Case No. CNU-1143-2018

Applicant: NICO Banquet Hall

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

ORDER AFFIRMING PLANNING BOARD

IT IS HEREBY ORDERED, after review of the administrative record, that Planning Board's DISAPPROVAL of Applicant's request for certification of a nonconforming use, as an eating or drinking establishment providing for adult entertainment, is hereby AFFIRMED.

A. The Application

In 2018, Applicant, NICO Banquet Hall, filed an application with the Planning Board requesting certification of a nonconforming use as an eating or drinking establishment providing for adult entertainment. Application Form.

Planning Board's Technical Staff issued a report, which recommended to the Board disapproval of the application. Staff Report, 10/3/2018.

Planning Board held hearings on October 18 and November 29, 2018. (10/18/2018, Tr.), 11/29/2018, Tr.)

B. The Board's Resolution

On November 29, 2018, the Board voted to disapprove the application. The Board's action was adopted on January 10, 2019, in Resolution No. 18-124. PGCPB No. 18-124. Persons of record were notified of the Board's decision on January 15, 2019.

C. The Appeal

On January 29, 2019, Applicant noted an appeal of the Board's decision to the District Council. Among other things, Applicant contends that 1) the Board's decision is based on an

erroneous interpretation and/or application of Maryland law and 2) the Board acted in an arbitrary and capricious manner when they reviewed the application, because a different legal standard was applied from what was used by the Board in prior applications. Appeal, 1/29/2019.

D. Standard of Review

Planning Board exercises original jurisdiction when it reviews an application for certification of a nonconforming use. District Council may *only* reverse the decision of the Board if the decision is not authorized by law, is not supported by substantial evidence on the record, or is arbitrary or capricious. *Cty. Council of Prince George's Cty. v. Convenience & Dollar Mkt./Eagle Mgmt. Co*., 238 Md. App. 613, 639, 193 A.3d 225, 240 (2018). Arbitrary and capricious means "unreasonably or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law." *Cty. Council of Prince George's Cty. v. FCW Justice, Inc*., 238 Md. App. 641, 676, 193 A.3d 241, 262 (2018) *quoting Harvey v. Marshall*, 389 Md. 243, 298, 884 A.2d 1171, 1204 (2005). The heart of the fact-finding process often is the drawing of inferences made from the evidence…[The District Council] may not 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[.]" Id. citing *People's Counsel for Baltimore County v. Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007).

E. Nonconforming Uses

Under Maryland jurisprudence, a property owner establishes a non-conforming use if the property owner can demonstrate to the relevant authority [i.e., the Planning Board] that the property was being used in a then-lawful manner before, and at the time of, the adoption of a new zoning ordinance which purports to prohibit the use on the property. Such a property owner has a

vested constitutional right to continue the prohibited use, subject to local ordinances that may prohibit extension of the use and seek to reduce the use to conformance with the newer zoning through an amortization or abandonment scheme. Nevertheless, nonconforming uses are not favored by Maryland law, and local ordinances regulating validly non-conforming uses will be construed to effectuate their purpose. *Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co*., 444 Md. 490, 513-14, 120 A.3d 677, 690-91 (2015) citing *Trip Associates, Inc. v. Mayor & City Council of Baltimore*, 392 Md. 563, 573-75, 898 A.2d 449, 455-56 (2006) (quoting *Cnty. Council of Prince George's Cnty. v. E. L. Gardner, Inc.*, 293 Md. 259, 268, 443 A.2d 114, 119 (1982)) (Emphasis added).

Under the County Code, whether a use that is not permitted is allowed by law to continue depends upon certification. For a use to be certified, the property owner must present evidence showing (1) when the use was lawfully commenced on the property, (2) that the use, subject to some exceptions, has not ceased for more than 180 consecutive days after the use became nonconforming, and (3) that, other than not having a use and occupancy permit, there are no local Code violations outstanding against the property. If the property owner satisfies these criteria, it will receive a use and occupancy permit from the County. PGCC § 27-244. *See also Convenience & Dollar Mkt./Eagle Mgmt. Co*., 238 Md. App. 613, 624, 193 A.3d 225, 232 (2018).

