

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

**SPECIAL EXCEPTION  
4717**

**DECISION**

Application: Private Club with Adult Entertainment  
Applicant: CD#15CL2001, Inc. d/b/a/ Shriners United  
d/b/a X4B Luxury Club  
Opposition: Indian Head Highway Area Action Council,  
District IV Citizens Advisory Council  
Hearing Dates: January 29, 2014, February 19, 2014 and  
March 6, 2014  
Hearing Examiner: Maurene Epps McNeil  
Disposition: Approval with Conditions

**NATURE OF REQUEST**

(1) Special Exception 4717 is a request for permission to use approximately 4,200 square feet of the 9.3 acre Rosecroft Shopping Center in the C-S-C(Commercial Shopping Center) Zone, located along the south side of Brinkley Road, approximately 1,400 feet east of its intersection with Fisher Road, also identified as 3279 Brinkley Road, Fort Washington, Maryland for Adult Entertainment. Adult Entertainment is prohibited in the C-S-C Zone pursuant to Section 27-461(b) of the Zoning Ordinance, unless the following provisions in Footnote 58 of that Section 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 of the request, and the Planning Board adopted Staff's recommendation as its own. (Exhibits 12 and 14)

(3) Several individuals and organizations appeared in opposition to the request.

(4) The record was kept open for the submittal of a variety of documents. The record closed on October 31, 2014, after the last of the items was received.

## FINDINGS OF FACT

### Subject Property

(1) The subject property is part of an integrated Shopping Center with a gross leasable area of 113,095 square feet. The Shopping Center is currently leased to a Jumbo Grocery Store, a Chinese carry out restaurant, a church, a day care center and Family Dollar Department Store. (March 6, 2014, T. 57-58) The Applicant leases a 4,200-square-foot building currently used as a Private Club that offers Adult Entertainment.<sup>1</sup>

(2) The Application does not propose any construction or disturbance and, therefore, is exempt from the requirements of the Tree Canopy Coverage Ordinance. (Exhibit 12, p. 62) There are no regulated environmental features on site. The subject property does not lie within a Chesapeake Bay Critical Area Overlay Zone. The subject property is also exempt from the requirements of the Prince George's County Woodland and Wildlife Habitat Conservation Ordinance because it contains less than 10,000 square feet of woodland on-site and has no prior Tree Conservation Plan ("TCP") approvals. (Exhibit 6) The Special Exception is also exempt from the Landscape Manual since Section 1.1(b) provides "[e]xisting conditions on developed sites not in conformance with the requirements of this manual that were otherwise lawful on January 1, 1990, and not the subject of any building or grading permit may continue as a matter of right."

### Neighborhood and Surrounding Use

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

North and West – Henson Creek  
North and East - Rosecroft Raceway  
South - Capital Beltway (I-495)

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

North - Brinkley Road right-of-way  
South - Huntley Square Condominiums in the R-18 (Multifamily Medium Density Residential) Zone  
East - Gas Station and Food or Beverage Store in C-S-C Zone  
West - Brinkley House Apartments in the R-18 Zone

(Exhibits 4 and 12, pp. 8 and 88)

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<sup>1</sup> Staff provides an excellent zoning history for the subject property from the construction of the Shopping Center in 1971 through the issuance of a Use and Occupancy Permit to Applicant in 2007 authorizing operation of a Private Club. (Exhibit 12, pp. 4-5)

## Master Plan and Sectional Map Amendment

(5) The 2006 Master Plan and Sectional Map Amendment (“SMA”) for the Henson Creek-South Potomac Planning Area recommends a commercial land use for the site (Exhibit 12, p. 59) Thus, the requested use is not inconsistent with the Master Plan’s recommendation. The SMA retained the property in the C-S-C Zone.

(6) The property is located in what was formerly described in the 2002 General Plan as the Developed Tier, and in the Plan Prince George’s 2035 General Plan as part of the Established Community Policy Area.

