Case No.: S.E. 4720

Applicant: Maages Auditorium
d/b/a Sinsaysionals

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and the disposition recommendation of the Zoning Hearing Examiner for Special Exception 4720, that permission to use approximately 2,674 sq. ft. of an approximately 0.74 acre of land, being Parts of Lots 1 through 4, Block P, of the Seabrook Subdivision, in the C-M (Miscellaneous Commercial) Zone located on the southeast side of Lanham Severn Road (MD 564), also identified as 9605-9607 Lanham Severn Road, Lanham, Maryland, for an Auditorium with Adult Entertainment, is DENIED, pursuant to Subtitle 27 of the Prince George's County Code, Zoning Ordinance, Sections 27-127, 27-131, 27-132, 27-140, 27-141, and 27-142, and the Land Use Article, Md. Code (2012, 2013 Supp.).[1]

[1] The Prince George's County Code, Subtitle 27, (2013 Ed. & Supp.), will be referred to as the Zoning Ordinance of Prince George's County and cited as "§ 27- ___." The sections of the Zoning Ordinance cited above are not exhaustive of the sections relied upon by the District Council in denial of S.E. 4720. The Land Use Article, Md. Code Ann. (2012 Ed., 2013 Supp.), will be referred to as the Land Use Article or cited as §___ of the Land Use Article. Effective October 1, 2012, Article 28 §§1-101 through 8-127 was repealed and recodified at Md. Code (2012), Land Use Article. *See Ray v. Mayor of Baltimore*, 59A.3d 545, 2013 Md. LEXIS 11 (Md. 2013).

> §27-127. Powers and duties to conduct hearings.
> (a) The Zoning Hearing Examiner shall conduct hearings for the following categories of zoning cases:
> (2) Applications for special exceptions under Part 4, including applications for variances in conjunction with the Special Exceptions.

The District Council adopts the findings of facts and conclusions of the Zoning Hearing Examiner in this matter, except as otherwise stated herein. *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596; 329 A.2d 428 (1974) (Where the Council has delegated the duty of making findings of fact and recommendations to the Zoning Hearing Examiner, the Council may comply with the requirement of "specific written findings of basic facts and conclusions of law" by adopting the Examiner's findings and conclusions).

PROCEDURAL HISTORY

On May 31, 2012, the Development Review Division of the Prince George's County Planning Department accepted, for processing, an application for special exception, S.E. 4720, filed on May 7, 2012, by Applicant, Maages (pronounced "Images") Auditorium, 9505 & 9607 Lanham Severn Road, Seabrook, Maryland 20706, for permission to use its auditorium for adult entertainment in the C-M (Miscellaneous Commercial) Zone. Maages Auditorium also does business as, (d/b/a or trade name), Sinsaysionals. The owner on the application form is listed as Fortress EMACK, LLC, 2824 Solomons Island Road, Edgewater, Maryland 21037. S.E. 4720 was filed pursuant to §§27-107.01(7.1), 27-473(b), 27-475.06.06, 27-317, and 27-459. *See* Application Form. *See* also Technical Staff Report, December 26, 2012.

On December 26, 2012, Technical Staff from the Development Review Division completed its review of S.E. 4720. The Technical Staff Report recommended DISAPROVAL of S.E. 4720. *See* Technical Staff Report.

On January 10, 2013, after review of the Technical Staff Report, the Prince George's County Planning Board did not schedule S.E. 4720 for public hearing. *See* Letter from Alan Hirsh, January 11, 2013.

On April 10, 2013, and May 9, 2013, evidentiary hearings were held before the Zoning Hearing Examiner (ZHE), on S.E. 4720. *See* (4/10/2013 Tr.), (5/9/2013 Tr.).

On June 14, 2013, the Applicant, through counsel, filed a Complaint for Declaratory Judgment, Preliminary and Permanent Injunctive Relief, Damages, Attorney's Fees, and Trial by Jury in the United States District Court for the District of Maryland, Case Number 8:13-cv-1722-DKC (federal complaint). The federal complaint challenges the constitutionality of County Bills 46-2010 and 56-2011, hereinafter CB-46-2010 and CB-56-2011. The Applicant alleges that the

elimination of conforming locations and the special exception requirements of this challenged legislation are in violation of the First Amendment of the United States Constitution and other relevant provisions of the United States Constitution, as well as the corresponding provisions of the Maryland Declaration of Rights.[2] The federal complaint states as follows:

- **Count I** – The Restrictions Contained In The Challenged Subject Legislation Violate The Equal Protection Doctrine
- **Count II** – The Challenged Subject Legislation Represents An Unlawful Exercise Of Police Powers And Imposes An Impermissible Prior Restraint On First Amendment Protected Activities
- **Count III** – The Special Exception Process Imposed On Plaintiffs By CB-56-2011 Lacks Adequate Procedural Safeguards And Result In A Violation Of Plaintiffs' Constitutional Rights
- **Count IV** – The Adult Clubs Bill Takes Property Without Due Process Of Law
- **Count V** – The Subject Legislation Contains Terms That Are Unconstitutionally Vague
- **Count VI** – The Subject Legislation Allows For Unbridled Administrative Discretion
- **Count VII** – The Challenged Legislation Fails To Provide For Adequate Alternative Avenues Of Communication

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[2] The District Council sits as an administrative agency when reviewing a zoning matter. *See County Council v. Brandywine Enterprise.*, 350 Md. 339, 711 A.2d 1346 (1998) ("The Regional District Act authorizes the County Council to sit as a district council in zoning matters, and, when it does so, it is acting as an administrative agency"); *County Council v. Carl M. Freeman Assocs*. 281 M. 70, 376 A.2d 869 (1973) ("When it sits at the district council in a zoning matter, the Prince George's County Council is an 'administrative agency' as the term is broadly defined"). *See also* §14-101(f) and §22-101(b) of the Land Use Article. *See also* §27-107.01(a)(1, 67, 68), Zoning Ordinance of Prince George's County (2013 Ed., 2014 Supp.) (each subsection therein defining "district" as that portion of the Maryland-Washington Regional District located in Prince George's County, Maryland, and "district council" as The Prince George's County Council, sitting as the District Council for that portion of the Maryland-Washington Regional District located in Prince George's County).

See §27-141 (…The Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision.). *See also* RULES OF PROCEDURE FOR THE PRINCE GEORGE'S COUNTY DISTRICT COUNCIL (Adopted by CR-5-1993 and Amended by CR-2-1994, CR-2-1995 and CR-74-1995)

See also Rule 6: Oral Argument and Evidentiary Hearings:
(f) The District Council may take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence.

- **Count VIII – (Supplemental State Court Claim Under 28 U.S.C. Sec. 1367)**
  The Challenged Legislation Violates Maryland Law For Failing To Provide An Amortization Period (Emphasis added).

See Complaint for Declaratory Judgment, Preliminary and Permanent Injunctive Relief, Damages, Attorney's Fees, and Trial by Jury in the United States District Court for the District of Maryland, Case Number 8:13-cv-1722-DKC, (ECF No. 6), filed June 14, 2013.

On August 13, 2013, the Applicant requested that the ZHE stay this matter pending until the disposition of the Applicant's Motion for Preliminary Injunction filed in the above federal complaint.

On March 5, 2014, the Honorable Deborah K. Chasnow issued a 52 page Memorandum Opinion which disposed of the above federal claims as follows:

> **The motion for a preliminary injunction and temporary restraining order filed by Plaintiffs Maages Auditorium; CD15CL2001, Inc., d/b/a Bazz and Crue and X4B Lounge; D2; and John Doe Jane Doe, for all those similarly situated will be denied**. Defendant Prince George's County, Maryland's motion to dismiss Plaintiffs John Doe and Jane Doe will be granted. Defendant's motion to dismiss Count IV of Plaintiffs' complaint will be granted. Defendant's motion for summary judgment on Counts I, II, III, V, and VI of Plaintiffs'complaint will be granted. Defendant's motion for summary judgment on Counts VII and VIII of Plaintiffs' complaint will be denied. *See* EFC No. 36, Case Number 8:13-cv-1722-DKC. (Emphasis added).

The federal court has retained jurisdiction over Counts VII and VIII, which are limited factual proceedings on whether sufficient property exists in the I-2 zone to permit all 14 adult entertainment facilities to relocate, and whether, if sufficient property exists in the I-2 zone, the County has provided sufficient time under Maryland law for those businesses to close up shop and relocate. The Applicant's counsel conceded at oral argument that the constitutionality of CB-56-2011 is currently before the federal court, and that ruling may go a long way in determining what happens in this matter. *See* (9/8/2014, Tr., p. 5)

On March 26, 2014, the ZHE issued her disposition recommendation in this matter and recommended DENIAL. *See* ZHE Notice of Decision, March 26, 2014.

On April 14, 2013, the District Council took no action in this matter.

On April 25, 2014, the Applicant appealed the disposition recommendation of the ZHE to the District Council, and requested oral argument. *See* April 25, 2014, Appeal Letter from Dennis Whitley, III, Esquire.

On June 19, 2014, notice of oral argument was mailed to all persons of record. Subsequently, a revised notice of oral argument was mailed to all persons of record on June 24, 2014, scheduling oral argument for September 8, 2014.