F. Planning Board Findings

Upon review of the evidence in the record to determine whether it *may*[1] grant or deny Applicant's request for certification of the nonconforming use, Planning Board made the following

[1] Under the County Code, use of the word "may" is permissive. § 27-108.01(a)(19). The auxiliary verb "may" indicates that the decision is one left to the *discretion* of the Planning Board. *FCW Justice, Inc*., 238 Md. App. 641, 676, 193 A.3d 241, 262 (2018)

findings and conclusions:

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Although significant evidence of the continuous use as a banquet hall and/or an eating and drinking establishment since 2000 has been provided with this application, the original use and occupancy permit (Permit No. 4752-2000-00) for Unit C, issued May 1, 2000 and revoked use and occupancy permit (Permit No. 29764-2002-00) for Units B and C issued November 14, 2002, do not indicate any entertainment or dancing use as part of the approvals. Further, with the submittal of the permit application in 2002, the applicant submitted a letter dated September 11, 2002 (Roozen to Ferrate) regarding the banquet hall proposed use which indicated the intent to host social events, gatherings, receptions, banquets and meetings and that the facility would prepare and provide food and drink for its users. The letter specifically indicated the facility would not hold "public dances or Go-Gos." The letter failed to indicate the venue would provide entertainment of any kind.

At the Planning Board hearings, held October 18, 2018 and November 29, 2018, the Planning Board heard extensive testimony from several witnesses. The witnesses for the applicant testified to the existence of adult entertainment throughout the period since 2000, but none of the witnesses provided any direct evidence concerning the lawful establishment of the adult-entertainment use. Several community-based witnesses testified in support of the staff's recommendation to deny the application, but none of these witnesses had any specific information concerning whether the adult-entertainment use was lawfully established. Testimony from planning staff, and William Edelen with the Enforcement Division of DPIE, raised a number of discrepancies and contradictions in the evidence presented by the applicant.

The permit and licensing evidence submitted by the applicant lacked any indication of an approved entertainment or dancing use on the subject property. The applicant submitted copious examples and anecdotal information regarding the actual use of the property for adult entertainment, but none of these items established that the adult entertainment was in fact established both lawfully and continuously as an "eating and drinking establishment with adult entertainment" from the period of May 1, 2000 to the present. The applicant referenced three prior CNU cases to bolster his argument that the instant CNU was lawfully established and continuous, but Counsel to the Board pointed out that CNU matters are heavily fact-specific and that all three prior cases had distinct facts, different from each other as well as the instant case. In each of the prior cases cited by the applicant, the Board considered documentary evidence from disinterested 3rd parties, such as liquor board permits, affidavits from inspectors, or building permits which specified adult entertainment or dancing approved for the premises.

Mr. Edelen, Ms. Deborah Gallagher and Ms. Sherri Conner all testified regarding the "low-priority" Health Department permit held by the applicant which allowed the sale of pre-packaged food only, not preparation of food on-site. In fact, the applicant's evidence which included a letter to DPIE in 2002 (Roozen to Ferrante) stating that the facility would prepare food for its customers is directly contradicted by the "low-priority" permit held by the applicant, prohibiting the preparation of food on-site. The applicant never explained this discrepancy, and instead argued an interpretation that an eating and drinking establishment that only sells packaged foods could also house adult entertainment, a conclusion disputed by the three above-referenced technical permit reviewers, inspectors and planners.

Further, Mr. Edelen's testimony indicated that a review of the permit history of the premises revealed a number of expired permits, revoked permits, and permits which are subject to final inspection of construction work that was never completed or approved after the fire in October 2014. The only valid permit in effect at the time of the hearing was Use and Occupancy Permit #4752-2000-00 for Unit C issued to the former owner of the property. Mr. Edelen stated that "final approval for the existing use has not been granted to re-open" after the fire, due to the work that was never finally inspected and approved by DPIE. As a result, Mr. Edelen testified that the building should not currently be occupied. The applicant's response was to point out that the applicant currently only has a violation for operating without a valid Use and Occupancy Permit and that no other violations have been issued by the DPIE. Mr. Edelen acknowledged that it is not DPIE practice to issue multiple violations while a proceeding to correct an issue, such as a CNU application, is pending.

Pursuant to Section 27-114 Uses in General, "No land, building, or structure shall be used in any manner, which is not allowed by this Subtitle." In 2000, at the time the applicant indicates the subject site was operating as an eating and drinking establishment with adult entertainment, it appears the Zoning Ordinance may have allowed entertainment within an eating and drinking establishment under the classification of "all others" or as a separate use under recreational or entertainment establishment of a commercial nature. On October 11, 2005, legislation was enacted specifically indicating adult-oriented performances were permitted subject to detailed site plan approval and subject to certain location criteria within the C-M Zone. Any legally existing adult-entertainment use in the C-M Zone which did not have detailed site plan approval or meet the locational criteria would have become nonconforming.

