

**CITY OF FREDERICK  
ZONING BOARD OF APPEALS  
MEETING MINUTES  
July 26, 2011**

<b>MEMBERS PRESENT:</b>	<b>MEMBERS ABSENT:</b>	<b>STAFF PRESENT:</b>
<b>Mr. Racheff</b> <b>Ms. Colby</b> <b>Mr. Hazlett</b> <b>Mr. Marvin Kennedy</b> <b>Mr. Philip Dacey</b>	<b>Ms. Heather Smith</b>	<b>Gabrielle Dunn, Division Manager of Current Planning</b> <b>Lea Ortiz, Office Manager</b> <b>Rachel Depo, Assistant City Attorney</b> <b>Brandon Mark, City Planner</b>

**ANNOUNCEMENTS**

For the benefit of the audience and especially the applicants, Mr. Racheff, Chairman, introduced everyone by name and department and explained the Zoning Board of Appeals process.

Mrs. Dunn announced that future ZBA Hearings beginning in August will be held at City Hall in the Board Room starting at 7:00 p.m. The hearing will also be televised on Channel 99.

**APPROVAL OF MINUTES:**

Approval of June 28, 2011 ZBA Hearing Minutes.

**MOTION:** Ms. Colby moved to approve the June 28, 2011 ZBA Hearing Minutes as published.  
**SECOND:** Mr. Kennedy  
**VOTE:** 4-0

**GENERAL PUBLIC COMMENT**

There was no general public comment.

**CASES TO BE HEARD**

**CASE NO.:** ZBA11-277CU  
**LOCATION:** 18 Market Space  
**APPLICANT:** Jeffrey Taboada

**DESCRIPTION:**

The Applicant is requesting approval of a conditional use in accordance with Sections 308 and 856 of the Land Management Code (LMC) for a restaurant with entertainment.

**BACKGROUND INFORMATION:**

This application was continued from the June 28, 2011 meeting of the Board in order for the Applicant to provide additional information in response to public testimony and the Board's inquiries regarding seating capacity and operations. The Applicant is proposing entertainment in the form of music which will be conducted between the hours of 9:00pm and 1:30am on Wednesday, Thursday, Friday and Saturday. The

Applicant also provided documentation regarding the seating capacity, level of security, the use of the balcony to the east of the building, the access to the gates to the rear of the property and the proposed smoking area which were brought up as public concerns during the June 28<sup>th</sup> public hearing.

**STAFF RECOMMENDATION:**

Based upon the finding of facts, Staff supports conditional approval of ZBA11-277CU finding that:

- 1) The policies and regulations found in both the 2004 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the existing restaurant is in harmony with these goals.
- 2) That the DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic and if conducted in accordance with the testimony provided and all applicable regulations, the characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact than the operation of any permitted use not requiring conditional use approval.
- 3) The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* based on the following:
  1. That the Mistero Bar and Italian Grille will serve unpackaged food where customers consume foods while seated at tables located within the building.
  2. That the Mistero Bar and Italian Grille will provide regular seating capacity at tables for at least eighty (80) percent of patrons.
  3. That subject to the conditions of approval, the sale of alcoholic beverages and entertainment will not constitute greater than forty (40) percent of the total quarterly revenues.
  4. That the Applicant has testified that the entertainment will not that include sexual conduct, nudity, or obscenity.
  5. That the sound levels shall conform to §15-21 of the City Code.
  6. That the Applicant has provided guarantees that the use of the property for a restaurant with entertainment will not constitute a nuisance because of noise or other activities associated with the use and that the failure of the owner/managers to consistently abide by all conditions, limitations, and restrictions which may be specified by the Board in granting the conditional use will result in the certificate of occupancy for entertainment being revoked.