On September 8, 2014, the District Council conducted oral argument, pursuant to procedures in §27-131. *See* (9/8/2014 Tr.) The Applicant raised several questions, discussed *infra*, at oral argument. *See* April 25, 2014, Appeal Letter from Dennis Whitley, III, Esquire. *See also* (9/8/2014, Tr.). At the conclusion of oral argument, this matter was taken under advisement.

On September 22, 2014, the District Council, pursuant to §27-132, referred this matter to staff for the preparation of an order of denial.

FINDINGS AND CONCLUSIONS

- Subject Property

The Adult Entertainment use, t/a Sinsaysionals, occupies two units in a strip of seven units. The remaining businesses in the commercial center are auto related. Vehicular access to the property is provided via a driveway from Lanham Severn Road which also provides access to the adjoining Car Wash. Access to the interior of the instant use is via a door in 9605 over which a canopy is hung. (Exhibit 19(a)) The neighborhood coincides with the Seabrook MARC Station focus area, which runs along Lanham Severn Road (MD 564) from Carter

Avenue in the west to Santa Cruz Street in the east. The Seabrook MARC station lies at the core of this area. Lanham Severn Road and the railroad tracks run parallel to each other, with a small strip of land placed between them that contains primarily auto-related uses. The Seabrook Station shopping center lies to the north of Lanham Severn Road just southwest of the MARC station. Northwest of the site, directly across Lanham Severn Road, are single-family residences in the large Seabrook Acres subdivision. The neighborhood is defined by the following boundaries:

Northwest	—	Lanham Severn Road (MD 564) including the residential and commercial properties on the northwest side;
Northeast	—	Santa Cruz Street;
South	—	AMTRAK railroad tracks; and
West	—	Carter Avenue.

The subject property is surrounded by the following uses:

North	—	Car repair businesses and a Car Wash in the C-M Zone.
East	—	A vacant parcel in the C-M Zone.
South	—	AMTRAK railroad tracks.
West	—	Across Lanham Severn Road (MD 564) are single-family residences in the R-80 (One-Family Detached Residential) Zone.

- Master Plan and Sectional Map Amendment

The subject property is subject to the recommendation of the 2010 *Glenn Dale–Seabrook–Lanham and Vicinity Approved Sector Plan and Sectional Map Amendment* which recommends a mixed-use land use for the subject property as part of the Seabrook MARC Station focus area. The objective of the Plan is to reduce the profusion of auto-oriented uses

along the Lanham Severn Road (MD 564) corridor by creating a transit-oriented, mixed-use community center along Lanham Severn Road that focuses on the Seabrook MARC station. The 2002 *Prince George's County Approved General Plan* places this property in the Developing Tier. The vision for the Developing Tier is to maintain a pattern of low- to moderate-density suburban residential communities, distinct commercial centers, and employment areas that are increasingly transit-serviceable.

- Prior History of the Subject Property

Numerous permit applications have been filed for the property since its initial construction. The following provides a list of permits or approvals that specifically relate to the instant Application:

March 1, 2001	Permit 8329110-2000-U was issued for a 60-seat auditorium (Sinsaysionals Indoor Theater) at 9607 Lanham Severn Road.
March 18, 2002	Permit 6015-2002-U was recommended for approval by the MNCPPC for a recreational establishment of a commercial nature, dance hall, and auditorium with a maximum of 60 seats at 9607 Lanham Severn Road. This Permit was not issued.
April 17, 2002	Permit 13039-2002-U was recommended for approval by the MNCPPC for a 20-student automotive repair training center at 9607 Lanham Severn Road. This Permit was not issued.
May 6, 2002	Permit 13039-2002-U was revised to remove the training center at 9607 Lanham Severn Road. This Permit was not issued.
May 30, 2002	Permit 18348-2002-U was recommended for approval by the MNCPPC for a 60-seat auditorium at 9605 Lanham Severn Road, referencing Permit 8329110-2000-U.
June 26, 2002	Permit 18348-2002-01-U was revised to change the number of seats from 60 to 28 at 9605 Lanham Severn Road and recommended for approval by the MNCPPC.

July 29, 2002 Permit 18348-2002-02-U was revised a second time to be a CUW (Commercial Use—Walkthrough) permit for a 60-seat auditorium at 9605 Lanham Severn Road. This Permit was recommended for approval by the MNCPPC.

June 25, 2003 Permit 18348-2002-02-U was issued to Maages Auditorium to operate "auditoriums" at 9605 Lanham Severn Road with the express limitation "OK for a 60 seat auditorium per 8329110-2000."

May 31, 2012 Special Exception SE-4720 for an Adult Entertainment use in the C-M Zone was accepted by the Planning Department, MNCPPC. The Applicant was requested to submit additional plans and justification so that the case could be referred out for comments, but they failed to do so.

July 10, 2012 The Zoning Section received a letter from the Applicant's attorney requesting that the processing of the subject Special Exception Application be placed on hold until after the Applicant had the opportunity to request and process a not yet filed Application for Certification of a Nonconforming Use.

October 10, 2012 Jimi Jones, Supervisor of the Zoning Section, sent an email to the Applicant's attorney stating that, per their earlier phone conversation that day, the Applicant has been advised that the Special Exception Application for the proposed Adult Entertainment use was scheduled to be reviewed by the Prince George's County Planning Board on January 10, 2013. Mr. Jones further stated that the required site plans and documents needed to process the Application were still outstanding and that Staff would continue to move forward with their review regardless of the status.

October 16, 2012 Jimi Jones, Supervisor of the Zoning Section, sent an additional email to the Applicant's attorney reminding them that the scheduled hearing date was rapidly approaching and that materials needed for the review and processing of the Special Exception Application had not been submitted to the Planning Department, and that a Staff Report would be issued without this information if need be.

October 31, 2012 CNU-32365-2012 was placed on hold by the Permit Review Section and written comments were issued to the Applicant's attorney. This Application for certification of a nonconforming auditorium in the C-M Zone was not pursued by the Applicant.

November 26, 2012 The Applicant's attorney submitted a letter to the Planning Board asking that Special Exception SE-4720 be stayed until the Certification Nonconforming Use Application was acted upon.

- Applicant's Request

The Applicant is seeking approval of SE-4720 to operate an Auditorium with Adult Entertainment through the validation of an existing Use and Occupancy Permit for an Auditorium. *See* (8329110-2000-U for 9607 Lanham Severn Road and 18348-2002-U for 9605 Lanham Severn Road)

- Applicable Law and Conclusions

The Prince George's County Council, by way of the express authority conferred by the Maryland General Assembly via the Regional District Act, sits as the District Council for that portion of the Maryland-Washington Regional District within Prince George's County. Md. Code Ann., Land Use, §§14-101(f), 22-101(b) (2012 & Supp. 2013). As such, the RDA designates the Prince George's County Council, sitting as the District Council, broad authority to regulate zoning and land use matters. *See* Md. Code Ann., Land Use, §§22-201(b), 22-202(a, b), 22-206, 22-208, 22-301(a)-(c), 22-310(a), 22-407(a) (2012 & Supp. 2013). In so doing, the legislature designates specific authority for the Council to make factual determinations and to adjudicate certain factual disputes in reaching a final decision in zoning cases.

Further, and pursuant to §22-104 of the RDA, the District Council may, by ordinance, adopt and amend the text of the zoning ordinance and may, by resolution or ordinance, adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, the size of lots, yards, courts and other open spaces. Accordingly, in exercising its authority to regulate land use and zoning in the County, the District Council enacted certain procedural prescriptions within the County Zoning Ordinance,

being also Subtitle 27 of the Prince George's Code. *See Prince George's County v. Ray's Used Cars*, 398 Md. 632, 635-36, 922 A.2d 495, 497 (2007).

In conveying this expansive zoning authority, the Maryland Legislature also ceded substantial legislative prerogative upon the district councils in §22-104 in furtherance of its zoning powers and responsibilities, which provides as follows:

> § 22-104. Authority to adopt and amend zoning law.
> (a) In general. -- The Montgomery County district council or the Prince George's County district council, in accordance with the requirements of this division as to the portion of the regional district located in the respective county, may:
> (1) by local law adopt and amend the text of the zoning law for that county; and
> (2) by local law adopt and amend any map accompanying the text of the zoning law for that county.
> (b) Purposes. -- The local law may regulate:
> (1) (i) the location, height, bulk, and size of each building or other structure, and any unit in the building or structure;
> (ii) building lines;
> (iii) minimum frontage;
> (iv) the depth and area of each lot; and
> (v) the percentage of a lot that may be occupied;
> (2) the size of lots, yards, courts, and other open spaces;
> (3) the construction of temporary stands and structures;
> (4) the density and distribution of population;
> (5) the location and uses of buildings and structures and any units in those buildings and structures for:
> (i) trade;
> (ii) industry;
> (iii) residential purposes;
> (iv) recreation;
> (v) agriculture;
> (vi) public activities; and
> (vii) other purposes; and
> (6) the uses of land, including surface, subsurface, and air rights for the land, for building or for any of the purposes described in item (5) of this subsection.
> (c) Limitation. -- The exercise of authority by a district council under this section is limited by §§ 17-402 and 25-211 of this article.

