

RESOLUTION

WHEREAS, the Prince George’s County Planning Board has reviewed Certification of Nonconforming Use Application No. CNU-15093-2015 requesting certification of a nonconforming use for an eating and drinking establishment with adult entertainment in accordance with Subtitle 27 of the Prince George’s County Code; and

WHEREAS, after consideration of the evidence presented at the public hearing on September 8, 2016, the Prince George’s County Planning Board finds:

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

B. **Development Data Summary:**

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

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

Zoning Ordinance Adopted Legislation

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

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

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

Council Bill CB-46-2010 (adopted on September 7, 2010) and CB-56-2011 (adopted on November 15, 2011) clarify the definitions, use and occupancy (U&O) requirements, and enforcement for adult entertainment and eating or drinking establishments in commercial and industrial zones, however, the amortization language did not apply to the M-U-I Zone. The use of live adult-oriented dancing is restricted to the Light Industrial (I-1) Zone. Deadlines for applying for special exceptions for existing businesses were established, but only for certain zones not including the M-U-I.

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

E. **Surrounding Uses:**

- North—** Sheriff Road and developed property zoned M-U-I.
- South—** Undeveloped property owned by the Town of Fairmount Heights zoned M-U-I.
- East—** Developed property with commercial uses zoned M-U-I.
- West—** Developed property with commercial uses zoned M-U-I.

F. **Certification Requirements:** Section 27-107(a)(166) of the Prince George's County Zoning Ordinance defines nonconforming use as:

- (A) The "Use" of any "Building," "Structure," or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), provided that:
 - (i) The requirement was adopted after the "Use" was lawfully established; or
 - (ii) The "Use" was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.
- (B) The term shall include any "Building," "Structure," or land used in connection with a "Nonconforming Use," regardless of whether the "Building," "Structure," or land conforms to the physical requirements of the Zone in which it is located.

Section 27-244 of the Zoning Ordinance sets forth the following specific requirements for certifying a nonconforming use:

- (a) **In general.**
 - (1) A nonconforming use may only continue if a use and occupancy permit identifying the use as nonconforming is issued after the Planning Board (or its authorized representative) or the District Council certifies that the use is nonconforming and not illegal (except as provided for in Section 27-246 and Subdivision 2 of this Division).
- (b) **Application for use and occupancy permit.**
 - (1) The applicant shall file an application for a use and occupancy permit in accordance with Division 7 of this Part.
 - (2) Along with the application and accompanying plans, the applicant shall provide the following:
 - (A) Documentary evidence, such as tax records, business records, public utility installation or payment records, and sworn affidavits, showing the commencing date and continuous existence of the nonconforming use;

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

Analysis—In accordance with Section 27-244(f), the Planning Board must determine whether, in fact, the use was legally established prior to October 11, 2005 when the use as a eating or drinking establishment of any type providing live adult-oriented performances in the C-S-C Zone was prohibited, on June 1, 2010 when the property was rezoned to M-U-I in a D-D-O Zone and the Subregion 4 Master Plan and SMA was adopted by the District Council, the dates the use became nonconforming, and that there has been no break in continuous operation of more than 180 days since that time. The applicant submitted the following documentary evidence in support of the application:

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

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

17. Permit review comments by Mary Hampton dated February 1, 2007 (Permit 2250-2007-U).
18. Permit review comments by Mary Hampton dated June 16, 2010 (Permit 14089-2010-CGU).
19. A site plan prepared by Bohler Engineering showing:
 - a. The exact nature, size, and location of the building, structure, and use;
 - b. A legal description of the property;
 - c. The precise location and limits of the use on the property and within any building it occupies.

The applicant has, therefore, submitted documentary evidence demonstrating the continuous existence of the subject use of "eating or drinking establishment with adult-oriented entertainment" since at least 1981.

DISCUSSION

A Use and Occupancy Permit (781U) was issued to Walter Palmer for 5715 and 5717 Sheriff Road on Lots 4 and 5 by M. Combs for a restaurant and carryout in the C-2 Zone in 1955. In 1978, the subject property was zoned C-S-C, Section 27-375 of the 1979 (7-82) Prince George's County Zoning Ordinance permitted an eating and drinking establishment other than a drive-in or fast-food restaurant, but including incidental carryout service, unrestricted.

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

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

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

On July 12, 1996, Maryland-National Capital Park and Planning Commission (M-NCPPC), Permit Review staff, Irene Armstrong, provided the King Oak Enterprises representative with comments for Permit 5566-96-U that included questions as to the use of the property, the length of time the property was used commercially, and the request to demonstrate the existing and proposed parking on the site plan with the requirement of one parking space for every three seats. The note indicates that there are approximately 76 seats, which equals approximately 25 parking spaces. The permit documentation questions the motel use because there is no previously issued permit for this use. Ms. Armstrong cites CB-89-1993 (Special Exception requirement), CB-27-1978 requiring certification for carry-outs, verifies the surrounding zoning, questions the second floor use, previous U&O issuances, perimeter fencing/screening, and the need for revised site plans. The King Oak Enterprises representative responds to some of the questions, but not all. Ms. Armstrong notes that the applicant was called and messages left. The permit was placed on hold and later abandoned. This was the last permit activity until April 2015.

Council Bill CB-49-2005, adopted by the County Council on October 11, 2005, prohibits eating or drinking establishments of any type providing live adult-oriented performances in all commercial zones, while providing an exception for those in the C-M Zone meeting specific criteria. Thus, the subject property became nonconforming on October 11, 2005 when the use was prohibited. No deadline was established for application to be certified as a nonconforming use.