The use was further defined and prohibited via legislation enacted in 2010 and 2011. The applicant's exhibits, specifically Exhibits 3 and 4, Certificate of Occupancy Permits issued in 2000 and 2002; Exhibits 7–19, Maryland Traders Licenses issued 2000–2015 (includes supplemental licenses submitted); Exhibits 20–32, Maryland Department of Health and Mental Hygiene Food Service Permit issued 2003–2015; Exhibits 44–48, Advertising flyers distributed 2014–2017; and Exhibits 86–90, Affidavits, all establish that the Nico Banquet Hall has operated

since 2000. However, the use and occupancy permit issued in 2000, which notes the banquet hall/catering/eating and drinking establishment uses, does not list any type of entertainment as a use and the permit issued in 2002 has since been revoked. This is further supported by documentary evidence in the permit file and testimony of Mr. Edelen, Ms. Gallagher and Ms. Conner, which fails to specify that the applicant was ever approved to have any adult entertainment or dancing use. Further the low-priority Health Department permit issued to the applicant over the years and as described by Mr. Edelen for pre-packaged food sales would not support an adult-entertainment use as it was only available with an eating and drinking establishment. In addition, operations within the building should have ceased due to the October 2014 fire, until final inspections of construction work were completed by DPIE, which to date still have not been completed. Therefore, the supporting evidence provided by the applicant and testimony presented at the hearing was not sufficient to establish that an eating and drinking establishment with adult entertainment was a legally established use that operated continuously since May 2000.

Based on the Prince George's County Zoning Ordinance, Section 27-244(b)(2)(B) for certification of a nonconforming use, the Planning Board finds that there is not enough evidence to support the applicant's argument that the use as an eating or drinking establishment providing live adult entertainment was legally established and/or that the use has continued both lawfully and without interruption (in excess of 180 days). PGCPB No. 18-24, pp. 5-13.

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G. Conclusion

Applicant's appeal is without merit. Planning Board's decision to deny certification of the nonconforming use application was not based on an erroneous interpretation and/or application of Maryland law. PGCC § 27-244, PGCPB No. 18-24, pp. 5-13. The Board found, among other things, that Applicant failed to establish, through evidence in the record, that an eating and drinking establishment with adult entertainment was a legally established use that operated continuously since May 2000. PGCPB No. 18-24, pp. 5-13. *See also Convenience & Dollar Mkt./Eagle Mgmt. Co*., 238 Md. App. 613, 639, 193 A.3d 225, 240 (2018) (District Council may *only* reverse the decision of the Board if the decision is not authorized by law, is not supported by substantial evidence on the record, or is arbitrary or capricious). Moreover, the Board did not act in an arbitrary

and capricious manner when it reviewed this application compared to prior applications. The Board found that nonconforming use applications are heavily fact-specific and that the prior applications had distinct facts, different from each other and from this application. In prior cases, the Board considered documentary evidence from disinterested third parties, such as liquor board permits, affidavits from inspectors, or building permits which specified adult entertainment or dancing was approved for the premises. PGCPB No. 18-24, pp. 5-13. The Board's decision was not unreasonable or without a rational basis; instead, the Board's decision was founded on reason and fact and the decision was not contrary to the evidence or established rules of law. *FCW Justice, Inc*., 238 Md. App. 641, 676, 193 A.3d 241, 262 (2018) (Arbitrary and capricious means "unreasonably or without a rational basis;" "founded on prejudice or preference rather than on reason or fact;" and "characterized by or guided by unpredictable or impulsive behavior, . . . contrary to the evidence or established rules of law."). The heart of the fact-finding process often is the drawing of inferences made from the evidence. District Council may not substitute its judgment on the question whether the inference drawn by the Board is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness. *Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007).

Planning Board's DISAPPROVAL of Applicant's request for certification of a nonconforming use, as an eating or drinking establishment providing for adult entertainment, is hereby AFFIRMED.

Ordered this 10th day of June, 2019, by the following vote:

In Favor: Council Members Anderson-Walker, Davis, Dernoga, Franklin, Glaros, Harrison, Hawkins, Ivey, Streeter, Taveras, and Turner.

Opposed:

Abstained:

Absent:

Vote: 11-0.

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: _____
Todd M. Turner, Chair

ATTEST:

_____
Donna J. Brown
Acting Clerk of the Council