



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

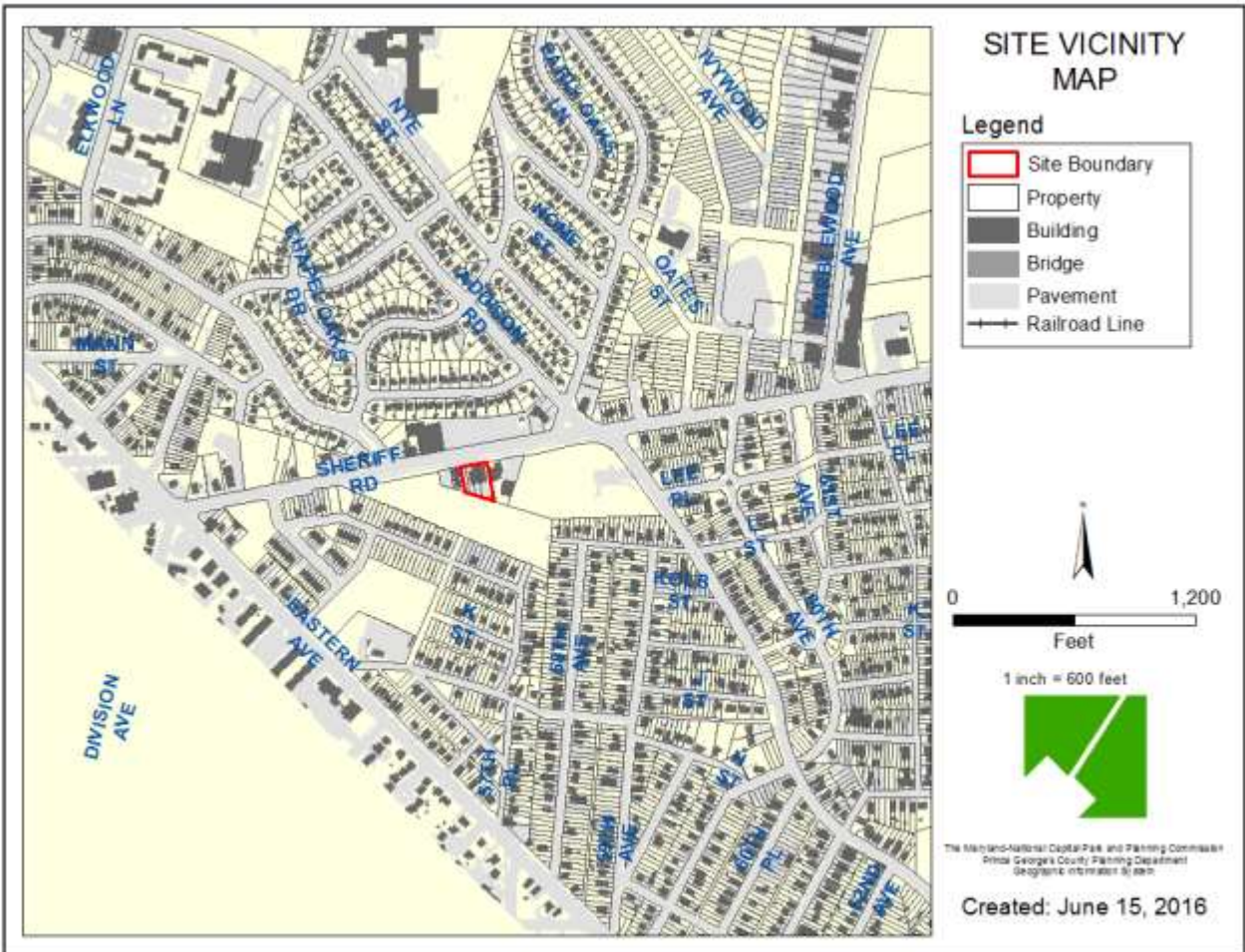
Certification of Nonconforming Use

CNU-15093-2015

Application	General Data	
Project Name: Ebony Inn Location: Approximately 622 feet southeast of the intersection of Addison Road and Sheriff Road. Applicant/Address: King Oak Enterprise 5367 Sheriff Road Fairmount Heights, MD 20743 Property Owner: Tommy and Lillian P. Broadwater 3309 Hayes Street Glenarden, MD 20706	Planning Board Hearing Date:	09/08/16
	Staff Report Date:	08/18/16
	Date Accepted:	06/15/16
	Planning Board Action Limit:	N/A
	Plan Acreage:	0.438
	Zone:	M-U-I
	Gross Floor Area:	6,489 sq. ft.
	Lots:	3
	Parcels:	1
	Planning Area:	72
	Council District:	05
	Election District	18
	Municipality:	Fairmount Heights
	200-Scale Base Map:	202NE05