See Md. Code Ann., Land Use §22-104(a, b) (2012 & Supp. 2013).

In addition, and in direct conformance with the RDA, the district councils may also divide the portion of the regional district located within its county into districts and zones of any number, shape, or area it may determine. *See* Md. Code Ann., Land Use §22-201 (2012 & Supp. 2013). As such, the enactment of zoning laws affecting the districts and zones of its respective geographic designation, as well as the right to the construction, alteration, and uses of buildings and structures, and the uses of land, including surface, subsurface, and air rights falls within the exclusive province of the district councils. *Id.* In so doing, the RDA inures the district councils with regulatory controls to promulgate prescriptions governing the form and manner of uses and structures on land, and to dictate the form and order of procedures deemed appropriate as to zoning and land use controls for land within its purview in §22-202 and 22-206, which provides:

> § 22-202. Effect of zoning laws.
> (a) Scope of section. -- This section applies to any zoning law that imposes a more restrictive height limitation, lesser percentage of lot occupancy, wider or larger courts, deeper yards, or other more restrictive limitations than those provided by State, county, municipal, or other local regulations.
>
> **(b) Priority of regulations. -- A zoning law described in subsection (a) of this section shall prevail in the area where it is imposed over the limitations provided by State, county, municipal, or other local regulations.** (Emphasis added.)
>
> § 22-206. Procedures.
> (a) In general. -- **A district council may amend its zoning laws**,[3] including any maps:
> (1) in accordance with procedures established in its zoning laws; and
> (2) after holding an advertised public hearing.
> (b) **Permissible elements. -- The procedures and zoning laws may include:**
> **(1) procedures limiting the times when amendments may be adopted;**

[3] Pursuant to Md. Code Ann., Land Use §14-101(q) (2012, 2013 Supp.):
(1) "Zoning law" means the legislative implementation of regulations for zoning by a local jurisdiction.

(2) "Zoning law" includes a zoning ordinance, zoning regulation, zoning code, and any similar legislative action to implement zoning controls in a local jurisdiction.

> **(2) provisions for hearings and preliminary determinations by an examiner, a board, or any other unit**;
> (3) procedures for quorums, number of votes required to enact amendments, and variations or increases based on factors such as master plans, recommendations of the hearing examiner, county planning board, municipal corporation, governed special taxing district, or other body, and petitions of abutting property owners, and the evidentiary value that may be accorded to any of these factors; and
> (4) procedures for hearings, notice, costs, fees, amendment of applications, recordings, reverter, lapse, and reconsideration de novo of undeveloped zoning amendments.
> (c) Notice to nearby property owners -- Prince George's County. --
> (1) In Prince George's County, the district council may provide for notice of the public hearing on a proposed amendment to its zoning plan or zoning laws to be given to the owners of properties, as they appear on the assessment rolls of the county, adjoining, across the road from, on the same block as, or in the general vicinity of the property that is the subject of the proposed amendment.
> (2) A zoning law adopted under this subsection may require notice to be given by mail or by posting the notice on or in the vicinity of the property involved in the proposed amendment or both.
> (d) Limitation. -- In a year in which a district council is elected, the district council may not amend a zoning law from November 1 and until the newly elected district council has taken office.

See Md. Code Ann., Land Use §§22-202, 22-206 (2012 & Supp. 2013) (Emphasis added).

Finally, the District Council enjoys specific authority to regulate land use in the County in establishing procedures relative to special exceptions pursuant to §§22-301, which provides:

> § 22-301. Special exceptions and variances.
> (a) Authorized. --
> **(1) A district council may adopt zoning laws that authorize the board of appeals, the district council, or an administrative office or agency designated by the district council to grant special exceptions and variances to the zoning laws on conditions that are necessary to carry out the purposes of this division.**
> (2) Any zoning law adopted under this subsection shall contain appropriate standards and safeguards to ensure that any special exception or variance that is granted is consistent with the general purposes and intent of the zoning laws.
> (b) Appeals. -- Subject to § 22-309 of this subtitle, an appeal from a decision of an administrative office or agency designated under this subtitle shall follow the procedure determined by the district council.
> (c) Authorization to decide certain questions. -- The district council may authorize the board of appeals to interpret zoning maps or decide questions, such as the location of lot lines or district boundary lines, as the questions arise in the

administration of zoning laws.

See Md. Code Ann., Land Use §§22-301, 22-310 (2012, Supp. 2013) (Emphasis added).

In turn, the District Council adopted local zoning provisions in the Zoning Ordinance in furtherance of the exercise of its ample authority supplied pursuant to §§20-104, 22-201, 22-202, 22-206. 22-301, and 22-310 of the RDA. §27-102 provides overarching purposes of the Zoning Ordinance to guide exercise of its police power in furtherance of the public safety, health, and welfare of the citizens and residents of the County:

> (1) To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County;
> (2) To implement the General Plan, Area Master Plans, and Functional Master Plans;
> (3) To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;
> (4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;
> (5) To provide adequate light, air, and privacy;
> (6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;
> (7) To protect the County from fire, flood, panic, and other dangers;
> (8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;
> (9) To encourage economic development activities that provide desirable employment and a broad, protected tax base;
> (10) To prevent the overcrowding of land;
> (11) To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;
> (12) To insure the social and economic stability of all parts of the County;
> (13) To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;
> (14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and
> (15) To protect and conserve the agricultural industry and natural resources.

See §27-102 of the Zoning Ordinance.

The Zoning Ordinance regulates special exceptions pursuant to the general zoning authority in §§22-202 and 22-206 and the specific authority as to special exceptions in §22-301 and 22-310 of the RDA. *See generally* §§27-102, 27-311, 27-314, 27-315, 27-319, 27-324 of the Zoning Ordinance. *See also* Md. Code Ann., Land Use, §§22-301(a)(2), 22-310(a) (2012 & Supp. 2013). Regarding special exceptions, §27-317, within Part 4 of the Zoning Ordinance, provides:

> A special exception **may** be approved, pursuant to §27-317(a), **if**:[4]
>
> (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

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[4] *See* §27-108.01. Interpretations and rules of construction.
(10) The word "approve" includes "approve with conditions, modifications, or amendments."
(19) The words "shall," "must," "may only" or "may not" are always mandatory and not discretionary. **The word "may" is permissive**. (Emphasis added.)
"May" is generally interpreted as permissive, in contrast with "shall," which is interpreted as mandatory. *See Board of Physician Quality v. Mullan*, 381 Md. 157, 166, 848 A.2d 642, 648 (2004); *State v. Green*, 367 Md. 61, 82, 785 A.2d 1275, 1287 (2001); *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990).

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

See §27-317(a, d) of the Zoning Ordinance (Emphasis added).

An Auditorium which includes Adult Entertainment is permitted in a Special Exception in the C-M Zone in accordance with §27-461(b)(5) footnote 58 as follows:

> 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.

§27-107.01 (7.1) of the Zoning Ordinance defines Adult Entertainment as:

> (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.

§ 27-107.01(a)(21.1) defines an Auditorium:

> (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.

With this statutory framework in mind, and, pursuant to §27-142, we take administrative notice that the burden of proof in any zoning case shall be the Applicants.

This special exception application was submitted for processing on May 31, 2012. §27-461, footnote 58 requires "Applications for adult entertainment must be filed and accepted by

June 1, 2012." The 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. §27-296 details those items required to be submitted in an Application for a Special Exception, the majority of which were not provided until the May 9, 2013, evidentiary hearing, and many of which were never provided.

§27-296 requires in pertinent part:

> **(a) General**
>
> *
>
> (3) All Applications shall be on forms provided by the Planning Board. All information shall be typed, except for the signatures.
>
> *
>
> (b) **Contents of Application form**.
>
> (1) The following information shall be included on the Application:
>
> (A) The name, address, and telephone number of the Applicant, and an indication of the Applicant's status as contract purchaser, agent, or owner;
>
> (B) The requested use of the property;
>
> (C) The street address of the property; name of any municipality the property is in; name and number of the Election District the property is in;
>
> (D) The total area of the property (in either acres or square feet);
>
> (E) The property's lot and block number, subdivision name, and plat book and page number, if any; or a description of its acreage, with reference to liber and folio numbers.
>
> (F) The name, address, and signature of each owner of record of the property. Applications for property owned by a corporation must be signed by those officers empowered to act for the corporation; and
>
> (G) The name, address, and telephone number of the correspondent.
>
> (c) **Other submission requirements**.
>
> (1) Along with the Application, the Applicant shall submit the following with all plans prepared at the same scale (where feasible):
>
> (A) An accurate plat (prepared, signed, and sealed by a registered engineer or land surveyor) capable of being reproduced on an ozalid or similar dry-copy machine, or six (6) copies of the plat. This plat shall show:
>
> (i) The present configuration of the property, including bearings and distances (in feet).
>
> *
>
> (ii) The names of the owners of record or subdivision lot and block numbers of adjoining properties;
>
> (iii) The name, location, distance to the center line, and present right-of-way width of all abutting streets. If the property is not located at

the intersection of two (2) streets, the distance to, and the name of, the nearest intersecting street shall be indicated;

(iv) The subdivision lot and block numbers of the subject property (if any);

(v) A north arrow and scale (not smaller than one (1) inch equals four hundred (400) feet);

(vi) The total area of the property (in square feet or acres);

(vii) The location of all existing buildings on the property; and

(viii) The subject property outlined in red.