Approval is conditioned upon:

1. In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use of a Restaurant with Entertainment within 2 years of the approval or the approval shall become void. The zoning permit application must describe the times and days on which entertainment will be held as approved by the Board
2. The Applicant must submit their quarterly revenues to the Planning Department for the next one year, beginning with the date on which entertainment at the restaurant first occurs, to verify compliance with the criteria established under Section 856(c).
3. A 6-month review of the calls for service to the Police Department will be conducted and provided to the Board for review in order to identify any violations of this approval.
4. That the approval of this Restaurant with Entertainment is automatically revocable if violations of any of the applicable regulations occur.

**APPLICANT PRESENTATION:**

Mr. Jeffrey Taboada, 25 Vista Avenue Thurmont, MD, concurred with the staff report. He stated that they may not have entertainment some of the days, but they are asking for the days in case they do need entertainment for situations such as weddings or birthday parties. He wanted the Board members to know that the latest they would have entertainment would be 1:30 a.m. and it may be earlier depending on the crowds and they would abide by the Ordinance of the City as well. Mr. Jeff McClair, 527 Pines Court, Frederick MD and introduced himself as one of the owners.

Mr. Hazlett asked if the Applicant had tested the noise level outside the building. Mr. Taboada said no because they are still in the construction phase and if the noise level is too high they would turn it down. They agreed to have a sound test done and encourage the public to give their input on the noise levels.

### **PUBLIC COMMENTS:**

Ms. Trudy LaGarde, East Third Street, asked why this project is going on without HPC approval. She commented that they have endured many problems with the Mirage Club and felt they (Mirage) are operating out of compliance. She is asking the Board to institute conditions of operations to limit the impact of noise and disruption to the neighborhood. She asked the Board to please limit the entertainment and music which will not be heard beyond interior walls of the building, and only have music on Friday and Saturday nights and ending at midnight. She also asked the Board to have a 6-month review of this business.

Ms. Paula Boorse, 23 E. Church Street, wanted to know what kind of music will be played at this establishment. Ms. Boorse was concerned that the floor plan for the 2<sup>nd</sup> floor showed an open space between tables assumed to be for dancing. She also wanted to know if the balcony is going to be used for emergency purposes only; or if it will be used for a private entry to this establishment. She also wanted the Board to know that the gates are in the very rear of the property and they do not belong to this property. She would ask that the music be played from 10:00 p.m. to 12:30 a.m.

Ms. Laura MacGillivray, 20A Market Space, requested the hours to be until 12:30 a.m. on Friday and Saturday nights. She is concerned that the bass noise levels cannot be measured. She opposed having the VIP entrance because she lives 8-1/2 inches from this establishment. She also felt a barrier should be considered between them and her place. In terms of the gates, she felt the Applicant misinformed the Board because they are located in the very back. She felt that a 1-month and 3-month review from the Police Department should take place.

Ms. Julia Ferguson, 20 East 2<sup>nd</sup> St., stated she loves the idea, but not at this location. She felt this establishment would be inviting trouble. She noted that the 2<sup>nd</sup> floor open area would be used as a dance floor. She asked that the music should be for Saturday only from 10:00 to 12:00 a.m. or 12:30 a.m.

Irene Kirilloff, E. Church St., commented that downtown residents put up with crowds, no parking and picking up other peoples trash and would like their neighborhood to be quiet at night.

Ms. Mary Rokos, 225 E. Church St., is concerned about measuring sound, levels and having entertainment on Saturday nights ending at 12:00 a.m. or 12:30 a.m.

Ms. Carol Powell, 11 West Second St., briefed the Board that in Washington DC they had an article about the troubles they are having with live entertainment. She mentioned that people have passed out in her yard, undressing in her yard, and her plants have been stolen. She said we need to preserve the area in which they live in.

Ms. Kathy McCoy, E. Church St., commented having entertainment from 10:00 p.m. to 12:30 a.m. would be satisfactory to her.