Purpose of Application	Notice Dates	
Certification of a nonconforming use for an eating and drinking establishment with adult entertainment.	Informational Mailing	6/3/2015
	Acceptance Mailing:	6/3/2016
	Sign Posting Deadline:	8/8/2016

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



THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

PRINCE GEORGE'S COUNTY PLANNING BOARD

TECHNICAL STAFF REPORT:

TO: The Prince George's County Planning Board

VIA: Jimi Jones, Supervisor, Zoning Review Section, Development Review Division

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

SUBJECT: **Certification of Nonconforming Use Application No. CNU-15093-2015
Ebony Inn**

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

RECOMMENDATION: **DISAPPROVAL**

NOTE:

The Planning Board has scheduled this application for a public hearing on the agenda date of September 8, 2016. The Planning Board also encourages all interested persons to request to become a person of record for this application.

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

FINDINGS

- A. **Location and Field Inspection:** The subject property, 5367 Sheriff Road, is located approximately 622 feet southwest of the intersection of Addison Road and Sheriff Road. The trapezoid shaped property, which consists of Parcel 13, Part of Lot 3, Lot 4, and Lot 5, is 0.43 acres in the Mixed Use–Infill (M-U-I) Zone in a Development District Overlay (D-D-O) Zone. The property is improved with a 6,247-square-foot two-story building with requisite parking. The uses located on the first level include the bar, the live adult entertainment, and the restaurant carryout. There is a vacant space that is identified as a barber shop. Access to the development is provided via ingress/egress on Sheriff Road.

B. **Development Data Summary:**

	EXISTING	PROPOSED
Zone	M-U-I in D-D-O	Unchanged
Acreage	0.438	Unchanged
Use(s)	Commercial (Eating and Drinking Establishment with adult-oriented entertainment)	Unchanged
Parcel/Lots(s)	Parcel 13, Part of Lots 3, 4, and 5	Unchanged

- C. **History:** Per the justification statement, the Ebony Inn is an established business that has operated at 5367 Sheriff Road since 1981 as a restaurant/carryout with adult-oriented entertainment. The Ebony Inn is owned by King Oak Entertainment and has been since 1981 when it began operations as documented on August 14, 1981. The original use as a restaurant and carryout began in 1955 when Walter Palmer was issued Use and Occupancy Permit 781U for a restaurant and carryout at 5717 Sheriff Road (address changed to 5367 on June 30, 1976) for Lots 4 and 5, which was zoned General Commercial, Existing (C-2), on April 26, 1955. There are three permit applications which are noted as abandoned: Permit 5217-87CU for a fish and seafood restaurant on September 29, 1987; Permit 5217-87 for a barber shop; and Permit 5566-96-U on July 11, 1996 for a bar, motel, and restaurant carryout. There are no other permit applications or activity until April 15, 2015.

Zoning Ordinance Adopted Legislation

Prince George’s County Council Bill CB-89-1993, effective on September 30, 1993, was an ordinance allowing certain eating or drinking establishments in the Miscellaneous Commercial (C-M) or Commercial Shopping Center (C-S-C) Zones, providing criteria for special exception approval and amending parking requirements. The intent of the legislation was to regulate eating and drinking establishments that operate late in the evening and adversely impact residential neighborhoods. The goal was to differentiate between “nightclubs” and other types of restaurants. Hotel lounges were exempt. Deadlines for applying for certification of nonconforming uses and special exceptions were established.

Council Bill CB-49-2005, adopted on October 11, 2005, prohibited eating or drinking establishments of any type providing live adult-oriented performances in the C-S-C Zone.

Prince George’s County Council Resolution CR-49-2010, adopted on June 1, 2010, rezoned the subject property from C-S-C to M-U-I in a D-D-O Zone. The M-U-I Zone prohibits eating or drinking establishments of any type providing live adult-oriented performances.

