915 Athena Street, Capitol Heights, Maryland 20743.

(Exhibit 14, p.28)

(13) Mr. Irving stated that the facility is open daily, offering adult entertainment from 8:00 p.m. until 6:00 a.m. (March 28, 2014 T.119) On Monday-Wednesday the site has two unarmed security guards in place. On Thursday-Sunday there are typically larger crowds, and there may be two additional guards on duty. Security guards are on call so additional security may be brought in as necessary. Mr. Irving also noted that the security plan has been effective but Applicant would abide by any security plan imposed if the request is approved.

(14) Applicant cleans its lot and Athena Street on a daily basis, and has done so since 2003. Applicant has made improvements to the property over the years by adding a carport, concrete, a board-on-board fence, an electrical upgrade, and outdoor lighting for the parking area.

(15) Reggie Baxter, accepted as an expert in land use planning, testified on Applicant's behalf. He concluded that the request would satisfy applicable provisions of the Zoning Ordinance, reasoning as follows:

27-317 is requirements for approval of a Special Exception, and it lists several of those, and the first one is Special Exception needs to promote the health, safety, morals, and comforts, convenience, and welfare of citizens and residents of the County. As stated in the justification we found that the use ... does comport with the general purposes as we had no evidence at the time that there had been any instances that showed that it was counter to the health, safety, morals, and comfort, convenience and welfare of the citizens. We had no complaints that I was aware of. The Applicant does employ private security there to maintain the safety, comfort and convenience of the residents.

The second requirement requires conformance with the applicable requirements and regulations of the Zoning Ordinance, that's 27-317(a)(2), and yes, the existing use is not proposed for expansion, and with the approval of the Special Exception it will be in conformance with the applicable requirements of the Zoning Ordinance, except for parking. The adult entertainment use has a more aggressive parking requirement than an auditorium use which it is currently permitted under, and they will ... require a departure from the parking and loading standards for an additional ...[13 spaces]....

[27-317(a)(3) requires that the use promotes] conservation, creation, and expansion of the community so it will be developed with adequate public facilities and all services, and to our knowledge there are adequate public facilities to serve this property and the subject use.... The Sub-region 4 Master Plan did update the 2000 Addison Road Metro Community Sector Plan. The 2010 Master Plan indicates that the property is in the Addison Road-Seat Pleasant Metro Center, Urban Center Two character area [and] is designated for redevelopment in accordance with a conceptual regulating plan that's published within that Master Plan.... However, the conceptual regulating plan that's required in order to foster that redevelopment has not yet been produced by the County. That's noted in footnote two of our statement of justification on page 4.

Thus, I think to summarize Sub-Region Four's recommendation as it pertains to the property kind of balances the ultimate envisioned redevelopment of the property with a need to provide a mix of neighborhood serving uses, so the plan in doing that balancing retains the C-M Zone

[The Sector Plan] recommends a mix of retail, office, recreational, and service commercial uses, along with a new street pattern in that vicinity. And basically an auditorium can provide for the cultural and recreational activities, as it has, and it also, the Master Plan also exempts legally existing uses, parking, loading and landscaping from compliance with the Development District Overlay Zone that was imposed at that time....

[T]he use does provide expanded employment and recreational opportunities for residents in the area, and it's very convenient to kind of the diverse population that exists there, both employee-wise and resident-wise. I was, again, not made

aware of any known complaints lodged against the property, and I'm not aware of any infringement on the health, safety, welfare caused by the particular use here....