(B) A site plan (drawn to scale) showing all existing and proposed improvements and uses on the subject property, and the use and zoning of adjacent properties. The site plan shall be in sufficient detail so that a determination can be made that the proposed use will be in compliance with all requirements of this Subtitle applicable to it. The site plan must be capable of being reproduced on an ozalid or similar dry-copy machine, or nine (9) copies of the plan must be supplied. In a Chesapeake Bay Critical Area Overlay Zone, the site plan shall be prepared in accordance with Subtitle 5B.

(C) A landscape plan shall be prepared in accordance with the provisions of the Landscape Manual. The landscape plan must be capable of being reproduced on an ozalid or similar dry-copy machine, or nine (9) copies of the plan must be supplied.

(D) Three (3) copies of the appropriate Zoning Map page on which the property is plotted to scale and outlined in red.

(E) A certificate of public convenience and necessity for a public utility power transmission line right-of-way, tower, pole, conduit, pipeline, or similar facility, if:

(i) The actual record owner of the subject property has not signed the Application; and

(ii) A certificate is required by the State or Federal agency having jurisdiction over the public utility operation.

(F) Three (3) copies of a typewritten statement of justification in support of the request. The statement shall address the provisions of this Subtitle applicable to the requested use. The statement shall also set forth the factual reasons showing why approval of the request would not be detrimental to the public health, safety, and welfare. This statement may be accompanied by three (3) copies of any material which (in the Applicant's opinion) is necessary to clarify or emphasize the typewritten statement. This additional material, if not foldable, shall be not larger than eighteen (18) by twenty-four (24) inches.

(G) A statement listing the name, and the business and residential addresses, of all individuals having at least a five percent (5%) financial interest in the property.

(H) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. This statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each

> Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors.
>
> (I) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds).
>
> (J) An approved Natural Resource Inventory.
>
> (K) A Type 2 Tree Conservation Plan prepared in conformance with Division 2 of Subtitle 25 and the Woodland and Wildlife Habitat Conservation Technical Manual or a Standard Letter of Exemption.
>
> (L) A statement of justification describing how the proposed design preserves and restores the regulated environmental features to the fullest extent possible; and
>
> (M) All other data or explanatory material deemed necessary by the District Council, Zoning Hearing Examiner, or Planning Board (submitted in triplicate).
>
> (2) For the purposes of (G), (H), and (I) above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

Almost 2 years after the Application was required by law to be filed, the Applicant has failed to comply with the requirements of §§ 27-296(c)(1)(A)(i), 27-296(c)(1)(A)(viii), and 27-296(c)(1)(B)-(M).

Upon receipt of the Pre-application Form for SE 4720 (Exhibit 4), the Applicant was provided with the specific Application guidelines and forms. (Exhibit 5) Of the 10 specific submittal requirements for a Special Exception Application, Exhibit 62, the Applicant only provided the first item required: "Application-One typed application form signed by all owners of record," prior to the evidentiary hearing. Prior to the close of the evidentiary record, the Applicant failed to provide the State Ethics Commission Affidavits required by item 10.[5]

Exhibit 63 is the MNCPPC, Development Review Division, Zoning, Special Exception and Departures Checklist. Of "I – REVIEW OF BASIC REQUIREMENTS", "A.

[5] We find that the ZHE did not err in finding #5. At the time of her disposition recommendation, *i.e.*, March 26th, 2014, the Applicant had not filed the required Public Ethics Affidavit. The Applicant filed a Non-Corporate Applicant Affidavit on March 31, 2014. We note also that the Public Ethics Law requires filing of the affidavit no later than 30 days prior to final action of the District Council.

DOCUMENTS REQUIRED:", "B. PROPERTY SURVEY REQUIREMENTS:" and 'C. SITE PLAN and LANDSCAPE PLAN REQUIREMENTS:", A, B, and C are required for Special Exception Applicants. (Exhibit 63, pp. 1-3) Of this myriad of required documents and information, the Applicant only submitted the first required document under "A" – a typed and signed Application Form, prior to the evidentiary hearing. The Applicant also paid the filing fee required under "C". (Exhibit 3)

The Application Form (required by §27-296(b)) and the only document or evidence provided by the Applicant prior to the evidentiary hearing, Exhibit 8, pp. 26-27, identified those provisions of the Zoning Ordinance which the Applicant was required to satisfy. (Exhibit 8, p. 27) "II – SITE PLAN REVIEW" and "III – STATEMENT OF JUSTIFICATION REVIEW" of the Checklist, Exhibit 63, could not be performed as required by the Technical Staff as the Applicant refused to provide the required evidence.

§27-311 requires: "In connection with each application for a Special Exception, the record shall include a report by the Technical Staff. This report shall include the Staff's recommendation."

§27-307 requires: "At least thirty (30) days prior to the public hearing established under Section 27-302(a), the original copy of the application, plans, maps, specifications, Technical Staff Report, and all other data, materials, or record evidence (to date) pertaining to the requested Special Exception shall be sent by the Planning Board to the District Council."

§25-202 of the Land Use Article, Annotated Code of Maryland, also requires that the Technical Staff Report be filed at least 30 days prior to the scheduled evidentiary hearing.

§27-308 requires: "At least thirty (30) days prior to the public hearing, the original Special Exception application file shall be available for public examination in the Office of the

Zoning Hearing Examiner, and a copy of the file shall be available for public examination in the Office of the Planning Board. This file may be reviewed by anyone, and copies of any of its contents may be obtained at a reasonable cost."

These sections of the Zoning Ordinance are to provide due process and fundamental fairness to all parties. *See Lussier v. Md. Racing Comm'n*, 343 Md. 681, 696–97, 684 A.2d 804 (1996) (An agency's interpretation of the statute that it administers will be given considerable weight); *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881 (1989) (Indeed a reviewing court will ordinarily follow a zoning agency's interpretation of its own ordinance, even if questionable; the agency's decision, favorable or unfavorable to an applicant, is presumed correct); *Marzullo v. Kahl*, 366 Md. 158, 172, 783 A.2d 169 (2001) (an ordinance interpretation by a local zoning board is entitled to "considerable weight."). By requiring the Applicant to provide full disclosure of its case 30 days prior to the evidentiary hearing, all parties are provided the opportunity to prepare a meaningful response or rebuttal.

The MNCPPC accepted an empty shell of an Application, that being merely an Application form containing the property owners' putative but illegible signature and the filing fee. Despite repeated phone calls, emails, and offers to work with the Applicant to get the Application completed, the Applicant refused to provide any substantial information to support its Application. (Exhibit 8, pp. 24-25) By letters dated July 9, 2012 and November 26, 2012, the Applicant stated that he intends to pursue an Application for Certification of Non-Conforming Use for the subject property; to date the Applicant merely obtained an Application number, CNU-32365-2012 (filed November 5, 2012), but has failed to provide a substantive Application

or to pursue said Application. (Exhibit 8, pp. 22-23 and 28)

On December 26, 2012 the Technical Staff issued its required Report in Special Exception 4720 recommending disapproval. In discussing the condition precedent findings of § 27-317 Staff states:

> 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 the necessary information, staff is compelled to recommend disapproval of the application. (Exhibit 8, p. 8)

After reviewing the Technical Staff Report and the complete lack of any evidence presented by the Applicant, the Planning Board decided against holding a public hearing and expedentiously adopted the Technical Staff's recommendation of denial. (Exhibit 1)

The proposed Site Plan submitted at the evidentiary hearing, Exhibit 15, concedes that the site is not in conformance with the minimum Parking and Loading Requirements of Part 11 of the Zoning Ordinance but argues that there may be, in the future, ways in which the parking and loading requirements may be met. Such an argument is specious and speculative. The Technical Staff, in its review of Exhibit 15, noted insufficiencies in both parking and loading spaces, errors in both parking and loading schedules, a violation of the Americans With Disabilities Act by the failure to provide a van accessible parking space for the physically handicapped, and a failure to screen the trash facility. The Staff also noted that 5 parking spaces adjacent to the east property line are off site and do not have adequate access, there is an island adjacent to the east property line which also appears to be off site, and that the existing 12' x 12'

waste area adjacent to the east property line appears to be off of the subject property. (Exhibits 48 and 49) The Applicant must meet its burden of proof at this time and concedes that it has failed to do so.