### **APPLICANT REBUTTAL:**

The Applicant stated that a HPC Hearing is scheduled for this Thursday. Regarding the kind of music, Mr. Taboada explained that sometimes they may have an acoustic guitar, a DJ playing moderate music and they would do their best to abide by the ordinance regulations. He encouraged all residences to give them their feedback on noise levels. The Applicant would consider putting gates up, but they would have to ask the owners. The Applicant explained that the reason for the open space on the 2<sup>nd</sup> floor is for servers to pass through without obstacles. Regarding the VIP entrance, the Applicant said they would use it for emergency purposes but that, they had also requested having it as an option to bring people

upstairs. The Applicant said they would like the extended hours, and would reduce noise later in the night, but would work with the residents. The Applicant mentioned there will be owners on site at all times.

**DISCUSSION:**

Mr. Hazlett asked the Applicant if they could put up a barrier between their establishment and the other renter next to them. The Applicant said they are going before the HPC on Thursday and that would have to be approved by HPC. Mrs. Dunn brought up a concern that she would not be comfortable making the barrier a condition of approval because it might not be feasible due to fire and building codes.

Ms. Depo gave the definition of “Noise” per the City’s Noise Ordinance and indicated that the noise levels are mandated by the State.

**MOTION:** Ms. Colby moved to approve a conditional use of a restaurant with entertainment at 18 Market Space ZBA11-277CU in accordance with Sections 308 and 856 of the Land Management Code based on the findings of fact:

- 1) The policies and regulations found in both the 2010 Comprehensive Plan and the Land Management Code (LMC) support the downtown as a center for arts and entertainment and that the proposed inclusion of entertainment at the restaurant is in harmony with these goals.
- 2) That the DB zoning district permits a variety of uses including many that generate a high volume of pedestrian and vehicular traffic and if conducted in accordance with the testimony provided and all applicable regulations, the characteristics of the use and its operation on the property in question and in relation to adjacent properties will not create any greater adverse impact than the operation of any permitted use not requiring conditional use approval.
- 3) The proposed use of the restaurant to include entertainment complies with the provisions of Article 8, Section 856 entitled *Restaurant with Entertainment* on the following:
  1. That the Mistero Bar and Italian Grille will serve unpackaged food where customers consume foods while seated at tables located within the building.
  2. That the Mistero Bar and Italian Grille will provide regular seating capacity at tables for at least eighty (80) percent of patrons.
  3. That subject to the conditions of approval, the sale of alcoholic beverages and entertainment will not constitute greater than forty (40) percent of the total quarterly revenues.
  4. That the Applicant has testified that the entertainment will not include sexual conduct, nudity, or obscenity.
  5. That the sound levels shall conform to §15-21 of the City Code.
  6. That the Applicant has provided guarantees that the use of the property for a restaurant with entertainment will not constitute a nuisance because of noise or other activities associated with the use and that the failure of the owner/managers to consistently abide by all conditions, limitations, and restrictions which may be specified by the Board in granting the conditional use will result in the certificate of occupancy for entertainment being revoked.

**Approval conditioned upon:**

- 1) In accordance with Section 312(g), the Applicant must apply for and receive a zoning certificate lawfully establishing the use of a Restaurant with Entertainment within 2 years of the approval or the approval shall become void. The zoning permit application must depict that 80% of the seating is

- at tables and describe the times and days on which entertainment will be held as approved by the Board.
- 2) **The Applicant must submit their quarterly revenues to the Planning Department for the next one year, beginning with the date, on which entertainment at the restaurant first occurs, to verify compliance with the criteria established under Section 856(c).**
  - 3) **A 6-month and 1-year review of the calls for service to the Police Department will be conducted and provided to the Board for review in order to identify any violations of this approval.**
  - 4) **The entertainment shall only operate on Friday and Saturdays between 10:00pm and 12:30pm.**
  - 5) **The balcony will be used for emergency purposes only, not to accommodate private parties.**
  - 6) **That the approval of this Restaurant with Entertainment is automatically revocable if violations of any of the applicable regulations occur.**

**SECONDED: Mr. Hazlett**  
**VOTE: 4-0**

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**CASE NO.: ZBA11-293CU**  
**LOCATION: 300 East 4<sup>th</sup> Street**  
**APPLICANT: Shawn Winpigler**

**DESCRIPTION:**

The Applicant is requesting approval of a conditional use per Section 308 and 866 of the Land Management Code for a 161' tall telecommunications facility.