[The proposed use is in conformance with the purposes of the C-M Zone]. The purposes of the C-M Zone are to provide locations for miscellaneous commercial uses, which may be disruptive to development of a retail shopping area. Also, the use helps for a land use, also, it helps form a land use mix that kind of sustains and compliments the recommended mixed use character that's put forth in both the Addison Road Metro Sector Plan ...[and the] 2010 , Sub-Region 4 Master Plan. Another purpose of the C-M Zone is to provide locations where possible on non-residential streets, and this is located right adjacent to and frontage on East Capitol Street. Another purpose of the C-M Zone is to provide concentrations of uses which are relatively far apart. Now, I'm not aware of another adult entertainment establishment in the vicinity of this property, so it meets the three purposes in the C-M Zone...(February 5, 2014 T. 30-37)

(16) Upon cross-examination, the Chief of Police for the Town of Capitol Heights had the witness admit that he had not reviewed the calls for service reports to verify that there were no complaints made about the use over the years.
(February 5, 2014 T.81-82)

Procedural Issue – Constitutionality of Special Exception Process

(17) Applicant initially argues that CB-56-2011 is unconstitutional because the District Council required that it first seek special exception approval before it is allowed to continue to operate what was a legal use that has by operation of law become a nonconforming use, at the subject property. Instead, the District Council must either phase the use out via amortization or grandfather it (allow it to continue "as is").
(Exhibits 11 and 20; February 5, 2014, T. 4-10)

(18) The Prince George's County Office of Law was offered the opportunity to respond to Applicant's legal argument since it would be a party to any law suit brought on these grounds. It submitted its Response in Opposition to Applicant's constitutional argument, and correctly noted that constitutional issues need not be addressed when a case can be properly disposed of on non-constitutional grounds. (Exhibit 39) However, in an abundance of caution, I will briefly discuss Applicant's argument.

(19) Courts have generally held that "an ordinance is presumed to be constitutional and the burden is upon the one attacking it to establish clearly" that it is not. Lucky Stores, Inc. v. Board of Appeals 270 Md. 513, 526, 312 A.2d 758 (1973). See, also: Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978); State v. Smith, 374 Md. 527, 823 A.2d 664 (2003) It is also beyond cavil that the District Council is empowered to determine which uses are allowed in a zone and whether the uses will be permitted

by right or upon approval of a special exception. The special exception provision thus bears the cloak of constitutionality.³

(20) Although the instant request is one seeking approval of a special exception to continue the newly-defined “adult entertainment” use at the subject property, there was testimony to indicate that Applicant has also filed for certification of its nonconforming use. This is proper since it has been held that where there was a valid use of property and a subsequent change in zoning invalidated such use, the change does not apply to the legal nonconforming use. Maages Auditorium v. Prince George’s County, 2014 U.S. Dist. :LEXIS 27849 (March 5, 2014)

(21) Accordingly, if the instant application is denied, Applicant may likely prevail on its request for a certified nonconforming use (assuming, arguendo, it satisfies all criteria for approval). I therefore, believe Applicant’s constitutional arguments are premature at this time.

Oppositions’ Concerns

(22) Several residents appeared, at one or more of the hearings held, in opposition to the request.

(23) The Chief of Police for the City of Seat Pleasant submitted a copy of the calls for service at the subject property since the issuance of the Use and Occupancy permit in 2003. (Exhibit 37) He provided the following information concerning the calls for service:

[The subject property is] outside my jurisdiction, but we’re such a small agency when incidents occur at the club, my department and his department are usually the first ones on the scene....

So, going back from January 1st, 2004 to January 28th, 2014 there have been 284 calls for service at this establishment. This does not include any calls for service stemming from the club, which would mean somebody leaving the club and venturing out into the neighborhood, which quite often happens because there are a couple of establishments in the City of Seat Pleasant that stay open late at night ... and we get a lot of calls from patrons of this club. And I know that because the officers when they talk to these individuals they usually say they’re coming from the club. But it’s not even the number that I’d like to discuss, it’s the type of calls that we’re getting, fight, shooting, check weapon, check weapon, gunshots, gunshots, check weapon, disorderly, disorderly.... So, they’re very serious calls for service, and it becomes a serious public safety issue. It puts a strain on our resources, like I said, Seat Pleasant and Capitol Heights are two

³ I would also note that Applicant is appealing the constitutionality of these special exception provisions in federal court, and that esteemed body will fully address the “facial” and “as applied” legality of said provisions.

small agencies, and it puts a tremendous strain on our resources when we have to respond to calls for service at this location....