The proposed Site Plan, Exhibit 15, contains an unacceptable disclaimer that certain locations are merely approximate as they are based on an aerial image obtained from Google Earth and are not accurate to a reasonable degree of engineering certainty. (Exhibit 48) The proposed Site Plan, Exhibit 15, contains the additional disclaimer that "this plan is for a Special Exception for the existing Sinsaysionals Adult Entertainment facility only (Units 9605 & 9607 – 2,675 S.F.)" This is further emphasized by a bold black broken line around a 2675 sq. ft. area designated "Special Exception Area (For 9605 & 9607 Units Only = 2,675 $SF^{\pm}$)" What role does this disclaimer play in the veracity to be credited to the remainder of the information provided on the document? *See Board of County Commissioners v. Oakhill Farms*, 232 Md. 274, 283, 192 A. 2d 761, 766 (1963) (**Whether the test of substantial evidence on the entire record or the test of against the weight of all the evidence is followed, the courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences or make independent determinations of fact, because to do so would be exercising a non-judicial role**. Rather, they have attempted to decide whether a reasoning mind could reasonably have reached the result the agency reached upon a fair consideration of the fact picture painted by the entire record. **In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous or, to use the phrase which has become standard in Maryland zoning cases, not fairly debatable**). **The basic reason for the fairly debatable standard is that zoning matters are, first of all, legislative functions and,**

absent arbitrary and capricious actions, are presumptively correct, if based upon substantial evidence, even if substantial evidence to the contrary exists. There is substantial evidence to support the zoning agency's conclusion if reasoning minds could reasonably reach the conclusion from facts in the record. Evidence is substantial if there is a little more than a scintilla of evidence. *See Cremins v. County Comm'rs of Washington County*, 164 Md. App. 426, 883 A.2d 966 (2005) (internal quotations and citations omitted). (Emphasis added). **Fairly debatable is whether the agency's determination is based upon evidence from which reasonable persons could come to different conclusions.** *Sembly v. County Bd. of Appeals*, 269 Md. 177, 182, 304 A.2d 814, 818 (1973). *See also Prince George's County v. Meininger*, 264 Md. 148, 151, 285 A.2d 649, 651 (1972). 232 Md. At 283, 193 A. 2d at 766 (internal quotations omitted) (Emphasis added). We take administrative notice that a "**Court may no substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness**. *See Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398, 396 A.2d 1080, 1089 (1979) (internal quotations and citations omitted) (Emphasis added).

Indeed, since Exhibit 15 expressly emphasizes that the Special Exception area is for only that area within the bold broken black line, the Applicant is providing no parking, no street frontage or access or any of the myriad of requirements of the Zoning Ordinance.[6]

On November 30, 2000, the Applicant applied for Use and Occupancy 8329110-2000 for a "Theater/Dance/Banquet Hall/Auditorium" for 9607 Lanham Severn Road. (Exhibit 34(f)) On February 22, 2001, Mary Hampton, Permit Review Section, MNCPPC, recommended approval

[6] There is a canopy erected over the entrance of one of the units. This canopy appears to be erected illegally as there is no evidence that it was erected pursuant to a validly issued permit. The canopy is also located off site of the Special Exception area on the Site Plan. (Exhibit 15)

of Use and Occupancy 8329110-2000 noting in pertinent part:

12/15/00 - Reginald Holley called and went over comments.
2/1/01 - Received letter from applicant. The use appears to be an auditorium use and a recreational establishment of a commercial nature.
2/22/01 - Mr. Holly submitted a revised letter. The use will operate as an auditorium.
2/22/01 - Mr. Holly submitted a revised letter. The use will operate as an auditorium.
2/22/01 - Mr. Holly submitted a revised letter describing how his use will operate. He will not operate dance contests/dancing, therefore the use is an auditorium. (Exhibit 58, pp. 31 and 26)

On February 22, 2001, the Applicant submitted written documentation stating **"The purpose that I would be using the facility (sic) would be to hold Comedy shows, contests (games), hair shows, fashion shows, model calls, poetry reading nights and sports shows."** (Exhibit 25, undated letter from Holly to Hampton received February 22, 2001) (Emphasis added). Use and Occupancy Permit 8329110-2000 was issued for the 9607 Lanham Severn Road on March 1, 2001 for use as an Auditorium to be operated by Sinsaysionals Indoor Theater. (Exhibit 8, p. 30)

In the spring of 2002, the Applicant applied for Use and Occupancy Permit 6015-2002 stating:

> **The proposed use of the space will be to hold Cabarers (public dance night w/ticketed admission) Fashion & Hair Shows, Comedy night, Amateur Night, Poetry Readings, Wedding Receptions, & Talent shows. The facility is 1377 square feet**. (Exhibit 8, p. 33 and Exhibit 30) (Emphasis added).

The Permit Review Section, MNCPPC, recommended approval "OK for recreational establishment of a commercial nature, dance hall, and auditorium, with a maximum of 60 seats." (Exhibit 8, p. 32) Use and Occupancy Permit 6015-2002 was not issued.

In the summer of 2002, the Applicant applied for Use and Occupancy Permit 18348-2002-00 and a series of revisions, and for a change of occupancy to Maages Auditorium for 9605 Lanham Severn Road. Use and Occupancy Permit 18348-2002-00 (May 30, 2002) was requested

for “warehouse-auditorium-dance/Banquet/Auditorium” and was recommended for approval by the Permits Review Division, MNCPPC, “OK for a 60 seat auditorium, reference 8329110-2000.” (Exhibit 34(a))

On June 26, 2002, the Applicant applied for revision 01 (the first revision) to Use and Occupancy 18348-2002-01 identifying the proposal use as an “auditorium”. This proposed revision was recommended for approval by the Permit Review Division “OK for an auditorium with 60 seats”. (Exhibit 34(a)) The proposed revision itself proposed the reduction of seats from 60 to 28 seats. (Exhibit 34(c))

On July 29, 2002, the Applicant applied for revision 02 (the second revision) to Use and Occupancy Permit 18348-2002-02, which the Permits Review Division recommended for approval “OK to change from Use and Occupancy to CUW for 60 seat auditorium reference #8329110-2000”. (Exhibit 34(d)) Use and Occupancy 18348-2002 was issued on June 25, 2003, to Maages Auditorium to operate “auditoriums” with the express limitation “OK for a 60 seat auditorium per 8329110-2000” at 9605 Lanham Severn Road. (Exhibit 24)

The Applicant testified during the evidentiary hearing that he has used the subject property has been used for Adult Entertainment since 2000. If this is true, the Applicant committed fraud in obtaining Use and Occupancy Permit 8329110-2000 and consequently Use and Occupancy Permit 18348-2002 by specifically misrepresenting his ultimate intentions for the use of the subject property. At no time during the Use and Occupancy Permit Application processes did the Applicant disclose that he intended to have Adult Entertainment (whatever its form or definition) at the subject property. Had the Applicant done so, any Application for a Use and Occupancy Permit for an Auditorium would have been denied. No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses. §27-461(a), §27-114 (No

land, building, or structure shall be used in any manner which not allowed by this Subtitle), §27-461(a)(7)(All uses not listed are prohibited). *See also County Comm'rs of Carroll Co. v. Zent,* 86 Md. App. 745, 759 fn. 9, 587 A.2d 1205, 1212 fn.9 (1991) (Permissive zoning ordinances lists the uses permitted and all other uses are prohibited.) Further, §27-253(a) prohibits the use of any building, structure, or land, or the conversion of any such use, "unless a use and occupancy permit certifying compliance with this Subtitle has been issued for the activity by the Building Inspector." *See* also §27-241.

On the record as a whole, the Applicant's testimony is based on whatever is most financially advantageous for him at that moment. The Applicant's current admission that he intended to operate Adult Entertainment when he applied for the Use and Occupancy Permits in 2000 and 2002, and then proceeded to utilize the properties for Adult Entertainment, rendered the Use and Occupancy Permits null and void *ab initio*.

The Use and Occupancy Permits for an Auditorium for the subject property are limited to the uses as set forth by the Applicant in 2001 – comedy shows, contest (games), hair shows, fashion shows, model calls, poetry reading nights and sport shows. The Applicant does not have a valid Use and Occupancy Permit for an auditorium which included activity that meets the definition of Adult Entertainment in order to seek relief pursuant to §27-461(b)(5) footnote 58.

Lt. Sudik, Prince Georges County Fire Department, Office of the Fire Marshal, testified as to the extensive history of repeated violations of the Fire Code, the correction Orders issued, the Uniform Civil Citations, and the violations of the Fire Capacity Certificate, by the Applicant, all at the subject property. (Exhibit 33 (a-k), T. pp. 12-15) The Capacity Certificate issued pursuant to Subtitle 11 (Fire Safety) of the County Code permits a maximum of 60 persons to occupy the use which is described as an "auditorium." The property has a history of repeated

violations of far exceeding this maximum capacity. (Exhibit 32(a)-(f)) The neighbors testified as to the detrimental effect this adult business operation has had upon their residential neighborhood. (T. pp. 15-61)

We now turn to the questions raised by the Applicant, through counsel, at oral argument. *See* April 25, 2014, Appeal Letter from Dennis Whitley, III, Esquire. *See also* (9/8/2014, Tr.).