## Applicant’s Request

(7) The Applicant is seeking approval of S.E. 4717 to operate a Private Club with Adult Entertainment. Members of a chapter of the Masons/Shriners located in Washington D.C. (the “Charles Datcher Lodge #15”, Free and Accepting Masons, Prince Hall) formed a separate nonprofit legal entity, CD#15CL2001, Inc., to do various charitable deeds and to operate the instant Private Club for the members’ enjoyment. Applicant actually operates two Private Clubs – one at the subject property (d/b/a X4B) and one on Forestville Road in District Heights (d/b/a Bazz and Crue).<sup>2</sup> Applicant has operated X4B since August 10, 2007, pursuant to a Use and Occupancy Permit that allows it to operate “a private club per 37380-2006”. (Exhibit 7)

(8) Applicant submitted copies of its Articles of Incorporation, tax records and Bylaws for inclusion in the record. (Exhibits 12 pp. 41-47, 38, 42, 45, 50 and 51) Applicant also submitted a “Programs & Services for X4B” flier explaining the Private Club’s interests and missions which include helping single mothers, providing drug prevention education, helping the homeless, and providing education to the adult entertainment industry workers. (Exhibit 43) Finally, a copy of the organization’s Trestleboard (similar to minutes) was provided. (Exhibit 44)

98) The Articles of Incorporation permitted the CD #15 CL2001, Inc., to “establish, own, maintain, conduct, carry on, manage and generally engage in the operation of a business for the purpose of conducting events, receptions, lodge meetings, and classes for an auxiliary group of the Masonic Lodge CD #15 .....” (Exhibit 12, p. 41)

(10) The Bylaws for X4B indicate that the Private Club has an annual meeting, special meetings as necessary, dues, a three to five – member Board of Directors (unpaid), annual Board elections, and Board officers. (Exhibit 38) The Trestleboard lists the elected and appointed officers, the various committees, and the “degree and ritualistic assignments” for the year.

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<sup>2</sup> Bazz and Crue’s application for Adult Entertainment -SE-4716-was denied by this Examiner.

(11) Andre Darnaby, the former secretary and current sergeant-at-arms for the Applicant, testified that the Private Club holds cabarets, bachelor parties and similar events at the facilities. (Feb. 19, 2014 T. 5-7, 10) They have also offered “adult entertainment” since 2007. He described adult entertainment as nude women dancing provocatively on a stage, or scantily-clothed women dancing on members’ laps or in a manner where they touch the members. (Feb. 19, 2014 T. 17-18) The witness also referred to this dancing as “exotic dancing”.

(12) Mr. Darnaby stated that one must be a member to enter the Club when it hosts an Adult Entertainment event. (Feb. 19, 2014 T. 11) One becomes a member by paying all, or a portion, of its annual membership fee (currently set at \$240); showing identification (proof of age); and completing a membership agreement. Applicant submitted redacted copies of Membership Agreements, signed and dated by members that were completed on various dates in 2013, a blank Member Agreement form, and a membership card. (Exhibits 46, 47, 48; Feb. 19, 2014 T. 11)

(13) The membership agreement includes the following statement:

X4B Luxury Hall is an auxiliary hall for members of CD 15 CL 2001 Inc. and vouched for members residing in the metropolitan area choosing willfully to contribute to widows, orphans, Time to Heal, and single mothers. X4B Luxury Hall is a strictly private club for private members only, and isn’t open to the public. With exceptions of dues, contributions, and donations, there are no admission fees, alcohol sold or public functions. **We are strictly private and exist for the purpose solely of our members.**

(Exhibit 46)

(14) Mr. Darnaby noted that adult entertainment is provided two nights a week – Friday and Saturday. (Feb. 19, 2014 T. 17) The hours of operation are 10:00 p.m. – 3:00 a.m. The Club employs a security detail inside and outside of the facility. There are interior and exterior security cameras at the site. (Feb. 19, 2014 T. 25-26) There is also a cleaning detail that scours the parking lot at the end of each event to ensure that litter is cleared. Mr. Darnaby was unaware of any opposition to the Club prior to the hearings held by this Examiner, and stated that he has only heard fellow tenants’ support of its use. He also testified that he is always present on adult entertainment nights and has no knowledge of the police being called to the facility. (Feb. 19, 2014, T. 47) He is “not aware” ... of any prostitution, shootings, stabbings, or fights at the facility, either. (Feb. 19, 2014 T. 22-23 and 25)

(15) The security personnel are independent contractors hired specifically for that purpose. All others on site are either volunteer Lodge members or the dancers. The dancers are independent contractors and not employed by Applicant.