Council Bill CB-46-2010 (adopted on September 7, 2010) and CB-56-2011 (adopted on November 15, 2011) clarify the definitions, use and occupancy (U&O) requirements, and enforcement for adult entertainment and eating or drinking establishments in commercial and industrial zones. The use of live adult-oriented dancing is restricted to the Light Industrial (I-1) Zone. Deadlines for applying for special exceptions for existing businesses were established.

- D. **Request:** The applicant requests certification of a nonconforming use for an eating and drinking establishment with adult-oriented entertainment on a property zoned M-U-I in a D-D-O Zone. An eating or drinking establishment of any type providing adult-oriented performances is prohibited in commercial and mixed-use zones. The applicant contends that the nonconforming status began on October 11, 2005 when Council Bill CB-49-2005, prohibiting the use in commercial zones, went into effect and again on June 1, 2010 when the subject property was rezoned from C-S-C to M-U-I in a D-D-O Zone and the 2010 *Approved Subregion 4 Master Plan and Sectional Map Amendment* (Subregion 4 Master Plan and SMA) was adopted by the Prince George's County District Council.

E. **Surrounding Uses:**

North— Sheriff Road and developed property zoned M-U-I.

South— Undeveloped property owned by the Town of Fairmount Heights zoned M-U-I.

East— Developed property with commercial uses zoned M-U-I.

West— Developed property with commercial uses zoned M-U-I.

- F. **Certification Requirements:** Certification of a nonconforming use requires that certain findings be made. First, the use must either predate the pertinent zoning regulation or have been established in accordance with all regulations in effect at the time it began. Second, there must be no break in operation for more than 180 days since the use became nonconforming.

Section 27-244 of the Prince George's County Zoning Ordinance sets forth the following specific requirements for certifying a nonconforming use:

(a) **In general.**

- (1) **A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).**

(b) **Application for use and occupancy permit.**

- (1) **The applicant shall file an application for a use and occupancy permit in accordance with Division 7 of this Part.**
- (2) **Along with the application and accompanying plans, the applicant shall provide the following:**

- (A) **Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;**
- (B) **Evidence that the nonconforming use has not ceased to operate for more than 180 consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions of nonoperation for more than one hundred eighty (180) consecutive calendar days between the time the use became nonconforming and the date when the application is submitted, or that conditions on nonoperation for more than one hundred eighty (180) consecutive calendar days were beyond the applicant's and/or owner's control, were for the purpose of correcting Code violations, or were due to the seasonal nature of the use;**
- (C) **Specific data showing:**
 - (i) **The exact nature, size, and location of the building, structure, and use;**
 - (ii) **A legal description of the property; and**
 - (iii) **The precise location and limits of the use on the property and within any building it occupies;**
- (D) **A copy of a valid use and occupancy permit issued for the use prior to the date upon which it became a nonconforming use, if the applicant possesses one.**

Analysis—In accordance with Section 27-244(f), the Planning Board must determine whether, in fact, the use was legally established prior to October 11, 2005 when the use as a eating or drinking establishment of any type providing live adult-oriented performances in the C-S-C Zone was prohibited, on June 1, 2010 when the property was rezoned to M-U-I in a D-D-O Zone and the Subregion 4 Master Plan and SMA was adopted by the District Council, the dates the use became nonconforming, and that the use has been in continuous operation since that time. The applicant submitted the following documentary evidence in support of the application:

1. Zoning Violation Notice Z-1026-5-15 stating that the Prince George's County Department of Permitting, Inspections and Enforcement (DPIE) witnessed adult entertainment at the property on July 11, 2013, July 27, 2013, February 16, 2014, and November 5, 2014.
2. Affidavits from the property owners, patrons of the eating and drinking establishment, and performers from at least 1981 to the present that affirm continuous operation without discontinuance of the use.
3. Copies of State of Maryland Alcohol Beverage Licenses from 2012 through 2016.
4. Copies of State of Maryland Special Entertainment Permits from 2012 through 2015.