- The District Council's jurisdiction to review of S.E. 4720 is limited to appellate jurisdiction based on County Council *County Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 217 Md. App. 310, 92 A.3d 601 (2014).[7]

This contention is without factual or legal merit because *Zimmer*, as published, applies to zoning cases decided by the Planning Board, not the ZHE. Although *County Council of Prince George's Cnty. V. Zimmer Dev. Co.*, 217 Md. App. 310, 92 A.3d 601 (2014) (*Zimmer*) was decided this year, the issue of the District Council's jurisdiction or standard of review, pursuant to §27-132(f)(1), as it relates to a disposition recommendation of the ZHE, was decided in **1998** by the Court of Special Appeals in *County Council v. Curtis Regency Serv. Corp*., 121 Md. App. 123, 708 A.2d 1058 (1998). *Curtis Regency* distinguished the role of the Planning Board and the ZHE as follows:

> Before we address the central issue in this case, the standard of review to be applied by the District Council in this type of appeal, we note that the District Council's suggestion, that the procedure used on appeal of a ZHE decision is parallel to an appeal of a Planning Board decision, is without merit. We find that the role of the ZHE is far removed from that of the Planning Board. For example, in a case relied upon by the District Council, *Cox v. Prince George's County*, 86 Md. App. 179, 586 A.2d 43 (1991), this Court explained the process through

[7] For the record, the District Council takes exception to the *Zimmer* decision, including but not limited to *Zimmer's* holding concerning the District Council's scope of authority, jurisdiction and standard of review of "zoning cases" preliminary determined by the Planning Board. Pursuant to §22-407 of the Land Use Article, the District Council voted, and filed, on July 10, 2014, a Petition for Writ of Certiorari in the Court of Appeals to review *County Council of Prince George's Cnty. V. Zimmer Dev. Co.*, 217 Md. App. 310, 92 A.3d 601 (filed May 28, 2014). An Answer to the Petition was filed on August 4, 2014. The District Council's Petition for Writ of Certiorari was granted on September 19, 2014, Case No. 64.
See http://www.courts.state.md.us/coappeals/petitions/201409petitions.html.

> which a special exception passes before reaching the District Council. First, the Technical Staff makes a report and recommendation and forwards it to the Planning Board. The Planning Board decides whether to accept the Staff's recommendation and forwards its own recommendation to the District Council. **Before the District Council decides the case, however, the ZHE, an employee of the District Council, files a written decision, with specific recommended findings of facts, conclusions of law, and a disposition recommendation. Finally, the District Council decides whether to grant the exception**.
>
> Although the ZHE has authority under § 27-312(a)(C) of the Prince George's County Code to approve or deny a special exception or variance, the Zoning Ordinance specifically retained in the District Council the authority, "upon its own motion," to elect "to make the final decision on the case itself." There is no analogue to this language with regard to the Planning Board's decisions on subdivisions. Instead, the process used for subdivision plat applications, under § 24-137 of the County Code, is as follows: (1) The applicant files its application with the Planning Board; (2) The Technical Staff then reviews the application and makes a recommendation; (3) The Planning Board reviews the recommendation, holds a public hearing, and then votes on the application; (4) If no appeal is taken, the decision of the Planning Board is final.
>
> **Clearly, the District Council's role with respect to decisions of the ZHE is not parallel to its role with respect to Planning Board decisions**. The Planning Board has original jurisdiction over the administration of subdivision regulations, and the District Council can hear appeals of those decisions only if an applicant or a party of record takes an appeal. It cannot, upon its own motion, make any decision or take the case away from the Planning Board. *See also Colao v. County Council of Prince George's County*, 109 Md. App. 431, 675 A.2d 148 (1996), *aff'd*, 346 Md. 342, 697 A.2d 96 (1997) (describing process for comprehensive design zone applications when ZHE decision is merely recommendation that District Council may or may not adopt).
>
> Having discarded the District Council's assertion that the standard of review used in hearing an appeal of a ZHE decision is the same standard of review to be used here, we return our focus to what we believe to be the thrust of this case – determining the correct standard of review by the District Council in an appeal of a Planning Board decision to approve a cluster subdivision. *Curtis Regency Serv. Corp*., 121 Md. App. 131-33, 708 A.2d 1062-63 (Emphasis added).

Therefore, we find that *Curtis Regency* is dispositive of the Applicant's issue of appellate versus original jurisdiction, and reject the Applicant's appeal on this issue. We take administrative notice of §25-204 of the Land Use Article, which provides that "A contested

application for a map amendment or special exception may not be granted or denied without written findings of material facts and conclusions." We also note that if *Zimmer* limits the District Council to appellate review *only* and disposition of the ZHE's recommendation *solely* on grounds whether it is arbitrary, capricious, illegal or discriminatory, it may be at variance with the Regional District Act. *See Mossburg, supra,* 329 Md. at 502, 620 A.2d at 890, quoting *Chevy Chase View, supra,* 323 Md. at 685, 594 A.2d at 1136 (1991). (The Regional District Act is the exclusive source of zoning authority in those areas of Prince George's County located within the Regional District. Therefore, '"any enactment concerning zoning in the county, which is at variance with the Regional District Act, is inoperative within the district.'")

Even if *Zimmer* is applicable, we are constrained, by the record, to determine if the disposition recommendation of the ZHE was arbitrary, capricious, illegal or discriminatory. For the findings and conclusions herein, we find, as a matter of law, that the ZHE's disposition recommendation was not arbitrary, capricious, illegal or discriminatory.

- The ZHE erred as a matter of law when she held that CB-56-2011 is constitutional. In particular, the Applicant states that the ZHE did not address its primary argument that the District Council eliminated a right by use (*i.e.*, an auditorium with no limitation on the types of entertainment that are allowed) without either making the use nonconforming or amortizing the Applicant's investment. *See* Exhibit 12, Applicant's Supplement to Statement of Justification.

- The ZHE erred as a matter of law when she held that CB-56 is in compliance with *Mayor and City Council of Baltimore v. Dembo, Inc.*, 123 Md. App. 527, 542, 719 A.2d 1007, 1015 (1998) because the Bill does not effectively preclude continuation of the Applicant's business. CB-56 did "effectively" preclude the continuation of the Applicant's business, because it required the Applicant submit to an extremely subjective special exception process where the final arbitrator is the same Council that enacted the faulty legislation.

As a preliminary matter, sitting as an administrative agency, we may are fully competent to resolve issues of constitutionality and the validity of statutes or ordinances in adjudicatory

administrative proceedings which are subject to judicial review. *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 451 n.8, 758 A.2d 995, 1002 n.8 (2000). This includes the constitutionality of an enactment as applied, as well as the constitutionality of an enactment as a whole. *Insurance Commissioner v. Equitable,*339 Md. 596, 622, 664 A.2d 862, 875 (1995). Not only are administrative agencies fully competent to decide constitutional issues, but this Court has consistently held that exclusive or primary administrative remedies must be pursued and exhausted, before resort to the courts, in cases presenting constitutional issues. *See, e.g.*, *Maryland Reclamation v. Harford County*, 342 Md. 476, 491-492, 677 A.2d 567, 575 (1996) (a zoning case where this Court held that the appellant's "failure to exhaust administrative remedies, before bringing this judicial review action, applies to the federal constitutional issues as well as the state constitutional and nonconstitutional issues"); *Goldstein v. Time-Out Family Amusement*, 301 Md. 583, 591, 483 A.2d 1276, 1281 (1984); *Arnold v. Prince George's County*, 270 Md. 285, 294, 297, 311 A.2d 223, 227-229 (1973); *Agrarian, Inc. v. Zoning Inspector*, 262 Md. 329, 331-332, 277 A.2d 591, 592-593 (1971); *Poe v. Baltimore City*, 241 Md. 303, 216 A.2d 707 (1966); *Baltimore v. Seabolt*, 210 Md. 199, 123 A.2d 207 (1956); *Tanner v. McKeldin*, 202 Md. 569, 577, 97 A.2d 449, 453 (1953); *Hoffman v. City of Baltimore*, 197 Md. 294, 305-306, 79 A.2d 367, 372 (1951). *See also PSC v. Wilson*, supra, 389 Md. at 88-93, 882 A.2d at 885-889. Furthermore, when a constitutional issue is raised in an adjudicatory administrative proceeding, and resolution of that issue is necessary for a proper disposition of the case, the agency's failure to decide the constitutional issue constitutes error. *Montgomery County v. Broadcast Equities, Inc., supra*, 360 Md. at 451 n.8, 758 A.2d at 1002 n .8; *Maryland Reclamation v. Harford County*, 342 Md. 476, 491-492, 677 A.2d 567, 575 (1996). However, the Court of Appeals pointed out, in the *Broadcast Equities* opinion, that **where the administrative agency might**

afford the plaintiff relief on non-constitutional grounds, it is unnecessary to rule on the constitutional issue. **That is, the firmly established principle of Maryland law is that we will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground**, *Ashford v. State*, 358 Md. 552, 561, 750 A.2d 35, 40 (2000), quoting *State v. Lancaster*, 352 Md. 385, 404 n.13, 631 A.2d 453, 463 n.13 (1993). *See, e.g.*, *Harryman v. State*, 359 Md. 492, 503 n.6, 754 A.2d 1018, 1024 n.6 (2000); *Thrower v. Support Enforcement*, 358 Md. 146, 149 n.2, 747 A.2d 634, 636 n.2 (2000); *Dorsey v. State*, 356 Md. 324, 342, 739 A.2d 41, 51 (1999) and cases there cited. (Emphasis added).