(16) Reginald Baxter, accepted as an expert in the area of land use planning, has been involved in other special exception applications for Adult Entertainment. He testified that the use at the present location presented the same complaints that it would if located elsewhere in the zone:

Mr. Whitley: The special exception applications, have you testified in six of these cases:

Mr. Baxter: Yes, I have....

Mr. Whitley: Okay. And the complaints in all six cases have been the same, correct?

Mr. Baxter: Not the same exactly I mean they're similar.... You know, loud noise, disorderly, car break-ins. Somewhat, I guess a homicide has been reported in many of them. I can't, I don't recall if it was in all. But with these complaints, I mean it's a call to that address, but you have no idea. It could be something totally unrelated to the operation of that particular use. It could be anything happening elsewhere in the parking lot, or –

Mr. Whitley: But these complaints, these type[s] of complaints seem to follow this type of use.

Mr. Baxter: Yes.

Mr. Whitley: It's the same complaints that were in the C-M [Z]one?

Mr. Baxter: Generally the same type of complaints.

Mr. Whitley: Generally the same type of complaints in the C-S-C [Z]one?

Mr. Baxter: That's correct....

Mr. Whitley: Generally the same type of complaints that were in the I-1 [Z]one?

Mr. Baxter: That's correct.

(March 6, 2014 T. 26-27)

(17) As noted, *supra*, the requested use is located within an integrated shopping center. The shopping center is required to have 453 parking spaces and the Site Plan indicates that it has 482. Adult Entertainment uses are required to have 1 space per 80 square feet. (T.30) Mr. Baxter opined that there is sufficient parking for the proposed use. (March 6, 2014, T. 30)

(18) Finally, Mr. Baxter found that the Application satisfied all of the special exception findings set forth in Section 27-317 of the Zoning Ordinance. (March 6, 2014 T.17-24) In reaching this conclusion he noted as follows:

[The use complies with the purposes of the C-S-C Zone.] [T]here are three purposes, to provide locations for predominantly retail commercial shopping facilities.... [T]he overall property is developed [with] a shopping center.... A private club is permitted in the zone.... And again, even private clubs with adult entertainment can exist as permitted use by special exceptions....

[T]he second purpose of the commercial shopping center zone is to

provide locations for compatible institutional, recreational, and service uses. Private club is classified as a recreational, entertainment, social, cultural activity under Section 27-461, which is the table of permitted use in the commercial zone....

[The use is compatible with the general retail shopping center.] When I went out there and examined the property ... this property, this particular use was ... closed. It was clean. There was an issue with its adjoining neighbor with a lot of debris stored outside, but that did not involve the subject property ....

[T]his particular use, the subject use, X4B has existed with, coexisted with the general retail shopping areas. It does operate at different hours generally, primarily at night when some of these uses are closed....

[Most of the oppositions' complaints] go to the, to noise and various complaints, and things that could be handled by appropriate conditions....

The current use of course requires approval of a special exception to validate it. And once that occurs, [the application] would be in accordance with applicable regulations....

(March 6, 2014, T. 22-24)

### **Procedural Issue - Constitutionality of Special Exception Process**

(19) 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. (Exhibit 35) Instead, the District Council must either phase the use out via amortization or grandfather it (allow it continue "as is").

(20) 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.<sup>3</sup>

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<sup>3</sup> 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. (Exhibit 27)

(21) Accordingly, if the instant application is denied, Applicant may 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.

### **Opposition's Comment**

(22) Several individuals and groups appeared in opposition to the request.