5. Town of Fairmount Heights Business Licenses from 2012 through 2015.
6. Newspaper articles from 2005 and 2013 stating that adult entertainment takes places at the Ebony Inn.
7. A copy of Legends Night Club v. Prince George's County Bd. Of License Comm'rs, 2009 U.S. Dist. LEXIS 32020; 2009 WL 926989, wherein the Federal District Court found that the Ebony Inn has been offering adult entertainment since August 14, 1981.
8. A copy of Legends Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011), affirming Legends Night Club, *infra*.
9. A copy of Jackson et al. v. King Oak Enter., Inc., Case No.: 8:12-cv-03170-AW, wherein the plaintiffs alleged that they were exotic dancers at the Ebony Inn from October 2009 until November 2012.
10. A September 6, 2013 Prince George's County Liquor Board inspection report stating that exotic dancing was being provided as entertainment.
11. Communication between the Prince George's County Office of Law and the Prince George's County Liquor Board confirming that the Ebony Inn has been offering adult entertainment since at least August 14, 1981.
12. Washington Suburban Sanitary Commission (WSSC) bills from June 2013 through April 2015.
13. Capacity and inspection report notes from the Prince George's County Fire/EMS Department from July 2011 through April 2015.
14. A Certificate of Good Standing issued by the State of Maryland, Department of Assessments and Taxation, stating that King Oak Enterprises, Inc. has been incorporated since June 7, 1965, has paid all taxes due, and is in good standing.
15. Zoning Hearing Examiner Final Decision, Zoning Violation Appeal No. 7-2013, page 7, wherein it is stated that, prior to Council Bill CB-46-2010, private clubs could legally provide what is now deemed adult entertainment.
16. The 1979 Prince George's County Zoning Ordinance, Section 27-375(3)C(c), which permits eating and drinking establishments in the C-S-C Zone other than a drive-in or fast-food restaurant, but including carryout service, unrestricted.
17. Permit review comments by Mary Hampton dated February 1, 2007 (Permit 2250-2007-U).
18. Permit review comments by Mary Hampton dated June 16, 2010 (Permit 14089-2010-CGU).

19. A site plan prepared by Bohler Engineering showing:
 - a. The exact nature, size, and location of the building, structure, and use;
 - b. A legal description of the property;
 - c. The precise location and limits of the use on the property and within any building it occupies.

The applicant has, therefore, submitted documentary evidence demonstrating the continuous existence of the subject use of “eating or drinking establishment with adult-oriented entertainment.”

DISCUSSION

A Use and Occupancy Permit (781U) was issued to Walter Palmer for 5715 and 5717 Sheriff Road on Lots 4 and 5 by M. Combs for a restaurant and carryout in the C-2 Zone in 1955. In 1978, the subject property was zoned C-S-C, Section 27-375 of the 1979 (7-82) Prince George’s County Zoning Ordinance permitted an eating and drinking establishment other than a drive-in or fast-food restaurant, but including incidental carryout service and unrestricted use. Permit 5217-87-CU, logged on July 2, 1987 and accepted on September 14, 1987, for a fish and seafood retail and carryout is noted as abandoned per purge May 1988 through September 15, 1988.

Per documentation provided by the applicant, the Ebony Inn (addressed as 5367 Sherriff Road, on Parcel 13) has operated as an eating and drinking establishment other than a drive-in or fast-food restaurant, but including incidental carryout service and providing adult entertainment, since August 14, 1981. Because the Zoning Ordinance was silent regarding adult entertainment uses, a permit with an unrestricted use was allowed to include live adult-oriented entertainment. This use was allowed through 2005 when legislation was enacted prohibiting the use, and further defined in 2010.

The County Council adopted CB-89-1993, which became effective on September 30, 1993. The purpose was to specifically define the uses of restaurants, nightclubs, eating and drinking establishments, and adult entertainment (live entertainment or no patron dancing) uses and created new parking, fencing, and county maintenance regulations for the uses. Businesses in the commercial zones with these uses were required to file a special exception by December 31, 1993 or a certification for a nonconforming use by August 30, 1994. Hotel lounges were exempt from the certification requirement.

It appears that the subject property was not subject to the certification deadlines of CB-89-1993 because it was the Ebony Inn and had a hotel lounge use. However, the subject property was subject to the newly adopted parking, fencing, and county maintenance regulations. There is no documentation of a permit being issued for a motel or hotel lounge for the subject property.