The Applicant advances no argument in fact or law, why the ZHE or the District Council, by law must invoke the constitutional exception in this matter.[8] CB-56-2011 provides for a special exception process and relief on non-constitutional grounds, and there is no need to reach the constitutionality of CB-56-2001, because S.E. 4720 can properly be disposed of on a non-constitutional ground. That is, the Applicant could have submitted a legally sufficient application to satisfy the legal requirements of the Zoning Ordinance. Rather, the Applicant submitted an application that was not complete and lacked the necessary site plans, statement of justification, and other documents and data required for the referral and review process. §27-296 details those items required to be submitted in an Application for a Special Exception, the majority of which were not provided until the May 9, 2013, evidentiary hearing, and many of which were never provided. We find it noteworthy to restate that the MNCPPC accepted an empty shell of an Application, that being merely an Application form containing the property owners' putative but

[8] As it relates to the constitutionality of CB-56-2011, we take administrative notice of the fact that, in parallel litigation, before the United States District Court of Maryland, the Honorable Deborah K. Chasnow, has retained jurisdiction over the constitutionality of CB-56-2011. *See* (9/8/2014, Tr., p. 5) (The Applicant's counsel conceded at oral argument that the constitutionality of CB-56-2011 is currently before the federal court, and that ruling may go a long way in determining what happens in this matter). *See also* U.S. Dist. Ct. Case No. 13-1722-DKC.

illegible signature and the filing fee. Despite repeated phone calls, emails, and offers to work with the Applicant to get the Application completed, the Applicant refused to provide any substantial information to support its Application. (Exhibit 8, pp. 24-25) By letters dated July 9, 2012 and November 26, 2012, the Applicant stated that he intends to pursue an Application for Certification of Non-Conforming Use for the subject property; to date the Applicant merely obtained an Application number, CNU-32365-2012 (filed November 5, 2012), but has failed to provide a substantive Application or to pursue said Application. (Exhibit 8, pp. 22-23 and 28)

The ZHE did not fail to address the Applicant's argument that CB-56-2011 eliminated a by right use. The ZHE found that the Applicant did not, and the record as a whole supports this finding, maintain a valid use and occupancy permit that expressly permits adult entertainment activities. Even if this finding was absent from the record, for the reasons stated above, we find that the Applicant, through the special exception or non-conforming use process, could obtain relief on non-constitutional grounds, and therefore unnecessary to rule on the constitutionality of CB-56-2011.

Simply put, the Applicant did not possess a by right use. CB-56-2011 must be read pursuant to the general principles of statutory construction. *See Koste v. Town of Oxford*, 431 Md. 14, 17-18 (2013)[9] The District Council is generally authorized by state law to promulgate, adopt and amend local zoning laws. *See* §22-104 of the Land Use Article. Under the same state law, "[a] person may continue, and appropriate licenses may be issued to the person for, a lawful

[9] ("We…do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute. We presume that the Legislature intends its enactments to operate together as a consistent and harmonious body of law, and, thus, we seek to reconcile and harmonize the parts of a statute, to the extent possible consistent with the statute's object and scope." (Internal quotation and citation omitted).

nonconforming use existing on the effective date of the respective zoning laws in the metropolitan district." *See* §22-113 of the Land Use Article. When read as a whole, the Land Use Article of the Annotated Code contemplates that the District Council is vested with authority to establish reasonable regulations pertaining to nonconforming uses. This principle was recognized by the Court of Appeals in *County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 443 A.2d 114 (1982), a case addressing the Regional District Act. CB-56-2011 merely modifies the Table of Uses for the C-M Zone, an act on its face that is not repugnant to the Regional District Act.

No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses. §27-461(a), §27-114 (No land, building, or structure shall be used in any manner which not allowed by this Subtitle), §27-461(a)(7)(All uses not listed are prohibited). *See also County Comm'rs of Carroll Co. v. Zent,* 86 Md. App. 745, 759 fn. 9, 587 A.2d 1205, 1212 fn.9 (1991) (Permissive zoning ordinances lists the uses permitted and all other uses are prohibited.) Further, §27-253(a) prohibits the use of any building, structure, or land, or the conversion of any such use, "unless a use and occupancy permit certifying compliance with this Subtitle has been issued for the activity by the Building Inspector." *See* also §27-241. There is no dispute that these provisions predate the enactment of CB-56-2011. Thus, for the Applicant to have a vested right in its alleged nonconforming use it needed to maintain a valid use and occupancy permit that expressly permitted adult entertainment activities. §27-108.01(a)(15)[10] These requirements cannot be viewed as constitutionally impermissible restrictions since the use and occupancy permits long predate the enactment of CB-56-2011. *See Mayor and City Council of Baltimore v.*

[10] Nothing in the uses described in Permit Nos.8329110-2000 or 18348-2002, "ok for a 60 seat auditorium," remotely lends itself to the conclusion that Adult Entertainment activities were permitted, even under a theory that Adult Entertainment was implied because it is of "like kind or character" to the permitted uses.

Dembo, Inc., 123 Md.App. 527, 542, 719 A.2d 1007, 1015 (1998) ("the majority rule follows the view that a nonconforming use business acquires no exception from subsequently enacted licensing requirements, provided such requirements do not effectively preclude continuation of the business"); and, *Powell v. Calvert Co*., 368 Md. 400, 795 A.2d 96 (2002) (In the absence of a vested right, a board must apply the law in effect at the time the case is heard). The requirements for a valid use and occupancy permit predate the Applicant's alleged "lawful" use, and cannot remotely be construed as a requirement that effectively precludes continuation of the business. CB-56-2011 merely incorporates these longstanding regulations into its update of the Table of Uses.

It is incumbent upon the Applicant to establish in the record that it was operating the property in a "then-lawful manner." *Dembo, supra.* The law is well established that a nonconforming use exists if a person utilizes property in a certain manner that is **lawful** before and up to the time of the adoption of a zoning ordinance, though the then-adopted zoning ordinance may make that previously lawful use non-permitted. *Purich v. Draper Properties, Inc.*, 395 Md. 694, 708, 912 A.2d 598, 607 (2006) (Emphasis added). Unfortunately, the Applicant, based on the record before us, has failed to establish that it was operating lawfully prior to the passage of CB-56-2011. To the extent that the Applicant argues that it has a legal nonconforming use, and that such argument is relevant, it has failed to carry the burden of proof to establish those facts in the record. §27-142. *See also* Exhibit 34(f), Exhibit 58, pp. 31 & 26, Exhibit 25, Exhibit 8, pp. 30, 33, Exhibit 30, Exhibit 34(a), Exhibit 34(c) and Exhibit 34(d), and Exhibit 24.

- The ZHE erred in holding that "the Applicant committed fraud in obtaining use and Occupancy Permit 832911-2000 and consequently Use and Occupancy Permit 18348-2002 by specifically misrepresenting his ultimate intentions for the use of the subject property." First, there was no legal requirement that the

Applicant identify any of his intended entertainment uses. Moreover, the fact that Applicant may have had "intended uses" when he applied for the 2000 permit, does not preclude the Applicant from using the auditorium for all other legal uses. The ZHE also does not state any legal authority for this holding. With reference to the 2000 permit, there was no representation about intended uses when the 2002 permit was applied for and issued. The ZHE cannot boot strap the harmless nonbinding representations from the 200 permit on the new and separate 2002 permit.

- The ZHE erred when she held as a matter of law that the Use and Occupancy Permits for an Auditorium for the subject property are limited to the uses as set forth by the Applicant in 2001-comedy shows, contests (games), hair shows, fashion shows, model calls, poetry reading nights and sports shows." First and foremost, the ZHE does not state any legal authority for this outrageous position. Second, the activities provided by Applicant that this Council now deems as "Adult Entertainment" can easily defined as contest(games), fashion shows, model calls and even sport shows. For example, the Applicant can have a contest or game that involves a dancer collecting the most tokens from patrons by providing services which may meet the definition of "Adult Entertainment."

The ZHE did not err when she held as a matter of law that the Use and Occupancy Permits for an Auditorium for the subject property are limited to the uses as set forth by the Applicant in 2001-comedy shows, contest (games), hair shows, fashion shows, model calls, poetry reading nights and sport shows." Nor did the ZHE err when she opined, in assessing the Applicant's testimony, that if the subject property was used for adult entertainment since 2000, the use and occupancy permit was obtained unlawfully. There is simply no merit in the Applicant's appeal on this issue. The unadulterated fact is, the Use and Occupancy Permits for an Auditorium for the subject property are limited to the uses as set forth by the Applicant in 2001-comedy shows, contest (games), hair shows, fashion shows, model calls, poetry reading nights and sport shows. *See* §27-461 (a) (No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses), §27-114 (No land, building, or structure shall be used in any manner which not allowed by this Subtitle), §27-461(a)(7)(All uses not listed are

prohibited).