(23) In general, most opposed to the request believed the use would decrease the quality of life for those residing in the area, lower their property values, and lead to an increased burden on the police (due to the number of calls at, or near, the site). (March 6, 2014, T. 35-42) At least one person opined that the use would have an adverse impact at the subject property:

This location is in the middle of a residential area. There is a church, [and] a daycare center.... There are two apartment developments across the street, [and] a condominium ... behind the shopping center. This is not a good location for this club.

(March 6, 2014, T. 37)

(24) A witness for the Indian Head Highway Area Action Council ("IHHAAC"), Inc., a federation of civic, citizen and neighborhood associations in south County, noted that there have been numerous police calls ("CAD" calls) to the shopping center in general, and the private club, in particular. (Exhibit 12, pp. 72-73) It submitted a copy of the CAD calls report for the period from 1/1/2007 until 5/15/2012 for 3279 Brinkley Road and 3285 Brinkley Road. (Exhibit 12, pp. 74-81) Most of the calls were for loud music/noise, property alarms going off, and to check the premises. The witness testified that IHHAAC is opposed to the use at the subject property because it abuts residential property, and generates excessive noise and litter. (March 6, 2014, T. 42-53)

(25) The Huntley Square Condominiums are directly behind the subject property (to the south). (Exhibit 12, p. 18) A few residents appeared in opposition to the request. One offered the following comment:

I have lived at Huntley Square for a number of years, and I go there frequently .... I'm renting the unit at the present. I'm highly concerned, as a retired teacher, about ... this type of business being in the shopping center....[W]hen you're living in Huntley Square and you're residing there, you just walk down the back, down a hill, and you can go to your condo. Literally, you can walk .... [Y]ou don't have to walk far if you want to go to the store that's there, you know, pick up some groceries, go to the carry-outs. And that particular ... business we're discussing now is right on the corner, or it's one of the first buildings that you get to when you walk up from Huntley Square condominiums.

I'm concerned because there are young people that live there. There are teenagers who are very susceptible to all kinds of influences. There are elementary school children that live there in that community .... I'm a property owner and I'm very concerned about the property values going down as other members, other people have stated earlier ....

And the murders, they're talking about murders that have occurred where these particular businesses are located. So I don't think this is something we can lightly say okay, it's just an adult club. But what are the effects it has on the people that live there?

(March 6, 2014, T. 54-55)

### **Agency Comment**

(26) Staff opined that the Applicant may not qualify as a "Club or Lodge, Private" as defined in the Zoning Ordinance, reasoning as follows:

By definition, a private club is only open to bona fide members and guests and it is not operated for profit. The applicant appears to advertise this facility as being open to the general public. Even if a one-time membership fee is charged, it would appear that anyone can be a member with a paid membership. Typical private clubs, such as the American Legion and the Knights of Columbus do not typically offer pay at-the-door events on a daily basis and their memberships require that certain criteria be met. These uses are typically viewed by the Internal Revenue Service (IRS) as being a public charity because they are a benefit to the community and provide services and programs to help others. For example, the primary mission of the American Legion is to support the American Legion and to honor the sacrifice of those who serve by enhancing the lives of our veterans, military and their families, both at home and abroad. That is what the Zoning Ordinance envisions a private club to be within Section 27-107.01(49).

Although the applicant may have obtained a use and occupancy permit for a private club, they did not operate as one. This private club never had the zoning approval or the legal right to operate an adult entertainment establishment at this location. The M-NCPPC Legal Department has stated that if the applicant was not truthful about their intended use at the time of review of the use and occupancy permit application, then any permit that was approved that was contingent upon the definition of "private club" was obtained through fraud.

Notwithstanding the applicant's intended use of adult entertainment, staff is of the opinion that if a special exception application had been received for an eating and drinking establishment at this location, including music and patron dancing past the hours of 12:00 A.M., excluding adult entertainment, the applicant would



be unable to meet the required findings that the proposed use ... would not be detrimental to the use or development of adjacent properties or the general neighborhood, or that the proposed use would not adversely affect the health, safety, or welfare of residents or workers in the area. In this case, this shopping center is so close to residentially-zoned land that the adverse impact to the adjacent properties and the general neighborhood seems clear....