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

It is worth noting that CB-46-2010 (adopted on September 7, 2010) and CB-56-2011 (adopted on November 15, 2011) define adult entertainment and clarify the definition of live adult-oriented entertainment, the U&O requirements, and enforcement for adult entertainment and eating or drinking establishments in both commercial and light industrial zones, however, the amortization language did not apply to the M-U-I Zone. Deadlines for applying for special exceptions for existing businesses were established, but only for certain zones not including the M-U-I. Because the property is zoned M-U-I in a D-D-O Zone, the commercial development standards no longer apply to the subject property. Once again, no deadline was established for application to be certified as a nonconforming use.

PLANNING BOARD HEARING

At the September 8, 2016 Planning Board hearing, the applicant's attorney submitted into the record the following documentary evidence in support of the application:

1. 1949 Prince George's County Zoning Ordinance (pages 34–36), citing Section 21.0 C-2 Zone (General Commercial), specifically, Section 21.1 Uses Permitted – Restaurant or tea room, with no restrictions.
2. Affidavit of Harriett Pemberton, former Chair of the Prince George's County Council, stating the purpose of CB-89-1993 and continuous offering of "adult entertainment" at the Ebony Inn from 1971 to 2001.
3. Affidavit of David Son, Chief Liquor Inspector for the Board of License Commissioners, stating that King Oak Enterprises has had a lawfully issued liquor license since 1967 and a Special Entertainment Permit, which requires an approved security plan, since 2012, and testifying to the operation of the business with "adult entertainment" without a 180-day break in service.
4. 1961 Prince George's County Zoning Ordinance pages 34–39), citing Section 21.0 C-2 Zone (General Commercial), specifically Section 21.1 Uses Permitted – Hotel and Restaurant or tea room, with no restrictions.

The Planning Board determined that this additional evidence demonstrates both the lawful establishment and the continuous existence of the subject use of "eating or drinking establishment with adult-oriented entertainment." The Ebony Inn has been operating under a 1955 Use and Occupancy Permit which lists the following use, "restaurant and carry out." When analyzed under the controlling law at that time, the 1949 Zoning Ordinance, the Board determined that the use of "Restaurant or tea room, with no restrictions" must have included adult entertainment within the ambit of "no restrictions." This conclusion is bolstered by the accompanying use in the C-1 Zone in the 1949 Zoning Ordinance, "Restaurant or tea room, provided that no dancing or entertainment, except music, is offered." The C-2 Zone then permits "[a]ll uses permitted in a C-1 Zone...with the following additions and modifications:...Restaurant or tea room, with no restrictions." Reading these two provisions together (in *pari materia*) and in context, as the rules of statutory construction require, it is obvious that the "with no restrictions" language pertains to the entertainment restrictions enumerated in the C-1 use listing. Furthermore, serious constitutional concerns would arise should the Board attempt to distinguish one type of dancing or entertainment from another. Therefore, the Board found that adult entertainment was permitted under the 1955 use and occupancy permit ("with no restrictions") and continued to be when the adult entertainment began in 1981. It remained that way until the passage of CB-49-2005, rendering the adult entertainment portion of the use "lawfully established" at the time it initially became nonconforming (2005).

CONCLUSION

The applicant requests certification of a nonconforming use for an eating and drinking establishment with adult-oriented entertainment on a property zoned M-U-I in a D-D-O Zone. An eating or drinking establishment of any type providing adult-oriented performances is prohibited outside of the I-2 Zone. The nonconforming status began on October 11, 2005, when Council Bill CB-49-2005, prohibiting the use in commercial zones, went into effect and again on June 1, 2010, when the subject property was rezoned from C-S-C to M-U-I in a D-D-O Zone and the Subregion 4 Master Plan and SMA was adopted by the District Council. The applicant has demonstrated that the use of an eating or drinking establishment of any type providing live adult-oriented performances was legally established prior to October 11, 2005, and that there has been no break in the operation and conduct of said use for more than 180 days.

NOW, THEREFORE, BE IT RESOLVED, that pursuant to Subtitle 27 of the Prince George's County Code, the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission adopted the findings contained herein and APPROVED the above-noted application.

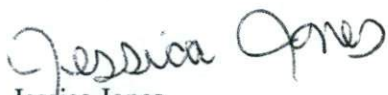
BE IT FURTHER RESOLVED, that an appeal of the Planning Board's action must be filed with the District Council for Prince George's County, Maryland within thirty (30) days of the final notice of the Planning Board's decision.

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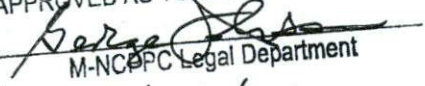
This is to certify that the foregoing is a true and correct copy of the action taken by the Prince George's County Planning Board of The Maryland-National Capital Park and Planning Commission on the motion of Commissioner Bailey, seconded by Commissioner Washington, with Commissioners Bailey, Washington, Geraldo, and Hewlett voting in favor of the motion at its regular meeting held on Thursday, September 8, 2016, in Upper Marlboro, Maryland.

Adopted by the Prince George's County Planning Board this 22nd day of September, 2016.

Patricia Colihan Barney
Executive Director

By 
Jessica Jones
Planning Board Administrator

PCB:JJ:IRT:rpg

APPROVED AS TO LEGAL SUFFICIENCY

M-NCPPC Legal Department
Date 9/26/16