One basic requirement for a vested right is that a lawful permit was obtained. *See Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 994 A.2d 842, 2010 Md. LEXIS 75 (2010) (noting that in order to obtain a vested right in an existing zoning use, a property owner must initially obtain a valid permit); *Marzullo v. Kahl*, 366 Md. 158, 191, 783 A.2d 169, 188 (2001) (stating that the first requirement to obtain a vested right is that the claimant has a valid permit); *Rockville Fuel & Feed Co. v. Gaithersburg*, 266 Md. 117, 127, 291 A.2d 672, 677 (1972) (stating that "a 'vested right' could only result when a lawful permit was obtained and the owner, in good faith, has proceeded with such construction under it . . . ."). The doctrine of vested rights has a constitutional foundation, and "rests upon the legal theory that when a property owner *obtains a lawful building permit*, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations." *Prince George's County v. Sunrise Dev. Ltd. P'ship*, 330 Md. 297, 312, 623 A.2d 1296, 1304 (1996) (emphasis added); *see also Town of Sykesville v. West Shore Communs.*, 110 Md. App. 300, 316, 677 A.2d 102, 111 (1996); *Prince George's County v. Equitable Trust Co., Inc.*, 44 Md. App. 272, 278, 408 A.2d 737, 741 (1979). Simply put, based on the record, the Applicant never had a lawfully issued use and occupancy permit for adult entertainment, regardless of whether such activity was defined in the zoning ordinance. *See* §27-461 (a) (No use shall be allowed in the Commercial Zones, except as provided for in the Table of Uses), §27-114 (No land, building, or structure shall be used in any manner which not allowed by this Subtitle), §27-461(a)(7)(All uses not listed are prohibited).

- The ZHE erred when she found that Lt. Sudik "testified as to the extensive history of repeated violations of the Fire Capacity Certificates, by the Applicant, all at the subject property. In actuality, Lt. Sudik said that since 2009, or for five years, there have been NO citations issued, despite the fact that the establishment is checked twice a month. This is a blatant example of how biases and subjective this entire special exception process been (*sic*).

The ZHE did not err regarding Lt. Sudik's testimony. We find no merit in the Applicant's contention. To the contrary, the ZHE's finding, #34, is an accurate representation of the record. That is, the ZHE found that:

> Lt. Sudik, Prince Georges County Fire Department, Office of the Fire Marshal, testified as to the extensive history of repeated violations of the Fire Code, the correction Orders issued, the Uniform Civil Citations, and the violations of the Fire Capacity Certificate, by the Applicant, all at the subject property. (Exhibit 33 (a-k), T. pp. 12-15)

This finding is not inconsistent with the record, but rather *consistent*, in context of this finding, of an extensive history of repeated violations at the subject property.

- The ZHE erred when she found that "the neighbors testified to the detriment effect that this adult business operation has had upon their residential neighborhood." All of the neighbors testified that they did not know that the business was there until the Applicant was required to send out the informational mailings. For example, Father Kramer, a married Roman Catholic Priest, who testified in opposition to the special exception, stated that he purchased his home in 201 and did not even know the business was there. Another example is Mr. Boyd, who also testified against the special exception. He stated that he lived in the immediate area since 1980, but did not know that the business was there until he got the informational mailing. Again, this is a blatant example of how biases and subjective this entire special exception process been (*sic*).

The ZHE relied on testimony from pages 15 through 61 of the evidentiary transcript. The Applicant cites only to self-serving pages of the evidentiary transcript, *i.e.*, pp.40-41 and pp. 54-56, to support his contention. We find the Applicant's appeal on this issue unpersuasive. The

ZHE committed no error in finding #36. *See Baiza v. City of College Park*, 192 Md. App. 321, 994 A.2d 495 (2010) ("It was by no means inappropriate for the City to consider the testimony of neighbors when conducting this inquiry into the public interest. *See, e.g., Dade County v. Section II Property Corp*., 719 So. 2d 1204, 1205 (Fla. Dist. Ct. App. 1998) (reversing the lower court and holding that adverse neighbor testimony was a sufficient basis for denying a special exception to which the permit applicant was "entitled unless the zoning authorities determine that the use would adversely affect the public interest . . . ."); *Bd. of Adjustment v. Ruble*, 193 N.W.2d 497, 506 (Iowa 1972) (citing precedent from several sister jurisdictions to support the proposition that "[i]n variance cases, 'public interest' has before been interpreted to be that interest of owners and occupants of neighboring properties."); *Rosewood Home Builders, Inc. v. Zoning Bd. of Appeals*, 17 A.D.3d 962, 794 N.Y.S.2d 152, 154 (N.Y. App. Div. 2005) (recounting that "evidence of the obvious aesthetic impact of the nonconforming structure was presented in the statements of objecting neighbors . . . and it cannot be said that the negative aesthetic impact of the nonconforming structure . . . is not a public interest . . . .").

- The ZHE erred with reference to findings numbered 37-40. The ZHE totally ignores the unrefuted testimony of the Applicant's expert land planner. This is just another example of how biases and subjective this entire special process been (*sic*).

The ZHE did not err with reference to findings 37-40. The ZHE findings are supported by specific exhibits, testimony, and legal authority within the Zoning Ordinance. *See People's Counsel for Baltimore County v. Loyola College*, 406 Md. 54, 85-87, 956 A.2d 166, 194-95 (2008) *citing People's Counsel for Baltimore Co. v. Mangione*, 85 Md. App. 738, 751-52, 584 A.2d 1318, 1324-25 (1991) (stating evaluation of evidence in special exception application not balanced with formulaic precision; finder of fact must judge credibility of each witness and apply

to evidence presented). *See also Anderson v. Sawyer*, 23 Md. App. 612, 620-22, 329 A.2d 716, 722-23 (1974) (finding testimony of expert no more probative value than layman in evaluation of evidence as to special exception application).

Finally, we find 1) the proposed use and Site Plan are not in harmony with the purposes of the Zoning Ordinance, §27-317(a)(1); 2) the proposed use is not in conformance with all of the requirements and regulations of the Zoning Ordinance, §27-317(a)(2); and 3) the proposed use will adversely affect the health, safety and welfare of residents or workers in the area as testified to by the neighbors, citizens and County Police and Fire Officials. (T. passim, Exhibits 8, 15, 19, 31, 32, 33, 34, 36, 38, 48, and 58) §27-317(a)(4). The Applicant has failed to adduce any evidence to support a finding or persuade us that Adult Entertainment on the subject property will not be detrimental to the use or development of adjacent properties or the general neighborhood. §27-317(a)(5)

Before us is the denial of a special exception case. As stated in Maryland cases, the Applicant's burden "assumes not merely the lesser burden of generating a fairly debatable issue so as to permit a ruling in its favor but the significantly greater burden of actually dispelling fair debate by proof so clear and decisive as legally to compel a ruling in its favor." *B. P Oil, Inc. v. Bd. of Appeals*, 42 Md. App. 576, 580, 401 A.2d 1054 (1979). What's more, in two special exception cases, the Court of Special Appeals of Maryland has stated, "It is the applicant . . . who bears the burden of persuading the administrative board that the desired use will not adversely affect the neighborhood." *See Futoryan v. City of Baltimore*, 150 Md. App. 157, 172, 819 A.2d 1074 (2003), *quoting Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974). Moreover, *Anderson* Court stated that a special exception applicant "has the burden of adducing testimony" to show, "to the satisfaction of the board," that the proposed use "would be

conducted without real detriment to the neighborhood" and "would not actually adversely affect the public interest." *Id.,* 23 Md. App. at 617, 329 A.2d 716.

The Court, in *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26, *cert. denied*, 370 Md. 269 (2002), where a zoning line extension was denied, gave a lengthy review of the burden of proof issue. Conceding that the *Angelini* applicant had met the burden of production, the Court held that the zoning board was still entitled not to approve the applicant's request:

> The appellant [or applicant] undertook to persuade the Board to alter [the zoning boundary]. It was the appellant who thereby became the proponent of the proposition on the table for debate, and it was the appellant, therefore, to whom was allocated the burden of persuasion. In this case, the Board was simply not persuaded. It is never the case that the Board must be either (1) persuaded by the appellant to act or (2) persuaded by the opponents not to act. What would happen, in so Manichean a world, if the Board were not persuaded by either side? There is only one burden of persuasion, and it points in only one direction. In abstract theory, [opposition parties] are not required to present any evidence at all, let alone substantial evidence."

144 Md.App. at 376-77, 798 A.2d 26 (portions omitted and emphasis added). The *Angelini* court relied on and quoted *Pollard's Towing, Inc. v. Berman's Body Frame, Inc.*, 137 Md. App. 277, 289-90, 768 A.2d 131 (2001), as follows:

> In this case, all that was required was that the Board be not persuaded that there was a need for additional towing services. To the extent its finding was weightier than that, the incremental weight was surplusage. For less is required to support a merely negative instance of non-persuasion than is required to support an affirmative instance of actually being persuaded of something. (Emphasis added.) These decisions indicate that the burden of persuasion remains with the applicant and that the opposition has no evidentiary burden at all, in cases where the zoning agency denies the application.

IT IS HEREBY ORDERED, after review of the administrative record, that permission to use approximately 2,674 sq. ft. of an approximately 0.74 acre of land, being Parts of Lots 1 through 4, Block P, of the Seabrook Subdivision, in the C-M (Miscellaneous Commercial) Zone located on the southeast side of Lanham Severn Road (MD 564), also identified as 9605-9607

Lanham Severn Road, Lanham, Maryland, for an Auditorium with Adult Entertainment, is DENIED.

Ordered this 23rd day of September, 2014, by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Olson, Patterson, Toles and Turner.

Opposed:

Abstained:

Absent:

Vote: 9-0

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

By: _____
Mel Franklin, Chairman

ATTEST:

_____
Redis C. Floyd
Clerk of the Council