(Exhibit 12, pp. 12-13)

(27) The Technical Staff recommended that the request be denied, reasoning, in pertinent part, as follows:

This application proposes the use of adult entertainment that would be located in a building that is only 34 feet away from residentially-zoned land.... The use is not only incompatible with the adjacent residential communities, it is incompatible with many of the uses that are located in the shopping center, such as the day care center, the churches, the grocery store, and the martial arts studio just to name a few....

The Huntley Square Condominiums abut the subject property to the south and the Brinkley House Apartments abut the property to the west. Both of these adjoining properties are located in the R-18 Zone. The proposed use is also located in the same building as the Abundant Community Church and the Remnant of Christ Ministries, and it is less than 370 feet away from a day care center....

Since the X4B Luxury Club submitted documentation at the time of the use and occupancy permit stating that they were a non-profit private club for only bona fide members and guests, much like a Knights of Columbus Hall or an American Legion, they were not required to go through the special exception process or to demonstrate that the use would not adversely affect the health, safety, or welfare of residents or workers in the area, or be detrimental to the use or development of adjacent properties or the general neighborhood.

(Exhibit 12, pp. 10-11)

(28) The Transportation Planning Section reviewed the Application and submitted the following comment:

The property is within the Rosecroft Shopping Center along Brinkley Road and south of the Capital Beltway. The adult entertainment is located on the upper level of an existing two story building, and occupies approximately 4,675 square feet. The shopping center contains 113,095 square feet of gross leasable area. In 2010 the County Council enacted CB-46-2010 requiring adult entertainment establishments to move to properties zoned I-2 by May 1, 2013.... CB-56-2011 subsequently allowed adult entertainment establishments to obtain special

exception approval in order to continue operations at their current locations. The applicant has a valid use and occupancy permit and is filing the special exception to remain at the current location in the C-S-C Zone.

There are no physical or operational changes proposed with this special exception. No transportation changes are proposed that would affect traffic safety. It would not affect the health, safety, or welfare of residents in the area or be detrimental to adjacent properties or surrounding neighborhoods over current conditions from the standpoint of transportation.

The site is adjacent to Brinkley Road, which is a master plan major collector within a 100-foot right-of-way. At this location the future proposed right-of-way would extend into the site in a varying fashion from 15 feet at the western property line to 40 feet near the center of the site, and back to six feet near the centerline of the main entrance. This would affect no buildings, but the sign and some parking are technically within the master plan right-of-way....

The Transportation Planning Section finds that the proposal would not adversely affect the health, safety, or welfare of residents or workers in the area from the standpoint of transportation, provided that the ultimate right-of-way for Brinkley Road is noted on the plan.

(Exhibit 12, p. 67)

(29) On October 15, 2012, Lieutenant Jarrel Jordan of the Prince George's County Police Department, the compliance coordinator for the Joint Agency Group ("JAG"), wrote a memorandum to Staff that provided as follows:

JAG is a compliance task force that concentrates on late night entertainment locations. This task force is a county executive initiative that focuses on public safety. JAG consists of several county and state agencies. Participating agencies include PGPD [Prince George's Police Department], PGFD [Prince George's Fire Department], DER [Department of Environmental Resources], SAO [State Attorney's Office], Liquor Board, Comptroller's Office, Health Department and Revenue Authority.

JAG has not observed any health, safety or welfare concerns at XB4.

(Exhibit 12, p. 69)

(30) The State Highway Administration noted that it had no comment on the Application. (Exhibit 12, p. 65)

**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) The Use should also satisfy the general purposes of the commercial zones and the C-S-C Zone found in Sections 27-446 (a) and 27-454(a) of the Zoning Ordinance. Section 27-446 (a) provides as follows:

- (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.

Section 27- 454 (a) provides as follows:

(a) **Purposes.**

- (1) The purposes of the C-S-C Zone are:
- (A) To provide locations for predominantly retail commercial shopping facilities;
  - (B) To provide locations for compatible institutional, recreational, and service uses;
  - (C) To exclude uses incompatible with general retail shopping centers and institutions;
- and
- (D) For the C-S-C Zone to take the place of the C-1, C-2, C-C, and C-G Zones.