**BACKGROUND INFORMATION:**

This application was continued from the June 28, 2011 meeting of the Board in response to the Applicant's request for a 30 day continuance.

The subject property, 300A East 4<sup>th</sup> Street, is the location of C. Edward Winpigler & Sons, Inc. contracting company. The property is zoned Light Industrial (M1), a zone in which telecommunications facilities are permitted as a conditional use. The surrounding zoning districts are as follows:

Per Section 1002 of the Land Management Code (LMC), a telecommunications facility is defined as *"Any facility, excluding a satellite television dish antenna, established for the purpose of providing wireless voice, data or image transmission within a designated service area. A telecommunications facility consists of one or more antennas attached to a support structure or related equipment. Equipment may be located within a building, an equipment cabinet, or an equipment room within a building."*

It should be noted that this request applies to a tower which has already been constructed. Accordingly to the Applicant's testimony, a tower to serve the Winpigler business was originally placed on the site in 1961. Since that time, the tower and antennas remained in service of the business until more recently, when the owner entered into an agreement with WETA to provide space on the tower to mount additional equipment. Upon entering into the lease agreement, it was determined that the tower was inadequate to support the new equipment and the existing tower was removed and a new tower erected. The installation of a new tower, despite being a replacement, requires compliance with all applicable regulations in place at the time of construction, including approval of a conditional use by the Board.

The telecommunications facility is located towards the rear of the property along Winpigler Alley which is shared with the residences of East 3<sup>rd</sup> Street. The facility is a 151' tower that will support a translator and antennas for WETA and radio antennas for C. Edward Winpigler and Sons business. The maximum

height of the tower, inclusive of the antennas is 161'. The tower is supported by three guy-wires that attach to 30' poles, one at a distance of 122' from the tower, 75' from the tower, and 100' from the tower.

**STAFF RECOMMENDATIONS:**

Staff does not support the Board's approval of the conditional use request for the construction of 161' telecommunication tower, finding that:

1. The telecommunications facility fails to meet the required setback equal to the height of the tower, inclusive of any extensions, or 161' to all property lines and further, that while a modification to this setback may be granted by the Board, insufficient information has been provided to justify the granting of this modification.

**APPLICANT PRESENTATION:**

Mr. Jeff Holtzinger, attorney with Holtzinger and Weaver, representing the applicant, advised the Commissioners that he would reserve the right to cross-examine the witnesses per a Court of Special Appeals that was heard in Maryland. Ms. Depo stated the Zoning Board of Appeals Rules of Procedures does not provide for it, but it is a reasonable request.

Ms. Depo thought further investigation on this matter should be looked at to cross-examine.

Mr. Racheff asked the Applicant if he is withdrawing this application. Mr. Holtzinger subsequently withdrew the application, as he believes the use should be considered as non-conforming, because the tower has been in place since 1968, and that that type of structure has be replaced periodically.

Ms. Depo explained that if the Applicant withdraws his application, he can go to staff to request a Determination letter. Ms. Depo also stated that if a case is withdrawn a substantially similar case could not be heard by the Board for 6 months.

**DISCUSSION:**

No discussion.

**PUBLIC COMMENT:**

No public comments.

**MOTION:** Motion was not taken as Applicant withdrew the application.

**SECOND:** N/A

**VOTE:** N/A

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**The meeting adjourned at 8:50 p.m.**

Respectfully submitted,

Lea M. Ortiz