On July 12, 1996, Maryland-National Capital Park and Planning Commission (M-NCPPC), Permit Review staff, Irene Armstrong, provided the King Oak Enterprises representative with comments for Permit 5566-96-U that included questions as to the use of the property, the length of time the property was used commercially, and the request to demonstrate the existing and proposed parking on the site plan with the requirement of one parking space for every three seats. The note indicates that there are approximately 76 seats, which equals approximately 25 parking spaces. The permits documentation questions the motel use because there is no previously issued permit for this use. Ms. Armstrong cites CB-89-1993 (Special Exception requirement), CB-27-1978 requiring certification for carry-outs, verifies

the surrounding zoning, questions the second floor use, previous U&O issuances, perimeter fencing/screening, and the need for revised site plans. The King Oak Enterprises representative responds to some of the questions, but not all. Ms. Armstrong notes that the applicant was called and messages left. The permit was placed on hold and later abandoned. This was the last permit activity until April 2015.

Council Bill CB-49-2005, adopted by the County Council on October 11, 2005, prohibits eating or drinking establishments of any type providing live adult-oriented performances in all commercial zones, while providing an exception for those in the C-M Zone meeting specific criteria. Thus, the subject property became nonconforming on October 11, 2005 when the use was prohibited.

With the June 1, 2010 adoption of the Subregion 4 Master Plan and SMA, Council Resolution CR-49-2010, the subject property was rezoned from C-S-C to M-U-I in a D-D-O Zone, which prohibits eating or drinking establishments of any type providing live adult entertainment performances. There are no footnotes exempting this property. Thus, the subject property became further nonconforming on June 1, 2010 when the zoning changed and the use was prohibited.

It is worth noting that CB-46-2010 (adopted on September 7, 2010) and CB-56-2011 (adopted on November 15, 2011) defines adult entertainment and clarifies the definition of live adult-oriented entertainment, the U&O requirements, and enforcement for adult entertainment and eating or drinking establishments in both commercial and light industrial zones. Deadlines for applying for special exceptions for existing businesses were established. Because the property is zoned M-U-I in a D-D-O Zone, the commercial development standards no longer apply to the subject property.

While the applicant has substantiated the existence of the eating or drinking establishment of any type providing live adult entertainment performances and its continuous operations since August 14, 1981 in accordance with Section 27-244(f) of the Zoning Ordinance, the applicant has not provided substantive documentation demonstrating that *the use was legally established prior* to October 11, 2005 when the use as a eating or drinking establishment of any type providing live adult-oriented performances in the C-S-C Zone was prohibited and June 1, 2010, when the property was rezoned to M-U-I in a D-D-O Zone and the Subregion 4 Master Plan and SMA was adopted by the District Council.

The lack of an approved U&O permit from 1996 demonstrating conformance to the parking, fencing, and county maintenance requirement suggests that the use was not legally established prior to October 11, 2005 or June 1, 2010. No action was taken by the applicant to address the outstanding comments for Use and Occupancy Permit 5566-96-U, which led to its eventual abandonment by M-NCPPC staff. Had the applicant addressed these comments, the legality of the use would not be in question. Also, the comments generated by Permit Review staff dated February 1, 2007, and June 16, 2010, indicate that the applicant was aware that the zoning and use changes had occurred, but the applicant opted not to take any action. The continued violation notices (four total) issued between July 2013 and November 2014 also indicate that the applicant was aware of the violation issues with the subject property and did not attempt to obtain a valid permit, or file for a special exception, within a timely manner.

CONCLUSION

The applicant requests certification of a nonconforming use for an eating and drinking establishment with adult-oriented entertainment on a property zoned M-U-I in a D-D-O Zone. An eating or drinking establishment of any type providing adult-oriented performances is prohibited outside of the I-1 Zone. The nonconforming status began on October 11, 2005, when Council Bill CB-49-2005, prohibiting the use in commercial zones, went into effect and again on June 1, 2010, when the subject

property was rezoned from C-S-C to M-U-I in a D-D-O Zone and the Subregion 4 Master Plan and SMA was adopted by the District Council. The applicant has not demonstrated that the use of an eating or drinking establishment of any type providing live adult-oriented performances was legally established prior to October 11, 2005. Therefore, it is recommended that Certification of Nonconforming Use Application No. CNU-15093-2015 be DISAPPROVED as a certified nonconforming use.