(3) Section 27-107.01(a)(7.1) and (49) defines “Adult Entertainment” and “Club or Lodge, Private” 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.

(49) **Club or Lodge, Private:** An establishment providing facilities for entertainment or recreation for only bona fide members and guests, and not operated for profit, excluding adult entertainment.<sup>4</sup>

(4) Pursuant to Section 27-142 of the Zoning Ordinance, the burden of proof in any zoning case shall be the Applicant’s.

(5) 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.

(6) As noted above, the Zoning Ordinance defines a “Private Club” as “facilities for entertainment or recreation “ for its “bona fide members and guests”. Additionally, the

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<sup>4</sup> The definition was amended to exclude adult entertainment in 2010 upon the District Council’s adoption as CB-46-2010. However, Adult Entertainment may continue if Footnote 58 of Section 27-461(b) is satisfied.

Private Club may not be “operated for profit”. Applicant submitted proof, accepted by the Internal Revenue Service, of its nonprofit status. There is disagreement, however, as to whether Applicant’s facilities are solely for its bona fide members and guests.

(7) Decisions which address whether an entity is or is not, a private club often center around claims of civil rights violations. where a party alleges that is a private club and, therefore, exempt from the requirements of the civil rights provision at issue. In Welsh v. Boy Scouts of America, 993 F.2d 1267, 1276 (7<sup>th</sup> Cir. 1993) the court provided a 7-prong test to determine whether a group is a “private club” and exempt from the strictures of the federal Civil Rights Act:

1. the genuine selectivity of the group,
2. the membership’s control over the operations of the establishment,
3. the history of the group,
4. the use of the facilities by non-members,
5. the club’s purpose,
6. whether the club advertises for its members; and
7. whether the club is a non-profit or profit organization.

(8) The Court noted that more weight is given to the 1<sup>st</sup> prong-selectivity, and found that the Boy Scouts were a selective group since all members were required to take the Boy Scout oath. The court did not believe the size of the Boy Scout’s membership negated its “private club” status.

(9) In Montgomery County v. Merlands, Inc., 202 Md. 279, 96 A.2d 261 (1953) the Court reversed the decision by a Board of Appeals to deny a special exception for a Private Club in a residential zone. In doing so, the Court provided the following analysis:

We see in the record no evidence which would rationally permit a finding that the Applicant was not a private club and indeed, the Board made no such express or explicit finding in its final opinion. As we have noted, in the first two opinions it based its denial on the ground that the application was a commercial venture. In the final opinion, it incorporated all evidence in prior hearings and left no doubt in the mind of the reader familiar with the history of the case that its fear that the venture would be a commercial venture rather than a private, non-profit undertaking, as a club must be, still persuaded its thought and influenced, if not controlled, its decision. The fear or impression of the Board on this point is not based on any fact in evidence, or otherwise available to it....

The fears which the Board seemingly had (which the Planning Commission shared to some extent) that the project, although in conception and form a country club, would in substance and operation be a commercial property, would seem to us to be groundless, in the first place, and to present no problem if they should happen to be well founded [since the Board is authorized to impose conditions].... The permit in this case would be granted on the representation

and condition that the property was to be used as a private club, comparable to the country clubs, upon which its set up was modelled, and if there was future substantial deviation from this plan which changed its nature or operation as a private club, the Board under this section of the 1952 Amendment could rescind and revoke the permit.

(*Id.* at 291-292)

### **CONCLUSIONS OF LAW**

(1) Applicant submitted evidence, as did some in opposition that supports its proffer that Adult Entertainment has been offered at the subject site since 2007, pursuant to its Use and Occupancy Permit for a "Private Club". There is disagreement as to whether Applicant is actually a "Private Club" or whether it fraudulently received its Use and Occupancy Permit for that use. I would note that there was no evidence that the Department of Permitting, Inspections and Enforcement ("DPIE"), or its predecessor (the Department of Environmental Resources or "DER") cited Applicant for fraud in obtaining its Use and Occupancy Permit. Thus, on the record before this Examiner it must be assumed that Applicant is a Private Club. It is recognized as a nonprofit by the Internal Revenue Service. It has an unpaid Board of Directors, and copies of its bylaws and minutes were provided. Its members pay annual dues. Under the tests cited in the cases above, this is, arguably, sufficient evidence that it qualifies as a Private Club.