An establishment like this does not belong in a residential area. I don't know the zoning laws, or, you know, to say this is a commercial area it's not entirely true. This area is surrounded by homes, it should not be in a residential area. The residents of Capitol Heights and Seat Pleasant should not have to explain to their kids why there's used condoms laying in the parking lot, why there's open alcoholic containers in the parking lot, why there's drug paraphernalia in the parking lot. A lot of the calls we get are ... to check persons, if you look at the calls for service, occupied vehicles with people in them doing things they shouldn't be doing in the neighborhood. I think someone already testified, 58 people can get into the club, but there's only 17 parking, alleged parking spaces. Where is everyone else parking?

(February 5, 2014 T. 99-102)

(24) The Chief of Police for the Town of Capitol Heights also noted that many of the calls for service originated from within the Applicant's facility:

In reference to calls for service, if you look at the last column, that's the complaint column.... [T]here's several calls for service that came in from the establishment itself, so these employees called for these events.... His own employees calling, as well as his own security guards. If you look at security guard Blue, Mr. Blue is on almost every page, he calls a lot in reference to guns, shootings, so his own people are calling in reference to this violence.... [S]o it's not like, you know, just the citizens, his own people, his own employees are calling.

(February 5, 2014 T. 120-121)

(25) The Chief also opined that the use is not a good mix with the neighborhood:

CHIEF AYERS: Okay. And in reference to safety, gun shots do travel, and homes, if you look at the aerial view, homes are right around this establishment, and to have ... an establishment that close inside a community conducting such a business is not a good mix. We have found used condoms; we have found individuals in vehicles having sexual activities around this establishment in the past, this was when I was with the County Police as a patrol officer as well as a community peace officer, so I'm very aware of this location. As to –

MR. WHITLEY: Okay. Can you give us a time reference when he's talking about? What years are you talking about?

CHIEF AYERS: in the last 10 years, sir....

MS. EPPS-MCNEIL: How recently have you seen condoms and sexual activity...?

CHIEF AYERS: Recently.

(February 5, 2014 T. 128)

(26) Upon cross-examination it was noted that there was no way to know from the call report whether any of the incidents led to charges of any kind, and that many of the calls did not lead to an arrest. The Chief of Police for the Town of Capitol Heights disputed Applicant's position that the adult entertainment is offered daily, but did admit that adult entertainment has been offered at the site since at least 2006. (February 5, 2014 T. 125, 130)

(27) Camelia Styles testified that she lives one block from the subject property on Athena Street. She pointed out that the aerial provided by Applicant does not show all of Athena Street, and therefore doesn't show all of the residences located thereon. (February 5, 2014 T. 74) She also stated that the adult entertainment has been offered at the site since 2003. (February 4, 2014 T. 134) She then explained why she is opposed to the request:

[Y]esterday between the house that's directly in front of the Athena entrance of the establishment ... right on the ground was a couple of condoms, there are two houses directly in front of his entrance on Athena Street, there were a couple of condoms....

Now , we're a small community ... and we have been complaining for years, realizing that this establishment, though it has been said is in commercial, in a commercial – it is not in the commercial aspect of, of this, of our neighborhood, it is actually along Athena Street and Maryland Park Drive, and we're the residents, the tax paying residents that are mostly affected. And this is why we're here today opposing the establishment there in our community because it is dangerous.

I have been in the neighborhood 31 years, and the report just says the fact that, about the, the shootings, I have witnessed the murders. In other words, I go outside, one of them I was standing there when the poor guy, I went down there, they had him covered up, and I witnessed that. That's terrible to witness. I have come and looked out my door and saw guys arguing, and talking about they're gonna kill one another. This is no easy thing for us to look at, because we are the citizens. We are the ones paying the taxes. I don't have anything against his establishment, but he doesn't live there from day to day and I have to deal with what we deal with on a constant basis.