(2) The proposed use is in harmony with the purposes of the Zoning Ordinance since Private Clubs are permitted in the Zone; Staff noted that the Application conforms to the commercial land use recommendations within the 2006 Master Plan; the use will not require further development on site, and, therefore will conserve natural resources and promote the conservation of the community; and the proposed conditions will limit any adverse impact upon adjoining development. (Sections 27-102 and 27-317(a)(1))

(3) The proposed use is in conformance with all of the requirements and regulations of the Zoning Ordinance, once the conditions noted below are satisfied. The Applicant is not requesting a variance or departure from the requirements of the Zoning Ordinance (Section 27-317(a)(2))

(4) The proposed use will not substantially impair the integrity of the 2006 Master Plan for Henson Creek-South Potomac Planning Area, since that Plan recommended commercial uses for the area. (Section 27-317(a)(3))

(5) Applicant submitted sufficient evidence to find that the use at the instant location would not be more adverse than it would be elsewhere in the C-S-C Zone. Although there have been some valid complaints lodged that arose from activity that either was generated at the Private Club or near its general location, they are similar to those which would arise if the use were located elsewhere. Moreover, JAG, the agency created specifically to address this type of use, noted it had no health, safety or welfare concerns with the Private Club. The proposed use will not adversely affect the health,

safety and welfare of residents or workers in the area, nor will it be detrimental to the use or development of adjacent properties or the general neighborhood, if conditions concerning the limited hours of operation, a security plan and restrictions on signage and flyers are imposed. (Sections 27-317(a)(4) and (5))

(7) The Applicant has obtained a Letter of Exemption from the Woodland and Wildlife Habitat Conservation Ordinance. (Section 27-317(a)(6))

(8) The Application does not propose the disturbance of any environmentally regulated features. (Section 27-317(a)(7))

(9) The property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

### **DISPOSITION**

S.E. 4717 is Approved, subject to the following conditions:

(1) The Adult Entertainment shall only be offered between the hours of 10:00 p.m. to 3:00 a.m. from Friday to Sunday (i.e., Friday and Saturday nights).

(2) The Adult Entertainment shall only be offered on the upper level of the subject property.

(3) Applicant shall not add signs that advertise the Adult Entertainment on the exterior of the building, nor may it litter the area by distributing promotional flyers in the parking lot or in the surrounding communities.

(4) Applicant may not lease or rent the facilities for any other person(s) or business entity(ies) to provide Adult Entertainment at the site.

(5) If Applicant ceases to operate a Private Club at the site, all Adult Entertainment shall cease.

(6) A security plan shall be submitted to the Prince George's County Police Department for review and approval (which shall not be unreasonably withheld). The Security Plan must address the number of security personnel on site when Adult Entertainment is offered as well as the location and number of internal and external security cameras, and other item deemed germane by the Police Department. A copy of the Security Plan shall also be provided for review and inclusion in the record prior to the issuance of permits.

(7) Prior to the issuance of permits the Special Exception Site Plan shall be revised as follows, and submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record:

- (a) All of the above conditions shall be added as Notes;
- (b) The parking table shall be revised to reflect the number of spaces required and provided for the Private Club.
  
- (c) The Site Plan shall be properly labeled as a Special Exception Site Plan with the Private Club, its associated parking and access to Brinkley Road outlined in red, or with the entire Shopping Center outlined in red;
  
- (d) The ultimate right-of-way for Brinkley Road shall be added;
  
- (e) The gross floor area for the Private Club, and the portion to be used for Adult Entertainment shall be added;
  
- (f) The proper address for the Private Club shall be shown on the Site Plan; and
  
- (g) Any requirements imposed by prior approvals for the Shopping Center shall be shown on the Site Plan.

[Note: The Site and Landscape Plans are Exhibits 11(a) and (b).]