(February 5, 2014 T. 132-133, 136-137)

(28) Mr. Douglas Edwards expressed concern over the fact that Applicant never provided detail as to the number of employees nor the number of patrons at the site. He believed that the missing information makes it impossible to determine if the number of parking spaces is sufficient. (March 28, 2014 T. 83-85)

Agency comment

(29) The Technical Staff recommended that the request be denied, reasoning as follows:

The applicant for this case has not provided the site plans that were required for the referral process. The one site plan that was submitted by the applicant during the pre-acceptance review of this application only included parking calculations for the proposed adult entertainment use only and indicated that 30 parking spaces are required and 17 are provided, a deficit of 13. The applicant acknowledged at the time of submittal that a departure from parking and loading spaces (DPLS) application would have to be approved by the Planning Board in order to waive some of the required parking spaces for this use. However, this application was never pursued. Therefore, the applicant has not demonstrated that the required parking spaces are being provided on the site...

No new construction or increase in gross floor area is being proposed through the subject special exception application. The building and parking were found to be in substantial conformance with the requirements of the C-M/D-D-O Zone at the time of its numerous permit applications. However, site plans were not submitted by the applicant for the special exception process. Therefore, compliance with the C-M/D-D-O zoning standards is unable to be determined at this time....

As noted previously, the applicant in this case has not submitted the statement of justification and plans necessary to process the 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 necessary information, staff is compelled to recommend disapproval of the application.

(Exhibit 14, pp. 8-9)

(30) Subsequent to its original Staff Report, Applicant provided "revised" plans, documents and exhibits. Upon review, Staff provided additional comment:

The site plan provided by the applicant is obviously a third or fourth generation permit plan with numerous ink pen annotations, deletions and other markings. It is not legible and cannot be considered adequate by staff for analysis

The site plan that was submitted by the applicant demonstrates that 30 parking spaces are required to serve the proposed adult entertainment establishment. The site plan claims to show 17 parking spaces on the subject property, however, it is difficult to tell whether they conform to the requirements of Part 11. Thus, the applicant's testimony and site plan note that a departure of 13 parking spaces would be necessary, as would a departure from design standards where the driveway narrows to 20, rather than the proscribed 22 feet. The applicant has known since before the application was accepted that these departures were required, but has apparently not felt a pressing need to obtain either. Further delaying the disposition of this case does not serve the purposes of the Zoning Ordinance; it serves only the applicant's desire to continue operating.

Section 27-142 of the Zoning Ordinance places the burden of proof in any zoning case squarely on the applicant. However, the applicant has not demonstrated conformance with the minimum parking requirements in Part 11 of the Zoning Ordinance to support the proposed special exception use and the property as a whole. Currently, staff is unable to find conformance with Part 11 and the required findings within Section 27-317(a) of the Zoning Ordinance for approval of the special exception application based on future and separate departure applications that have not been applied for and that may not be approved....

Section 27-317(a)(4) and (5) require a finding be made as to the potential for adverse and detrimental impacts of the residents, workers, adjacent properties and the general neighborhood. Staff would note the fact that this club is located on the edge of a residential neighborhood. The juxtaposition of these two seemingly incompatible uses leads staff to the conclusion that the potential for negative impacts is greater than if the club were located in a strictly commercial or industrial area. Staff admits that this conclusion is somewhat speculative; however, testimony at the hearing shows this location has been frequently visited by the police and has been the scene of several shootings....

The applicant submitted the special exception application the day before the June 1, 2012, expiration date provided in Footnote 58 within Section 27-461(b)(5) of the Zoning Ordinance. Although the applicant's acceptance package was not complete and lacked the necessary plans and statement of justification that were required for the referral process, M-NCPPC accepted the package in order to preserve the applicant's legal right to pursue the special exception, with the understanding that the required site plans and other needed documents would be submitted promptly by the applicant. Several months later, on October 10 and October 16, 2012, the Supervisor of the Zoning Section sent e-mails to the applicant's attorney reminding them that the scheduled hearing date was rapidly approaching and that the materials needed for review and processing of the special exception application had not been submitted to the Planning Department, and that the staff report will be issued without this information if need be. The applicant had from the time the case was accepted to the time the technical staff report was released.

In this case, the applicant has not met their burden of proof for approval of a special exception application and the validity of the underlying use and occupancy permit that would allow the applicant to pursue a special exception application for the use of adult entertainment is in question. The facts and conclusions within the technical staff report remain valid.

Based on the preceding analysis and findings, staff recommends DISAPPROVAL of Special Exception Application No. SE 4719.

(Exhibit 40, pp. 1-2)

(31) A representative of DPIE provided a copy of a violation notice, dated December 19, 2013, that was issued for the trash, litter and debris allowed to accumulate on the site, the failure to re-stripe the parking lot, and other code violations. (Exhibit 45; March 28, 2014 T. 53-54) The inspector also noted that the concrete that Applicant added is not in the area on the Use and Occupancy Site Plan designated for parking. (Exhibit 47(c); March 28, 2014 T. 72-76) Another inspector submitted pictures showing that the parking spaces have been used for storage and other uses, and showing trash and debris on site. (Exhibits 47 (a)-(d), 48, 49 and 50) Upon cross-examination the inspector did agree that the items were easily movable, and that the facility was not open when the pictures were taken. (March 28, 2014 T. 104-106)

(32) There was some testimony at the hearing as to whether Applicant's trade name ("Grand Ma's South Carolina Catering") was properly registered with the State. Applicant submitted information from the State Department of Assessments and Taxation which indicates that it is registered at this time. (Exhibit 54)

LAW APPLICABLE

(1) The requested Special Exception may be reviewed if the use of the subject property satisfies Footnote 58, *supra*. Applicant must also satisfy the strictures found in Sections 27-317 of the Zoning Ordinance.

(2) Section 27-317 provides as follows:

- (a) A Special Exception may be approved if:
 - (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
 - (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
 - (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
 - (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
 - (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
 - (6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and

(7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Footnote 58 allowed the instant application if “adult entertainment” had been offered in an “auditorium”. Section 27-107.01(a)(21.1) defines an “Auditorium” as follows:

(21.1) **Auditorium:** A room or building used for the gathering of people seated as an audience; open to the general public, with or without an admission charge, and used primarily for public speaking, theatrical production; excluding any form of patron dancing or adult entertainment.

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

(7.1)**Adult Entertainment:** Adult Entertainment means any exhibition, performance or dance of any type conducted in a premise where such exhibition, performance or dance involves a person who:

(A) Is unclothed or in such attire, costume or clothing as to expose to view any portion of the breast below the top of the areola or any portion of the pubic region, anus, buttocks, vulva or genitals with the intent to sexually arouse or excite another person; or

(B) Touches, caresses or fondles the breasts, buttocks, anus, genitals or pubic region of another person, or permits the touching, caressing or fondling of his/her own breasts, buttocks, anus, genitals or pubic region by another person, with the intent to sexually arouse or excite another person.

(4) The Use should also satisfy the general purposes of the commercial zones and the particular purposes of the C-M Zone, found in Sections 27-446 and 27-459, respectively, of the Zoning Ordinance:

Sec. 27-446. General purposes of Commercial Zones.

(a) The purposes of Commercial Zones are:

(1) To implement the general purposes of this Subtitle;

(2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;

(3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;

(4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;

(5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;

- (6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;
- (7) To increase the stability of commercial areas;
- (8) To protect the character of desirable development in each area;
- (9) To conserve the aggregate value of land and improvements in the County; and
- (10) To enhance the economic base of the County.

Sec. 27-459. C-M Zone (Commercial Miscellaneous).

(a) **Purposes.**

- (1) The purposes of the C-M Zone are:
 - (A) To provide locations for miscellaneous commercial uses which may be disruptive to the harmonious development, compactness, and homogeneity of retail shopping areas;
 - (B) To provide these locations, where possible, on nonresidential streets; and
 - (C) To provide concentrations of these uses which are relatively far apart.

(5) Pursuant to Section 27-142 of the Zoning Ordinance the burden of proof in any zoning case shall be the Applicants.

(6) The Court of Appeals provided the standard to be applied in the review of a special exception application in Schultz v. Pritts, 291 Md 1, 432 A2d 1319, 1325 (1981):

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. . . . But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

CONCLUSIONS OF LAW

(1) The Applicant submitted the instant Application for Special Exception on May 31, 2012. (Exhibit 1) Section 27-473 (fn 56) of the Zoning Ordinance, mandates that “[a]pplications for adult entertainment must be filed and accepted by June 1, 2012.” The submitted Application was not complete and lacked the necessary site plans, Statement of Justification, and other documents and data required for the referral and review process. Section 27-296 of the Zoning Ordinance details those items required to be submitted in an Application for a Special Exception the majority of which were not provided until just before the evidentiary hearing on February 5, 2014. These submissions did not fully satisfy the provisions of the Zoning Ordinance since the Site Plan appears to be a copy of one that accompanied the Use and Occupancy permit

approved over ten years ago – as Staff correctly noted, it is not legible, does not clearly depict the requisite parking, and has other infirmities.

(2) The record does support Applicant's contention that Adult Entertainment has been offered at the subject site since 2003/2004, prior to enactment of changes in the Zoning Ordinance that regulate "adult entertainment".

(3) The evidence reveals that there has been adverse impact at the location above and beyond that which the use would generate elsewhere in the C-M Zone. The subject property sits right at the edge of a residential community. The residents and the police chiefs of two affected municipalities have shown that the use has adversely impacted the residential community by requiring police to respond to additional calls to the site, and by exposing residents –and children– to illicit sexual behavior and sexual paraphernalia. Accordingly, Applicant has not shown that the proposed use and Site Plan are in harmony with the purposes of the Zoning Ordinance, particularly Section 27-102(a)(6). (Section 27-317(a)(1))

(4) The Applicant concedes that its Application is not in conformance with the minimum design, parking and loading requirements of Part 11 of the Zoning Ordinance but urges that the necessary Departures could be sought at a later date. Since there is no way to know prior to application that the Departures would be approved there is no way to approve the Site Plan at this point. The Applicant must meet its burden of proof at this time and concedes that it has failed to do so. Thus, the proposed use is not in conformance with all of the requirements and regulations of the Zoning Ordinance. (Section 27-317(a)(2))

(5) The proposed use will adversely affect the health, safety and welfare of residents or workers in the area, and will be detrimental to the use of adjacent properties. (Sections 27-317(a)(4) and (5)) The subject property is accessed from two residential streets and is very close to several residences. If there were some way to "rope" the use off from those streets and residences it would be easier to lessen any impact from the use – such as the sexual activity on the residential streets and the calls for police service resulting from visitors to the site. However, under the facts in this record that solution is not available.

(6) The proposed use will not substantially impair the integrity of the Sector Plan, Master Plan or General Plan. (Section 27-317(a)(3)) The Applicant has obtained a Letter of Exemption from the Woodland Conservation Ordinance and does not have a Type II Tree Conservation Plan. (Section 27-317(a)(6)) The Application does not propose the disturbance of any environmentally regulated features. (Section 27-317(a)(7)) The subject property does not lie within the boundaries of a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

DISPOSITION

Special Exception 4719 is DENIED.